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

(b)(6)

Date: JUN 2 6 2013 Office: NEW YORK, NY

IN RE: 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:

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 Director, New York, New York, 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 indicates that the applicant is a native and citizen of the Dominican Republic who was granted lawful permanent resident status in the United States under an assumed identity on June 30, 1999. He subsequently 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 procuring a U.S. immigration benefit through fraud or the willful misrepresentation of a material fact.[1] The record indicates that the applicant is married to a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative (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 his wife.

The District Director found that the applicant failed to establish that extreme hardship would be imposed on the applicant's qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated August 13, 2007. The applicant filed Form I-290B, Notice of Appeal or Motion (Form I-290B) on September 13, 2007. The Form I-290B was forwarded to the AAO in December 2011.

On appeal, the applicant, through counsel, asserts that the District Director abused his discretion by not finding extreme hardship to the applicant's HIV-positive wife. Counsel also submits new evidence of hardship on appeal.

The record reflects that the applicant entered the United States without inspection in 1991, married a U.S. citizen, and returned to the Dominican Republic to apply for an immigrant visa based upon the Form I-130 that his spouse filed on his behalf. Because the applicant was diagnosed with HIV, a statutory inadmissibility at the time, his immigrant visa application was denied. The applicant subsequently divorced his first U.S. citizen spouse, assumed a different identity to conceal his inadmissibility for HIV, and in 1994 he entered the United States as a non-immigrant under this assumed identity as [redacted] He married a second U.S. citizen under his assumed identity and was granted lawful permanent resident status on June 30, 1999. On November 26, 2001, after a visit to the Dominican Republic, the applicant applied for admission as a returning lawful permanent resident. Upon inspection at JFK International Airport, U.S. immigration officers charged the applicant as an arriving alien and issued him a Form I-862, Notice to Appear, alleging that he had a communicable disease of public health significance, he had obtained his permanent-resident status by fraud, and he was an intending immigrant without proper documents.

While the applicant was in proceedings, on May 10, 2002, the applicant's U.S. citizen spouse filed a second Form I-130 on his behalf using the applicant's true identity. He concurrently filed Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485), and Form I-601. On December 13, 2002,

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[1] The applicant also initially was found to be inadmissible to the United States under section 212(a)(1)(A)(i) of the Act, 8 U.S.C. § 1182(a)(1)(A)(i), as an alien with a communicable disease of public health significance, specifically human immunodeficiency virus (HIV). However, on July 14, 2003, the District Director, Newark, New Jersey, approved the applicant's waiver under section 212(g) of the Act.

the applicant's removal proceedings were terminated for the District Director to adjudicate the applicant's Forms I-130 and I-485. The Form I-130 was approved on December 17, 2002. On August 14, 2007, the District Director denied the applicant's Form I-485, finding him inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring a U.S. immigration benefit through fraud or the willful misrepresentation of a material fact.

Section 246 of the Act provides, in pertinent part:

> Rescission of Adjustment of Status
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> a) If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General [now Secretary of Homeland Security, "Secretary"] that the person was not in fact eligible for such adjustment of status, the [Secretary] shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the [Secretary] to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

The regulation at 8 C.F.R. Part 246.1, in regard to notice, states:

> If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case, . . . a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.

There is no evidence in the record that the applicant was properly served with a notice of intent to rescind his permanent resident status or that the applicant's lawful permanent resident status was properly rescinded in accordance with section 246 of the Immigration and Nationality Act (the Act), 8 U.S.C. §1256, and 8 C.F.R. § 246.1. Moreover, the record does not indicate that the applicant was issued a final order of

removal by an immigration judge, which would have effected a rescission of the applicant's permanent resident status. In the absence of such evidence, it appears that the applicant still maintains lawful permanent resident status, in which case Form I-601 would be unnecessary.

The matter is remanded to the District Director for a determination of the applicant's current immigration status. If the District Director determines that the applicant's lawful permanent resident status was properly rescinded, the District Director should supplement the record with evidence of that rescission and recertify the Form I-290B to the AAO for adjudication. If the District Director determines that the applicant is still a lawful permanent resident, the District Director will issue a new decision dismissing the applicant's Form I-601 as unnecessary.

ORDER: The matter is remanded to the District Director for further action as described above.