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U.S. Department of Homeland Security
U.S. Immigration and Citizenship Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H5

FILE: [redacted] Office: ROME, ITALY Date: MAR 25 2010

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); and section 212(a)(9)(B)(v), of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Michael Rhew

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Rome, Italy, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the district director for further proceedings consistent with this decision.

The applicant, [redacted], is a native and citizen of Pakistan who was found to be inadmissible to the United States pursuant to 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 admission into the United States by fraud or willful misrepresentation; and under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year. The applicant is married to [redacted] a citizen of the United States. He sought a waiver of inadmissibility under sections 212(i), 8 U.S.C. § 1182(i), and 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), so as to immigrate to the United States. The district director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director, dated July 24, 2007.* The applicant submitted a timely appeal.

Inadmissibility for unlawful presence is found under section 212(a)(9)(B) of the Act. That section provides, in part:

> (B) Aliens Unlawfully Present
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> >
> > > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.
>
> . . . .

U.S. Citizenship and Immigration Services (USCIS) records reflect that the applicant entered the United States on a B-2 visa on October 1, 1994, using the name [redacted] and date of birth of January 1, 1957. He was authorized to remain in the United States for a temporary period through November 1, 1994. The applicant filed an asylum application on January 4, 1995, which application was referred to an immigration judge on March 31, 1995. In the asylum application the applicant listed that he had a wife named [redacted] and three children. On April 3, 1995, an Order to Show Cause and Notice of Hearing was issued to the applicant for remaining in the United States

beyond November 1, 1994 without authorization. On October 26, 1995, the Notice of Hearing in Deportation Proceedings was issued to the applicant for a master hearing on December 7, 1995. On December 7, 1995, the Notice of Hearing in Deportation Proceedings was issued to the applicant for a master hearing on January 18, 1996. On January 25, 1996, an immigration judge denied the applicant's asylum application for lack of prosecution and his application for withholding of deportation, and his application for voluntary departure was granted until July 25, 1996, with an alternate order of deportation to Pakistan.

On August 20, 1997, the applicant, using the name [redacted] and date of birth of December 15, 1956, married [redacted], a U.S. citizen. On October 2, 1997, she filed a Form I-130, Immediate Relative Petition on behalf of the applicant and the applicant filed the Form I-485, Application to Register Permanent Residence or Adjust Status. The applicant listed no children on the Form I-485, and [redacted] listed [redacted] as the applicant's prior wife. On July 10, 1998, the applicant was granted advance parole under the name [redacted]. He left to Pakistan on an unknown date and reentered the United States using the advance parole document with the name [redacted] on September 6, 1998.

On April 7, 1999, [redacted] and the applicant were interviewed separately under oath in connection with the Form I-130. The Immigration and Naturalization Service (INS) officer noted that there were several discrepancies in the answers given by [redacted] and the applicant to the same questions, which discrepancies they were unable to explain after being provided with an opportunity to do so. Consequently, the Form I-130 was denied on July 29, 1999.

On August 24, 1999, [redacted] appealed the denial. The Board of Immigration Appeals (BIA) dismissed the appeal on August 30, 2001, finding that [redacted] failed to meet her burden of establishing that her marriage to the applicant was entered into in good faith. *See* section 204(c) of the Act. The BIA reached its conclusion because it found that during the INS interview the applicant and [redacted] had given discrepant answers to basic and fundamental questions about their relationship, and that [redacted] had failed to adequately explain those discrepancies on appeal. In dismissing the appeal, the BIA stated that its decision was without prejudice to the submission of a new visa petition supported by evidence establishing the marriage to the applicant is bona fide for immigration purposes. The applicant's Form I-485 was denied on September 12, 2001.

On December 27, 2001, [redacted] filed a new Form I-130 on the applicant's behalf, and the applicant filed a new Form I-485. On March 15, 2002, a warrant of removal was issued. Prior to the adjudication of the Form I-130 and Form I-485, the applicant was apprehended on March 5, 2002, and removed from the United States on April 4, 2002. On June 18, 2003, the applicant and [redacted] divorced. On March 12, 2004, the Form I-129F, Petition for Alien Fiance(e), was filed by [redacted] (now [redacted]), who is a U.S. citizen, on the applicant's behalf. On November 30, 2003, the applicant and [redacted]) married in Pakistan. [redacted] filed a Form I-130 of the applicant's behalf on February 3, 2004. The Form I-129F was approved on October 15, 2004. The Form I-130 was approved on August 15, 2005.

Based on the record, the applicant is not inadmissible for unlawful presence under section 212(a)(9)(B)(i)(II) of the Act. The unlawful presence provisions went into effect on April 1, 1997. However, an alien who is in the United States in unlawful status will not accrue unlawful presence if

he or she has a properly filed application for adjustment of status that is pending. The accrual of unlawful presence is tolled until the application is denied. *See* Memorandum by Donald Neufeld, Acting Assoc. Director; Lori Scialabba, Assoc. Director, Refugee, Asylum and International Operations Directorate; and Pearl Chang, Acting Chief, Office of Policy and Strategy, 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; Revision to and Re-designation of *Adjudicator's Field Manual* (*AFM*) Chapter 30.1(d) as Chapter 40.9 (AFM Update AD 08-03); AFM Update AD 08-03, May 6, 2009, page 33.

The record here shows that on October 2, 1997, [redacted] filed the Form I-130 and the applicant filed the Form I-485. The Form I-130, which is the basis for the Form I-485, was denied on July 29, 1999. [redacted] appealed the denial on August 24, 1999, which appeal the BIA dismissed on August 30, 2001. The applicant's Form I-485 was denied on September 12, 2001. On December 27, 2001, [redacted] filed a new Form I-130 on the applicant's behalf, and the applicant filed a new Form I-485. The applicant was removed from the United States on April 4, 2002. Based on the record, the applicant accrued six months of unlawful presence from April 1, 1997, when the unlawful presence provisions went into effect, until October 2, 1997, when the Form I-485 was properly filed. He accrued 3 months and 15 days of unlawful presence from September 12, 2001 until December 27, 2001, the date the new Form I-485 were filed. Thus, the applicant accrued 9 months 15 days of unlawful presence prior to his removal, rendering him inadmissible under section 212(a)(9)(B)(i)(I) of the Act. The director therefore erred in finding the applicant inadmissible under the ten-year bar of section 212(a)(9)(B)(i)(II) of the Act.

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 record conveys that the applicant willfully committed material misrepresentations. In filing the asylum application, he used the name [redacted] and the date of birth of January 1, 1957, and he claimed to have three children and a spouse named [redacted] His asylum application was denied because it was found to lack credibility. The applicant used a new identity with the Forms I-130 and I-485 and the Application for Travel Document. He used the name [redacted] the date of birth of December 15, 1956, and he claimed to have no children and to have a former spouse named [redacted]. In support of his forms he submitted a birth certificate, passport, and other documents bearing the name [redacted] He used the advance parole document to travel to Pakistan and return to the United States. In a sworn statement dated March 28, 1995, the applicant gave his true name as [redacted] and his true date of birth as January 1, 1957. Even though the applicant claims that his true name is [redacted] and that he was born on December 15, 1956 in Pakistan, in view of his numerous misrepresentations the AAO cannot determine whether he is [redacted], or someone else. The record therefore shows that the applicant sought to procure a visa, other documentation, or admission into the United States or other benefit provided under the Act by misrepresenting the material fact of his identity and eligibility. As such, the AAO finds him inadmissible under section 212(a)(6)(C) of the Act.

Furthermore, the BIA found that the applicant's prior marriage is within the purview of section 204(c) of the Act as a marriage entered into for the purpose of evading the immigration laws. Section 204(c) of the Act 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 to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

8 U.S.C. § 1154(c). The corresponding regulation 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.

8 C.F.R. § 204.2(a)(ii). Citing section 204(c) of the Act, the BIA found that [redacted] failed to meet her burden of establishing that her marriage to the applicant was entered in good faith. The BIA reached its conclusion because it found that during the INS interview the applicant and [redacted] had given discrepant answers to basic and fundamental questions about their relationship, and failed to adequately explain those discrepancies on appeal. The BIA stated that its decision was without prejudice to the submission of a new visa petition supported by evidence establishing the marriage to the applicant is bona fide for immigration purposes. Although the [redacted] and the applicant submitted a new visa petition, they divorced prior to the petition's adjudication. Because the record does not show that the applicant established that his marriage to [redacted] was entered in good faith and not for the purpose of evading the immigration laws of the United States, the AAO must conclude that the applicant's prior marriage is still within the purview of section 204(c) of the Act as a marriage entered into for the purpose of evading the immigration laws. In that the applicant's prior marriage has been found to have been entered into for the purpose of evading the immigration laws of the United States, he is permanently barred from obtaining a visa to enter the United States. *See* 8 U.S.C. § 1154(c). In light of this permanent bar, no purpose would be served in addressing the applicant's contentions regarding his eligibility for an extreme hardship waiver of inadmissibility under section 212(i) 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 the Service.[1] Therefore, the AAO remands the matter to the

[1] The regulation under 8 C.F.R. § 205.2, revocation on notice, provides:

district director to initiate proceedings for the revocation of the approved Form I-130 petition (and the corresponding Form I-129F). Should the approved Form I-130 be revoked, the district director will issue a new decision dismissing the applicant's Form I-601 as moot. 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 district director will issue a new decision addressing the merits of the applicant's Form I-601 waiver application. If that decision is adverse to the applicant, it will be certified for review to the AAO.

ORDER: The matter is remanded to the district director for further proceedings consistent with this decision.

(a) *General.* Any Service officer authorized to approve a petition under section 204 of the Act may revoke the approval of that petition upon notice to the petitioner on any ground other than those specified in §205.1 when the necessity for the revocation comes to the attention of this Service.
(b) *Notice of intent.* Revocation of the approval of a petition of self-petition under paragraph (a) of this section will be made only on notice to the petitioner or self-petitioner. The petitioner or self-petitioner must be given the opportunity to offer evidence in support of the petition or self-petition and in opposition to the grounds alleged for revocation of the approval.
(c) *Notification of revocation.* If, upon reconsideration, the approval previously granted is revoked, the director shall provide the petitioner or the self-petitioner with a written notification of the decision that explains the specific reasons for the revocation. The director shall notify the consular officer having jurisdiction over the visa application, if applicable, of the revocation of an approval.
(d) *Appeals.* The petitioner or self-petitioner may appeal the decision to revoke the approval within 15 days after the service of notice of the revocation. The appeal must be filed as provided in part 3 of this chapter, unless the Associate Commissioner for Examinations exercises appellate jurisdiction over the revocation under part 103 of this chapter. Appeals filed with the Associate Commissioner for Examinations must meet the requirements of part 103 of this chapter.