



U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[Redacted]

FILE: [Redacted]

Office: Miami

Date: MAR 27 2000

IN RE: Applicant:

[Redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(i) of the Immigration and Nationality Act, 8 U.S.C. 1182(i)

IN BEHALF OF APPLICANT:

[Redacted]

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prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami, Florida, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained.

The applicant is a native and citizen of Brazil who was found to be inadmissible to the United States under § 212(a)(6)(C)(i) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having attempted to obtain admission to the United States by fraud or misrepresentation. The applicant is the beneficiary of an immigrant visa under the Diversity Visa Program. The applicant seeks the above waiver in order to remain in the United States.

The district director concluded that the applicant failed to possess the requisite family relationship and was ineligible for the waiver. The district director then denied the application accordingly.

On appeal, counsel argues that the applicant did not commit fraud because he was pulled from the inspection line before he had any opportunity to commit the fraud. Counsel argues that the intention to commit fraud is not the same as the act of committing fraud. Counsel cites 9 FAM 40.63 N4.6 which states that a timely retraction will serve to purge a misrepresentation and remove it from further consideration and a ground for inadmissibility under § 212(a)(6)(C)(i) of the Act.

The record clearly reflects the applicant arrived at [REDACTED] International Airport on September 18, 1993, in possession of a photo-substituted passport in an assumed name. Documentation in the record reflects that he had traveled from Brazil using that assumed name. The applicant admitted under oath that he knew the document was fraudulent and he paid \$2,000 for it. He withdrew his application and returned to Brazil. The applicant was admitted to the United States on January 28, 1995, as a nonimmigrant visitor and was authorized to remain until July 27, 1995. He has failed to depart.

Section 212(a)(6)(C)(i) of the Act provides that:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act provides that:

(1) The Attorney General may, in the discretion of the Attorney General, waive application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney

General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Sections 212(a)(6)(C) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. There is no longer any alternative provision for waiver of a § 212(a)(6)(C)(i) violation due to passage of time. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

The district director responded to counsel's argument on a motion to reopen by stating that Matter of Y-G-, 20 I&N Dec. 794 (BIA 1994), is relevant to the matter at hand. In that case a Haitian national boarded a flight by using a fraudulent, photo-switched passport. He presented the fraudulent Haitian passport at the port of entry, immediately revealed his true identity and requested political asylum in the United States. The immigration judge held that the applicant conceded his excludability (inadmissibility) under former § 212(a)(19) of the Act, presently codified as § 212(a)(6)(C)(i) of the Act. The Board of Immigration Appeals (BIA) determined on review that the applicant had not conceded excludability under that section of the Act. The BIA determined that an application for admission is continuous and admissibility is determined at the time the application is finally considered. The BIA then reviewed the matter utilizing the current laws and regulations under the amended statute § 212(a)(6)(C)(i) of the Act. See Matter of D-L & A-M, 20 I&N Dec. 409 (BIA 1991).

The BIA noted that the applicant had not made his fraud or willful misrepresentation to an authorized official of the U.S. government and concluded that the alien had not practiced fraud or made a willful misrepresentation in procuring or seeking to procure documentation. The BIA then determined that the issue involved determining whether the alien is excludable for fraud or willful misrepresentation of a material fact is seeking to procure entry (now referred to as admission) into the United States. The BIA noted that under the present statute the alien is excludable not only if he "seeks" to procure but also if he "has sought to procure or has procured" an entry into the United States by fraud or

willful misrepresentation. The BIA determined that the alien had not committed fraud or willful misrepresentation when he did not present or intend to present the fraudulent document to an authorized official of the United States Government.

The present case parallels the matter discussed in Matter of Y-G-, supra. According to counsel's statement, the applicant was standing in the inspection line when he was pulled out of line and brought to an inspection interview where he readily admitted his true identity. The Service's Form I-275 report states that "Subject presented for admission to the United States a photo-switched Brazilian passport under the name of [REDACTED] Subject admitted his true identity and is returning home voluntarily." The district director stated in his decision that it was impossible to ascertain from the record whether the applicant actually presented a fraudulent passport to an inspector or was "pulled out of line" as he had alleged.

Although Matter of Da Silva, 17 I&N Dec. 288 (Comm. 1979), has been substantially overruled by the BIA regarding the use of an alien's initial fraud as an adverse factor, the Commissioner's finding in that decision that questionable factors should either not be considered at all, or should be resolved in favor of the applicant is germane in the present matter.

Following the district director's conclusion that it is impossible to ascertain just exactly what occurred on September 18, 1993, at the Miami International Airport, the Associate Commissioner chooses to follow the rationale of Matter of Da Silva, supra, considering the very questionable factor of whether the applicant actually presented or intended to present a fraudulent document to a U.S. official. It is accordingly concluded that the record fails to establish that the applicant committed fraud or willful misrepresentation and fails to establish that he is inadmissible under § 212(a)(6)(C)(i) of the Act.

We note also that the applicant was allegedly issued a nonimmigrant visa in 1994 or 1995, most likely by a consular officer in Brazil, and was admitted to the United States as a nonimmigrant visitor in 1995. There is no evidence in the record to show that his name had been placed in any of the Service's lookout systems as an inadmissible alien, or that he was considered to be inadmissible by a consular officer at the time he applied for his nonimmigrant visa.

Accordingly, the appeal will be sustained. The application is not required, and all action on it is terminated.

ORDER: The appeal is sustained. The application is not required, and all action on it is terminated.