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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

[redacted]

DATE: JAN 18 2012 OFFICE: NAIROBI, KENYA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 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, Nairobi, Kenya, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the Field Office Director for further action.

The applicant is a native and citizen of Kenya who was found to be 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)(i)(II), for having been unlawfully present in the United States for more than one year and seeking admission within 10 years of his last departure from the United States; and section 212(a)(6)(C)(i) of 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 is the spouse of a U.S. Citizen and is the beneficiary of an approved Form I-130 Petition for Alien Relative. The applicant seeks a waiver of inadmissibility in order to reside in the United States with his U.S. citizen spouse and child.

The Field Office 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. See *Decision of the Field Office Director,* dated July 20, 2009. The applicant's Form I-212 was likewise denied. *Id.* The Field Office Director additionally determined that the applicant's conditional residence status had been terminated based on a finding of marriage fraud under section 204(c) of the Act, and thus the underlying Form I-130 was approved in error. Accordingly, the Field Office Director indicated that the Form I-130 is being returned for revocation. *Id.*

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). 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). 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 his first wife, [redacted] on December 26, 1981. The applicant entered the United States in September 1983 on an F-1 student visa. On July 23, 1987, the applicant married his second wife, [redacted] who filed a Form I-130 for him on September 17, 1987. The Form I-130 asserts regarding the applicant's "Prior Husbands/Wives," that he has "None." On March 17, 1988, the Form I-130 was approved and the applicant adjusted his status to conditional resident. On March 18, 1990, the applicant's conditional residence was terminated for failure to file Form I-751, *Joint Petition to Remove the Conditional Basis of Alien's Permanent Resident Status*. The applicant and his second wife filed Form I-751 on May 3, 1991. The applicant divorced his first wife, [redacted] on July 2, 1992. See *Decree of Divorce*, dated July 2, 1992. A conflicting *Divorce Decree*, purportedly dated September 26, 1986, was submitted for the first time on appeal asserting that the applicant and his first wife divorced on August 18, 1986. The AAO notes that this date conflicts not only with the *Decree of* Divorce, but with the date of divorce listed by the applicant and his current spouse (who was also his first wife), [redacted] on the Form I-130 she filed on September 22, 2006. The applicant remarried [redacted] on May 24, 2006 after divorcing his second wife on July 5, 2005.

The record reflects that questions were raised concerning the bonafides of the applicant's second marriage during the couple's first and second Form I-751 interviews, and that the applicant's spouse failed to appear for their third Form I-751 interview on December 30, 1992. When asked why his spouse did not appear, the applicant responded that they had separated on December 18, 1992, when he returned from Kenya, and he did not know if she would return to their home as he had heard that she was in Atlanta. On February 5, 1993, the District Director, Dallas, Texas, terminated the applicant's conditional residence based on a finding of marriage fraud

The Field Office Director concluded that when the applicant married his second wife, [redacted] he had no lawful status in the United States, that the conditional resident status he obtained through that marriage was terminated based on a finding of fraud, and that accordingly, he is no longer eligible to be the beneficiary of an approved Form I-130 petition. See *Decision of the Field Office Director,* dated July 20, 2009. The Field Office Director concluded that the Form I-130 was approved in error and is being returned for revocation.

Because the record does not show that the applicant entered into his marriage to [redacted] 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 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 sections 212(a)(9)(B)(v) and 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. The AAO notes the Field Office Director has indicated that the I-130 petition was being forwarded for revocation; however, the results of the revocation are not in the record. Therefore, the AAO remands the matter to the Field Office Director to await the results of the revocation proceedings. Should the approved Form I-130 petition be revoked, the applicant's Form I-601 will be moot and no further action will be required. 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 return the file to the AAO for adjudication of the appeal of the Form I-601 waiver application.

ORDER: The appeal is remanded to the Field Office Director for further action as noted in this decision.