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FILE:

Office: NEW YORK

Date:

SEP 01 2009

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v)  
of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT: SELF-REPRESENTED

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).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The District Director, New York, New York, denied the instant waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record contains a Notice of Entry of Appearance (Form G-28) executed by the applicant, on November 18, 2004, in which he recognized a New York lawyer as his then attorney of record. On appeal, however, the applicant stated that he is no longer represented by counsel. All representations will be considered, but the decision in this matter will be furnished only to the applicant.

The record shows that the applicant is a native and citizen of the Dominican Republic, is married to a U.S. citizen, is the father of a U.S. citizen child, is the stepfather of two U.S. citizen children, and is the beneficiary of an approved Form I-130 petition. The district director found the applicant to be inadmissible pursuant to sections 212(a)(9)(B)(i) and 212(a)(2)(D)(iii) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. §§ 1182(a)(9)(B)(i) and 1182(a)(2)(D)(iii). The applicant seeks a waiver of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(h)(1)(B) of the Act in order to reside in the United States with his wife, his children, and his stepchild.

The district director found that the applicant had been unlawfully present in the United States for more than a year and is therefore inadmissible pursuant to section 212(a)(9)(B)(i) of the Act. The district director also found that the applicant is coming to the United States to engage in unlawful commercialized vice, and is inadmissible under to section 212(a)(2)(D)(iii) of the Act.

The district director found that the applicant had failed to establish extreme hardship to his U.S. citizen spouse, and is not, therefore, eligible for waiver, pursuant to section 212(a)(9)(B)(v) of the Act, of his inadmissibility under section 212(a)(9)(B)(i). The district director also found that the applicant had failed to demonstrate that he qualified for waiver, pursuant to the requirements of either section 212(h)(1)(A) or section 212(h)(1)(B) of the Act, of his inadmissibility pursuant to section 212(a)(2)(D)(iii) of the Act. Accordingly, the district director denied the application. On appeal the applicant reiterated his request that the waiver application be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO’s *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The entire record was reviewed and considered in arriving at a decision on the appeal.

Section 212(a)(9)(B)(i) of the Act provides:

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 (whether or not pursuant to section 1254a(e) of this title) prior

to the commencement of proceedings under section 1225(b)(1) or section 1229(a) of this title, 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.

Various documents in the record contain conflicting dates pertinent to the applicant's entry into the United States. A G-325A, Biographic Information form that the applicant signed on April 10, 1995 states that the applicant left the Dominican Republic during April 1990 and began living in the United States during June 1990. A Form G-325A that the applicant signed on November 18, 2004 states that the applicant lived in the Dominican Republic through March 1991. The Form I-130, Petition for Alien Relative, in this case, which the applicant's wife signed on April 11, 2001, states that the applicant entered the United States without inspection on March 1991.

In any event, as the applicant was arrested, under the name [REDACTED] in New York City, on December 31, 1991 for reckless endangerment and criminal possession of a weapon, he was clearly present in the United States on that date. The record contains no indication that he ever gained any legal status in the United States and no indication that he ever departed the United States. As a result, the applicant's unlawful presence in the United States began, for the purpose of the salient statute, on April 1, 1997, the effective date of the unlawful presence provisions of the Act.

In order to trigger inadmissibility under section 212(a)(9)(B)(i) of the Act, however, the applicant must have departed the United States. As was noted above, the record contains no evidence that the applicant has departed the United States. As such, he is not inadmissible pursuant to section 212(a)(9)(B)(i) of the Act.

The remaining basis relied upon in the decision denying the waiver application is the finding that the applicant is coming to the United States to engage in commercialized vice and is therefore inadmissible pursuant to section 212(a)(2) of the Act, which states, in pertinent part:

D) Prostitution and commercialized vice.-Any alien who-

....

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

The record shows that, on August 21, 1995, the applicant was convicted of a violation of sections 110 and 225.15 of the New York Penal Law (NYPL), attempted possession of gambling records, and was fined \$250. On April 22, 1998 the applicant was convicted of a violation of NYPL 225.15,

possession of gambling records, and fined \$200. Those convictions are sufficient to show that the applicant has engaged in unlawful commercialized vice.

As was noted above, however, the applicant entered the United States during either 1990 or 1991. As such, the first of those convictions was approximately four or five years after his initial entry. That conviction is insufficient to show that the applicant came to the United States with the formed intention of engaging in commercial vice.

Further, the more recent conviction occurred more than ten years ago. Notwithstanding that the decision denying the waiver application noted that the record contains no other evidence that the applicant is rehabilitated, that past conviction is an insufficient reason to believe that the applicant is now seeking admission to the United States to engage in commercialized vice. The evidence is insufficient to render the applicant inadmissible pursuant to section 212(a)(2) of the Act.

However, the record raises an additional issue that was not addressed in the decision of denial. 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 or the spouse of an alien lawfully admitted for permanent residence, 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.

The 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). 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 applicant's previous wife, [REDACTED] filed a previous Form I-130 to classify the applicant as an immediate relative of a United States citizen or lawful permanent resident. The petition was approved on June 9, 1993. At a May 2, 1996 interview, however, significant discrepancies were noted between the testimony of the applicant and that of [REDACTED]. As a consequence of these discrepancies, the I-130 approval was revoked on September 27, 1996.

Specifically, whereas [REDACTED] stated that she was born in Manhattan and that her middle name is [REDACTED], the applicant stated that she has no middle name and was born in the Bronx. Ms. [REDACTED] stated that she and the applicant did not discuss his immigration status before they married and that she was surprised that he did not possess a green card, whereas the applicant stated that they had discussed his immigration status prior to their marriage and that she was not surprised that he did not have a green card.

[REDACTED] stated that the applicant entered the United States approximately five years prior to their 1993 marriage; whereas the applicant stated that he entered the United States during 1991. Ms. [REDACTED] stated that the applicant came directly to the United States from the Dominican Republic, whereas the applicant stated that he entered through Mexico. [REDACTED] stated that her daughter was living with her when she and the applicant married, and the applicant stated that she lived alone when they married.

[REDACTED] stated that she worked at a dental office at [REDACTED] in the Bronx and that she took a bus when her boss was unable to transport her to work. The applicant stated that she worked at a dental office at [REDACTED] and that her boss always took her to work. [REDACTED] stated that a friend took the applicant to work. The applicant stated that he rode to work with his boss, who was also his brother-in-law.

[REDACTED] stated that the applicant's nephew's name was [REDACTED]. Ms. [REDACTED] stated that a friend of the applicant transported him and his belongings to her apartment when he moved in. The applicant stated that [REDACTED] father drove him and his belongings. The applicant stated that his nephew's name was [REDACTED].

[REDACTED] stated that the night before she arrived home at 7 pm and made the applicant lasagna, which they ate together but without [REDACTED] daughter, who ate in her room. The applicant stated that [REDACTED] returned home at 5 pm, and that he prepared rice, beans, and pork chops which he, his wife, and her daughter ate together.

[REDACTED] stated that she has no alarm clock. The applicant stated that the alarm clock is set for 6 am. [REDACTED] stated that her rent is \$695 per month and does not include utilities. The applicant stated that the rent is \$480 and includes gas and electricity. [REDACTED] stated that their home contains no smoke alarms. The applicant stated that there is a smoke alarm in the living room and one in the hall.

stated that a friend, [REDACTED]<sup>1</sup> drove her to the May 2, 1996 interview. The applicant indicated that he took a taxi to the interview.

These and the many other discrepancies between the applicant's answers and his previous wife's answers at their interview demonstrate that they did not have a *bona fide* marriage, but that they contracted a marriage specifically to acquire an immigration benefit for the applicant. An independent review of the record establishes substantial and probative evidence that the applicant's marriage to [REDACTED] was entered into for the purpose of evading the immigration laws.

Because the applicant's marriage was found to have been entered into for the purpose of evading the immigration laws of the United States, the applicant is permanently barred from obtaining a visa to enter the United States. *See* 8 U.S.C. § 1154(c). The appeal will be dismissed.

**ORDER:** The appeal is dismissed.

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<sup>1</sup> The instant Form I-130 indicates that the applicant present wife used the name [REDACTED] during a previous marriage.