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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: SAN FRANCISCO, CA

Date:

AUG 17 2007

IN RE:

[REDACTED]

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

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

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

Robert P. Wiemann

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, San Francisco, California, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the decision of the district director withdrawn and the waiver application declared moot.

The applicant is a native and citizen of Russia who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured and attempted to procure admission into the United States by fraud or willful misrepresentation when applying for a visitor's visa and during his adjustment interview. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

The district director found that the applicant committed fraud on September 16, 2002, when during his adjustment interview, he, "willfully gave false testimony regarding his marital status." In addition, the district director found that the applicant claimed he had a wife and child in Russia on his non-immigrant visa application. The director then concluded that the applicant failed to show that his qualifying relative would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. The application was denied accordingly. *Decision of the District Director*, dated September 30, 2004.

On appeal, counsel asserts that the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility to the United States. She also asserts that the applicant was truthful in his statements on his nonimmigrant visa application regarding his marriage and child. She states that he was separated from his wife, but that the marriage had not been officially dissolved, so the applicant did not consider himself an unmarried man. Counsel acknowledges that during his adjustment interview, the applicant withheld information regarding his previous marriage and his child in Russia. Counsel concludes that the applicant's waiver application should be granted as the applicant's spouse would suffer extreme hardship as a result of the applicant's inadmissibility. *Counsel's Brief*, dated November 13, 2004.

The AAO finds that the applicant did not commit fraud when he applied for a nonimmigrant visa and stated that he was married and had a child in Russia. The record shows that, although the applicant was separated from his wife at the time he submitted his nonimmigrant visa application in 2001, he had reason to believe that he was still legally married. The applicant has submitted a divorce decree, indicating that while a Regional Court Judge in St. Petersburg, Russia made a decision in the applicant's divorce case on May 12, 1997, his marriage was not officially dissolved until May 23, 2001. *Divorce Decree*, dated November 22, 2001.

The AAO finds that the record does indicate that at his adjustment interview on September 16, 2002, the applicant withheld information regarding his previous marriage and his child, but finds that these misrepresentations are not material.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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.

The Supreme Court in *Kungys v. United States*, 485 US 759 (1988) found that the test of whether concealments or misrepresentations are "material" is whether they can be shown by clear, unequivocal, and convincing evidence to have been predictably capable of affecting, i. e., to have had a natural tendency to affect, the Immigration and Naturalization Service's (now Citizenship and Immigration Service's) decisions. In addition, *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1960; AG 1961) states the following with regard to misrepresentation in immigration matters:

A misrepresentation made in connection with an application for visa or other documents, or with entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (AG 1961). Because the applicant, on the true facts of his application (that he was previously married, but divorced before he married his current spouse), is admissible and because it has not been shown by clear, unequivocal, and convincing evidence that the concealment of his previous marriage would not have been predictably capable of affecting the district director's decision, the applicant's misrepresentation is not, therefore, material. Accordingly, the AAO finds that the applicant is not subject to section 212(a)(6)(C) of the Act and no longer requires a waiver of inadmissibility. The appeal will be dismissed and the waiver application declared moot.

ORDER: The appeal is dismissed and the waiver application declared moot.