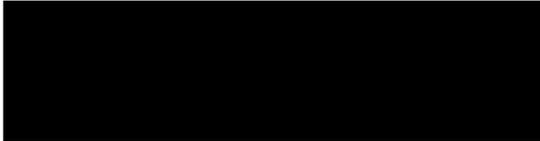


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U.S. Citizenship  
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Office: DENVER (SALT LAKE CITY)

Date:

**AUG 29 2007**

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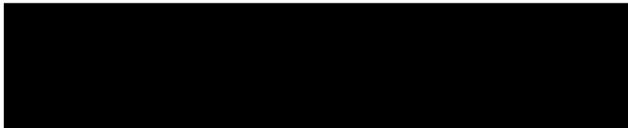
Applicant:



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:



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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the District Director, Denver, Colorado, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Mexico 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 seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States and reside with his U.S. citizen wife and children.

The district director concluded that the applicant failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated September 21, 2005.

On appeal, counsel for the applicant contends that the district director impermissibly used information contained in the applicant's prior application for permanent residence under section 210 of the Act in order to find that the applicant is inadmissible due to fraud or misrepresentation. *Brief in Support of Appeal*, dated December 9, 2005. Counsel asserts that the records related to the applicant's application under section 210 of the Act are confidential pursuant to section 210(b)(5) of the Act, and they may not be used in subsequent proceedings. *Id.* at 6-7. Counsel further asserts that the applicant's wife would suffer extreme hardship should the applicant's waiver application be denied. *Id.* at 9-17.

The record contains briefs from counsel; a letter from the applicant's mother-in-law's doctor; copies of birth certificates for the applicant's children; a copy of the applicant's wife's prior divorce decree; a statement from the applicant; a statement from the applicant's wife; information on learning disabilities; a psychological evaluation of the applicant's family members conducted by a clinical psychologist; evidence that the applicant's wife's parents are permanent residents in the United States; verification of the applicant's and his wife's employment; a copy of the applicant's birth certificate; documentation of the applicant's wife's bank account; a copy of the applicant's wife's naturalization certificate; a copy of the applicant's marriage certificate, and; documentation in connection with the applicant's two criminal convictions. The entire record was reviewed and considered in rendering this decision.

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.

Section 212(i) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 [Secretary] 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.

The primary issue in the present matter is whether the applicant has been properly found inadmissible under section 212(a)(6)(C) of the Act.

The record reflects that the applicant previously filed an application under section 210 of the Act, and his status was adjusted to permanent resident on December 1, 1990. On April 7, 1994, the prior District Director, Salt Lake City, Utah, issued correspondence notifying the applicant of his intent to rescind the applicant's adjustment of status under section 210 of the Act. The prior district director explained that, upon investigation, the single document that the applicant submitted in support of his application under section 210 of the Act was found to be unreliable, and thus the applicant failed to meet his burden of proof. *Notice of Intent to Rescind Adjustment of Status*, dated April 7, 1994. The applicant was afforded 30 days in which to respond to the notice of intent to rescind his adjustment of status. *Id.* at 4. The applicant failed to respond, and his adjustment of status was rescinded accordingly. *Notice of Rescission of Adjustment of Status*, dated June 2, 1994.

On September 8, 1997, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, based on his marriage to his wife, who is a naturalized United States citizen. Subsequently, the Salt Lake City Sub-Office issued correspondence to the applicant notifying him that he is inadmissible, in part due to fraud or misrepresentation,<sup>1</sup> and that he required a Form I-601 application for a waiver of inadmissibility. *Letter from Sub-Office Regarding Inadmissibility*, undated. In the correspondence, the Salt Lake City Sub-Office did not describe the actions by the applicant that ostensibly constituted fraud or misrepresentation. *Id.* In his letter denying the applicant's Form I-601 application for a waiver, the district director stated that the applicant's prior permanent resident status under section 210 of the Act was rescinded "due to fraud and/or misrepresentation," and that the applicant is therefore "excludable under section 212(a)(6)(C) [of the Act]." *Letter of Denial*, dated September 21, 2005.

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<sup>1</sup> It is noted that the Sub-Office further informed the applicant that he was inadmissible due to convictions of crimes, and for unlawful presence in the United States. However, in the district director's notice of denial of the applicant's application for a waiver, he did not address the applicant's inadmissibility for either crimes or unlawful presence. Upon review, the AAO confirms that the applicant is not inadmissible for unlawful presence, as he has not accrued at least 180 days of unlawful presence since the enactment of the unlawful presence provisions of the Act, April 1, 1997. Nor does the record show that the applicant is inadmissible due to his two convictions under prior Utah Code sections 41-6-44 and 41-6-44.20 for driving under the influence of alcohol and drinking alcohol while in a motor vehicle. (Both provisions have been replaced by Utah Code sections 41-6a-502 and 41-6a-526, respectively.) The record does not reflect what subsection of prior Utah Code section 41-6-44 under which the applicant was convicted, and as some of the relevant subsections did not include the requirement of a culpable mental state or describe a crime that is inherently base, vile, or depraved, the applicant's conviction under Utah Code section 41-6-44 does not constitute a crime involving moral turpitude. See *Matter of Torres-Varela*, 23 I&N Dec. 78, 82-86 (BIA 2001); See e.g. *Hernandez-Martinez v. Ashcroft*, 329 F.3d 1117 (9<sup>th</sup> Cir. 2003) *reh'g denied* 343 F.3d 1075 (9<sup>th</sup> Cir. 2003). As prior Utah Code section 41-6-44.20 did not contain the requirement of a culpable mental state or describe a crime that is inherently base, vile, or depraved, the applicant's conviction under that provision does not constitute a crime involving moral turpitude. *Id.*

As noted by counsel, documentation submitted by an applicant in connection with an application under section 210 of the Act is deemed confidential and can be used only for limited purposes. INA § 210(b)(6). Section 210(b)(6) of the Act provides the following:

(6) Confidentiality of information

- (A) In general - Except as provided in this paragraph, neither the Attorney General, nor any other official or employee of the Department of Justice, or bureau or agency thereof, may –
  - (i) use the information furnished by the applicant pursuant to an application filed under this section for any purpose other than to make a determination on the application, including a determination under subsection (a)(3)(B) of this section, or for enforcement of paragraph (7);
  - (ii) make any publication whereby the information furnished by any particular individual can be identified; or
  - (iii) permit anyone other than the sworn officers and employees of the Department or bureau or agency or, with respect to applications filed with a designated entity, that designated entity, to examine individual applications.
- (B) Required disclosures - The Attorney General shall provide information furnished under this section, and any other information derived from such furnished information, to a duly recognized law enforcement entity in connection with a criminal investigation or prosecution, when such information is requested in writing by such entity, or to an official coroner for purposes of affirmatively identifying a deceased individual (whether or not such individual is deceased as a result of a crime).
- (C) Construction
  - (i) In general - Nothing in this paragraph shall be construed to limit the use, or release, for immigration enforcement purposes or law enforcement purposes of information contained in files or records of the Service pertaining to an application filed under this section, other than information furnished by an applicant pursuant to the application, or any other information derived from the application, that is not available from any other source.
  - (ii) Criminal convictions - Information concerning whether the applicant has at any time been convicted of a crime may be used or released for immigration enforcement or law enforcement purposes.

- (D) Crime - Whoever knowingly uses, publishes, or permits information to be examined in violation of this paragraph shall be fined not more than \$10,000.

Section 210(b)(7) of the Act provides the following:

(7) Penalties for false statements in applications

- (A) Criminal penalty - Whoever –
  - (i) files an application for adjustment of status under this section and knowingly and willfully falsifies, conceals, or covers up a material fact or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, or
  - (ii) creates or supplies a false writing or document for use in making such an application, shall be fined in accordance with title 18 or imprisoned not more than five years, or both.
- (B) Exclusion -An alien who is convicted of a crime under subparagraph (A) shall be considered to be inadmissible to the United States on the ground described in section 1182(a)(6)(C)(i) of this title.

Section 210(b)(6) of the Act defines the permitted use of evidence provided by an applicant in connection with an application under section 210 of the Act. Such evidence may be used to determine whether the applicant is eligible for the benefit sought under section 210 of the Act. Section 210(b)(6)(A)(i) of the Act. In response to a proper request by a duly recognized law enforcement entity, such evidence shall be provided, and thus may be used, in connection with a criminal investigation or prosecution, including for purposes of affirmatively identifying a deceased individual. Section 210(b)(6)(B) of the Act. Where an applicant has provided information in connection with an application for benefits under section 210 of the Act that is not available through any other sources, such information may not be used for immigration enforcement purposes, except for enforcement actions under section 210(b)(7) of the Act. Sections 210(b)(6)(C)(i) and (b)(7) of the Act.

Section 210(b)(7) of the Act provides for criminal penalties where an applicant commits fraud or misrepresentation in connection with an application for benefits under section 210 of the Act. Section 210(b)(7)(A) of the Act. When an applicant has been convicted of a crime under section 210(b)(7)(A) of the Act, he is inadmissible under section 212(a)(6)(C)(i) of the Act. Section 210(b)(7)(B) of the Act.

In the present matter, the applicant's permanent resident status pursuant to section 210 of the Act was rescinded due to a finding that evidence he submitted was not reliable and he failed to meet his burden of proof. *Notice of Intent to Rescind Adjustment of Status*, dated April 7, 1994; *Notice of Rescission of Adjustment of Status*, dated June 2, 1994. The record does not reflect that the applicant was prosecuted or convicted for fraud or misrepresentation under section 210(b)(7)(A) of the Act. As the applicant was not

convicted under section 210(b)(7)(A) of the Act, he is not inadmissible under section 212(a)(6)(C)(i) of the Act by operation of section 210(b)(7)(B) of the Act.

The district director now uses evidence from the applicant's prior application under section 210 of the Act to make a finding that he committed fraud or misrepresentation, such that he is inadmissible under section 212(a)(6)(C)(i) of the Act. The district director made this finding in the course of adjudicating the applicant's Form I-485 application to adjust his status based on his marriage to a U.S. citizen under section 245 of the Act. However, the record does not show that the evidence used by the district director was available through any source other than the applicant. Sections 210(b)(6)(C)(i) of the Act. The use of the evidence the applicant provided with his application under section 210 of the Act to make a determination of inadmissibility, independent of proceedings under section 210 of the Act, is proscribed by section 210(b)(6) of the Act and impermissible.

Section 210(b)(7)(A) of the Act affords the U.S. Department of Homeland Security (DHS) the authority to bring action against an applicant for committing fraud or misrepresentation in an application for benefits under section 210 of the Act. If such an action results in a conviction, an applicant is inadmissible under section 212(a)(6)(C)(i) of the Act by operation of section 210(b)(7)(B) of the Act. Where, as in the present matter, DHS has declined to bring an action under section 210(b)(7)(A) of the Act,<sup>2</sup> section 210(b)(7)(B) of the Act is not triggered and an applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act based on evidence he provided with his application under section 210 of the Act.

The record contains no permissible evidence that the applicant committed fraud or misrepresentation. Thus, the record does not support that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act. The record does not reflect that the applicant is inadmissible under any other provisions of the Act. Accordingly, he does not require a waiver of inadmissibility, and the present Form I-601 application for a waiver will be deemed moot.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(6)(C) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained.

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<sup>2</sup> The AAO emphasizes that the district director rescinded the applicant's adjustment of status under section 210 of the Act due to a finding that he failed to meet his burden of proof. *Notice of Intent to Rescind Adjustment of Status*, dated April 7, 1994. The district director did not indicate that the applicant committed fraud or misrepresentation, or that he was inadmissible under any provision of the Act. *Id.*