U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

Date: JUN 2 6 2013 Office: MOSCOW, RUSSIA FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B); Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Moscow, Russia, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded for further action consistent with this decision.

The record reflects that the applicant is a native and citizen of Georgia who entered the United States on July 29, 1998, with an F-1 non-immigrant student visa to attend a college in California. The applicant departed the United States on September 10, 2009. The Field Office Director found the applicant inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B), for having been unlawfully present in the United States for a period of more than one year.[1] On April 16, 2010, after the applicant's departure, the applicant was ordered removed from the United States *in absentia.* The applicant also was found to be inadmissible under section 212(a)(9)(A) of the Act, 8 U.S.C. § 1182(a)(9)(A), as an alien previously ordered removed.[2] The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Form I-130, Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with his U.S. citizen spouse. The applicant also seeks permission to reapply for admission after removal pursuant to section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii).

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[1] The AAO notes that the record does not clearly establish the applicant's inadmissibility under this section of the Act. Individuals with student visas are admitted for "duration of status," and pursuant to U.S. Citizenship and Immigration Services (USCIS) policy they begin accruing unlawful presence on the date USCIS finds a status violation while adjudicating a request for another immigration benefit or on the date an immigration judge finds a status violation in the course of proceedings. *See Memorandum from Donald Neufeld, Act. Assoc. Dir., Domestic Operations, Lori Scialabba, Assoc. Dir., Refugee, Asylum and International Operations, Pearl Chang, Acting Chief, Office of Policy and Strategy, U.S. Citizenship and Immigration Service, to Field Leadership, "Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act,"* dated May 6, 2009. In this case the record does not show that a status violation was determined prior to the applicant's departure from the United States.

[2] The record includes evidence that the applicant departed from the United States before he was placed into immigration proceedings in 2010. The legacy Immigration and Naturalization Service provided general guidance concerning section 212(a)(9) of the Act, advising that section 212(a)(9)(A) of the Act applies only to individuals who have departed or been removed from the United States *subsequent* [emphasis added] to issuance of an order. *See Memorandum from Louis D. Crocetti, Jr., Associate Commissioner, Office of Examinations, Immigration and Naturalization Service, Processing of section 245(i) adjustment applications on or after the October 1, 1997 sunset date; Clarification regarding the applicability of certain new grounds of inadmissibility to 245(i) applications, HQ50/5.12-96Act.034 (May 1, 1997); see also Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Office of Programs, Immigration and Naturalization Service, Implementation of section 212(a)(6)(A) and 212(a)(9) grounds of inadmissibility, HQIRT 50/5.12-96act.026 (March 31, 1997)* (only individuals who have been removed or have departed the United States after the issuance of a removal order are subject to section 212(a)(9)(A)(ii)). Evidence in the record shows that the applicant departed the United States on September 10, 2009, seven months before an immigration judge ordered him removed. Thus it does not appear that he requires permission to reapply for admission into the United States.

The Field Office Director concluded that the applicant had 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 Field Office Director,* dated August 23, 2012. In the same decision, the Field Office Director denied the applicant's Form I-212, Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212), because no purpose would be served in approving it.

Section 204(c) of the Act, 8 U.S.C. § 1154(c), states:

> [N]o petition shall be approved if (1) the alien has previously . . . sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General [now Secretary of Homeland Security, "Secretary"] to have been entered into for the purpose of evading the immigration laws, or (2) the [Secretary] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The corresponding regulation at 8 C.F.R. § 204.2(a)(ii) provides:

> Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy. Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

A decision that section 204(c) of the Act applies must be made in the course of adjudicating a subsequent visa petition. *Matter of Rahmati*, 16 I&N Dec. 538, 359 (BIA 1978). U.S. Citizenship and Immigration Services (USCIS) may rely on any relevant evidence in the record, including evidence from prior USCIS proceedings involving the beneficiary. *Id.* However, the adjudicator must come to his or her own independent conclusion and should not ordinarily give conclusive effect to determinations made in prior collateral proceedings. *Id.; Matter of Tawfik*, 20 I&N Dec. 166, 168 (BIA 1990).

The record reflects that the applicant married U.S. citizen [redacted] on September 3, 2004. On July 12, 2005, [redacted] filed Form I-130 on behalf of the applicant. The Field Office Director, Newark, New Jersey, denied the Form I-130 on August 15, 2007, because she concluded that contradictory answers to the same questions by the petitioner and the applicant during their interview "clearly establish [their] marriage [was] strictly for [the applicant] to procure permanent residence in the United States and for no other reason since a couple engaged in a bona fide marital relationship would never have had such glaring discrepancies regarding their home and daily lives." *Decision of the Field Office Director,* dated August 15, 2007.

The record indicates that the applicant divorced on February 15, 2011. The applicant married his current spouse in Tbilisi, Georgia on March 6, 2011. On April 10, 2011, the applicant's current spouse filed a Form I-130 on behalf of the applicant, and the Form I-130 was approved by USCIS on October 14, 2011.

There is evidence in the record that the applicant married for immigration purposes. In that the applicant's prior marriage was found to have been entered into for the purpose of evading the immigration laws of the United States, he is ineligible as a beneficiary of a petition for an immigrant visa to enter the United States. In light of this ineligibility for an immigrant visa, no purpose would be served in addressing the applicant's contentions regarding his eligibility for a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, or his request for permission to reapply for admission after removal pursuant to section 212(a)(9)(A)(iii) of the Act.

Pursuant to 8 C.F.R. § 205.2, the approval of an I-130 petition is revocable when the necessity for the revocation comes to the attention of USCIS. Therefore, the AAO remands the matter to the Field Office Director to initiate proceedings for the revocation of the Form I-130 petition approved on October 14, 2011. Should the approved Form I-130 petition be revoked, the Field Office Director will issue a new decision dismissing the applicant's Form I-601 as unnecessary as there would be no application for admission to the United States. In the alternative, should it be determined that the applicant is not subject to section 204(c) of the Act and that the Form I-130 is not to be revoked, then the Field Office Director will issue a new decision addressing the merits of the applicant's Form I-601 waiver application.[3] If that decision is adverse to the applicant, it will be certified for review to the AAO pursuant to 8 C.F.R. § 103.4.

ORDER: The matter is remanded to the Field Office Director for further proceedings consistent with this decision.

[3] Though the applicant does not appear to be inadmissible under sections 212(a)(9)(A) or 212(a)(9)(B) of the Act, in the event the Form I-130 is not revoked, the applicant may still require a waiver under section 212(a)(6)(C) of the Act, if it is determined that he misrepresented material facts to obtain an immigration benefit.