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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

U.S. Citizenship and Immigration Services

H5

FILE: [redacted] Office: SACRAMENTO, CALIFORNIA Date: JAN 24 2011

IN RE: Applicant: [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:

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Sacramento, California, and is now before the Administrative Appeals Office (AAO) on appeal. The Field Office Director's decision will be withdrawn and the appeal will be dismissed as the underlying application is moot.

The record reflects that the applicant is a native and citizen of Ethiopia 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 attempting to procure a benefit under the Act by fraud or the willful misrepresentation of a material fact, to wit; the applicant failed to disclose a prior marriage and divorce on a Petition for Alien Relative (Form I-130), an Application to Register Permanent Resident (Form I-485) and on her marriage certificate to her current spouse. The record indicates that the applicant is married to a United States citizen and is the beneficiary of an approved Form I-130. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her United States citizen spouse and children.

The Field Office Director found 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 Field Office Director*, dated May 28, 2008.

On appeal, counsel asserts that the Field Office Director's decision was erroneous and that the applicant should not be found inadmissible under section 212(a)(6)(C) of the Act, because the applicant never perpetrated willful misrepresentation or fraud for the purpose of obtaining a benefit under the Act; that the omission of her prior marriage and divorce is not material, and that denial of her waiver application will result in extreme hardship to her husband. *See Form I-290B and accompanying brief from counsel's Brief in Support of the appeal.* Counsel contends that the applicant correctly indicated on her visa application and to the Consular Officer that she was divorced at the time of the visa application and she was granted a visa to come to the United States. Counsel further contends that the applicant's failure to indicate her prior marriage and divorce on the petition filed by her current husband is not material because at the time the Form I-130 was filed, the applicant was already divorced, had the legal right to marry the petitioner and the Form I-130 was approved based on the legitimacy of her marriage to the petitioner. *See Counsel's Brief in Support of I-601 Waiver.*

The record includes, but is not limited to, an affidavit from the applicant's husband, counsel's brief, letters of employment for the applicant's husband, copies of W-2 Wage and Tax Statements for the applicant's husband, copies of Earnings Statements for the applicant and her husband, a copy of an account statement from Bank of America, and copies of a U.S. Department of State Country Report on Human Rights Practices in Ethiopia for 2007 and 2008. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (i) In general.-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.
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> . . . .

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

(i) (1) The Attorney General [now the Secretary of Homeland Security, "Secretary"] may, in the discretion of the [Secretary], waive the 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 [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...

Upon a review of the record, the AAO agrees with counsel that the applicant is not inadmissible under section 212(a)(6)(C) of the Act for failure to disclose her prior marriage as it is not material. A misrepresentation is generally material only if the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. The BIA has held that a misrepresentation made in connection with an application for visa or other documents, or for 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 have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

In this case, the record contains a copy of a divorce certificate from Ethiopia showing that the applicant divorced her prior husband, [redacted], on December 12, 2003. *See a copy of Divorce Certificate,* registered [redacted] on March 6, 2008. The applicant correctly indicated on the Form DS-156 that she was divorced. The applicant was divorced at the time the Form I-130 was filed by her current husband. The Form I-130 was approved based on the fact that the applicant and the petitioner were legally married. The fact that the applicant was married before is not material because had the true fact been known, the applicant would still have been eligible for the Form I-130 petition, as she was divorced from her first husband at the time the Form I-130 was filed.

The AAO however noted that there is a possibility that the applicant may have committed fraud or the willful misrepresentation of a material fact as an Intending Immigrant in the use of her non-immigrant visa. The record shows that the applicant indicated on the visa application that the purpose of her visit to

the United States was to attend training in [redacted] at the CDC in Atlanta, Georgia, from May 9 to May 20, 2006. The record was devoid of any documentation pertaining to the applicant's attendance and/or participation in the training. On December 8, 2010, the AAO sent a Request for Evidence (RFE) requesting the applicant to submit evidence that she attended the training in compliance with her visa and as she had indicated on the visa application. On December 20, 2010, the applicant submitted a copy of a Certificate issued on May 19, 2006, by the CDC indicating that the applicant successfully completed her training in Polio Eradication at the CDC headquarters in May 2006. Thus the AAO finds that the applicant complied with the terms of her non-immigrant visa and was not an Intending Immigrant.

Therefore, based on the evidence in the record, the AAO finds that the applicant did not defraud or make a willful misrepresentation of a material fact to a United States government official in order to procure a benefit under the Act, for which she otherwise would not have been eligible. The AAO concludes that the applicant's failure to disclose a prior marriage and divorce on her Form I-130 and Form I-485 is not material. Thus, the applicant is not inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

The AAO finds that the Field Office Director erred in concluding that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. As such, the issue of whether the applicant established extreme hardship to a qualifying relative pursuant to section 212(i) is moot and will thus not be addressed.

ORDER: The Field Office Director's decision is withdrawn as it has not been established that the applicant is inadmissible. The appeal is dismissed as the underlying application is moot.