(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 18 2014 Office: OAKLAND PARK, FL [redacted]

IN RE: APPLICANT: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Oakland Park, Florida, and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on motion. The matter will be remanded to the Field Office Director for further proceedings consistent with this decision.

The applicant is a native and citizen of Peru who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of committing a crime involving moral turpitude (CIMT). The applicant is seeking a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h).

The Field Office Director denied the waiver application as a matter of discretion because the applicant has been convicted of three crimes since entering the United States. *Decision of the Field Office Director*, dated August 17, 2013. The AAO dismissed a subsequent appeal, finding the applicant did not demonstrate that any of the qualifying relatives would experience extreme hardship in the event of the applicant's continued inadmissibility. *AAO Decision,* July 25, 2014.

On motion, counsel submits: a brief; a letter from the applicant's physician; medical records; the applicant's statement; business records; and articles and reports on medical care in Peru. In the brief, counsel contends in the decision the AAO failed to consider and weigh the hardship factors, and that the applicant's rehabilitation and other positive equities were ignored. Counsel also asserts that the medical records should have been enough to establish medical hardship, and that the AAO mischaracterized evidence by stating it was an assertion of counsel.

The record includes, but is not limited to: the documents listed above; briefs from counsel; statements from family members and friends of the applicant and his spouse; statements from the applicant and his spouse; court records pertaining to the applicant's convictions; background materials on the country conditions in Peru; medical records related to the applicant's health conditions; tax returns; pay stubs and other financial records for the applicant, his spouse and their automotive repair business in Florida; copies of financial documents; documents filed in relation to the applicant's removal proceedings; other applications and petitions; evidence of birth, marriage, residence, and citizenship; and photographs. The entire record was reviewed and considered in rendering a decision on the motion.

The applicant's inadmissibility under section 212(a)(2)(A)(i)(I) of the Act for having convictions for crimes involving moral turpitude is not contested on appeal or on motion. As such, we affirm our previous finding that the applicant remains inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act, and requires a waiver of this inadmissibility under section 212(h) of the Act.

The AAO conducts appellate review on a de novo basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

To establish eligibility for a marriage-based immigrant visa, the petitioner must submit proof of the legal termination of all previous marriages for both the petitioner and the beneficiary. *See* 8 C.F.R.

§ 204.2(a)(2). In the present case, the applicant is the beneficiary of a Petition for Alien Relative (Form I-130) filed by the applicant's spouse on October 9, 2009. The Field Office Director approved the visa petition on June 15, 2010. The Field Office Director subsequently issued a Notice of Intent to Revoke ("NOIR") on March 15, 2012.[1] Therein, the Field Office Director states that the applicant submitted documentation to show that on [redacted] 2007, he obtained a divorce in the Dominican Republic from his first spouse, before he married his present spouse in Florida on [redacted] 2009. The Field Office Director found, though, as neither party resided or had physical presence in the Dominican Republic at the time of the divorce, the divorce was invalid in Florida. In support, the Field Office Director cited to Florida case law indicating that "Florida courts will not recognize a foreign national's divorce decree unless at least one of the spouses was a good faith domiciliary of the foreign nation at the time the decree was rendered." *See Field Office Director's decision* at 3, *citing In re Schorr's Estate,* 409 So.2d 487, 488-89 (Fl. Dist. Ct. App. 1981). The Field Office Director additionally noted that in *Matter of Luna,* the BIA held:

> A foreign court must have jurisdiction to render a valid decree, and that the applicable tests of jurisdiction are ordinarily those of the United States, rather than that of the divorcing country, and a divorce obtained in a foreign country will not normally be recognized as valid if neither of the spouses had a domicile in that country, even though domicile is not a requirement for jurisdiction under the divorcing country's laws.

Matter of Luna, 18 I&N Dec. 385 (BIA 1983). In response to the NOIR, counsel submitted a brief, paperwork indicating the applicant was in the process of divorcing his first wife in a Florida Circuit Court, and copies of Florida statutes. In the brief, counsel states that both the applicant and his first wife were represented by Dominican attorneys in the divorce proceedings and had reason to believe they were legally divorced and therefore, eligible to remarry. Counsel adds that Florida Statute §826.01, which is a criminal statute punishing bigamy, does not apply to a person who, like the applicant, reasonably believed he was free to marry. In support, counsel cites to Florida Statute § 826.02.

Regardless of whether the applicant faces criminal penalties for bigamy under Florida Statute §826.01, the applicant has not established that his [redacted] 2007, divorce was valid, and that he was consequently legally free to marry the I-130 petitioner on [redacted] 2009. The BIA held in *Matter of Ma,* 15 I&N Dec. 70 (BIA 1974), that "the validity of a marriage, for immigration purposes, is governed by the place of celebration." *Matter of Ma* at 71, *citing Loughran v. Loughran,* 292 U.S. 216, 233 (1934); *Matter of Levine*, 13 I. & N. Dec. 244 (BIA 1969); *and Matter of P-*, 4 I. & N. Dec. 610 (A.G.1952). The BIA further held, "[i]n cases where a marriage follows a divorce, we look at the prior divorce in light of the law of the state of celebration of the subsequent marriage for the purpose of determining whether or not that state will recognize the validity of the divorce." *Matter of Ma* at 71. In this case, as the applicant and the I-130 petitioner's [redacted] 2009, marriage occurred in Florida, Florida law controls whether the Dominican divorce is legally recognized.

[1] This NOIR was re-issued on May 13, 2013.

It does not appear that the applicant's 2007, divorce would be legally recognized in Florida. The District Court of Appeals of Florida, Fourth District, held that a woman who appointed a Dominican Republic attorney to represent her in divorce proceedings in that country, and a man who immediately returned to the United States after obtaining a divorce decree in the Dominican Republic, did not have a recognizable, valid divorce decree as neither party was a good faith domiciliary of the Dominican Republic at the time the decree was rendered. *In re Schorr's Estate, supra.* In this case, the record reflects that neither the applicant nor his first wife lived in the Dominican Republic at the time of their divorce, and although it appears they were represented by attorneys in the Dominican divorce proceedings, neither of them returned to that country to obtain the divorce.

Counsel contends that, under *Higgins v. Higgins,* 146 So.2d 122 (Fla. Dist. Ct. App. 1962)[2] and *Young v. Young,* 97 So. 2d 470, 471 (Fla. 1957), Florida recognized the propriety of a judicial proceeding to dissolve the apparent bonds of matrimony uniting a man and a woman under circumstances where one or the other is legally married to a third party. Counsel contends that consequently, under Florida law, a divorce of a former spouse validates a current marriage to a subsequent spouse which may have been entered into prior to the divorce of the previous spouse.

In this case, there is no legal support for a contention that the applicant's 2012, divorce from his first wife, obtained from the Florida Circuit Court of validates his 2009, marriage to the I-130 petitioner. The statutes counsel cites to in support discuss the crime of bigamy and exceptions to that crime, and not the validity of a subsequent marriage.[3] Moreover, the cases counsel discusses in the NOIR response also do not support this contention. In *Young v. Young,* the Supreme Court of Florida did not find that a subsequent marriage, where one party was already legally married to another person, was valid, but instead that "even though a marriage is void in its inception it is to the best interests and good order of society that the invalidity of the marriage be adjudicated by a court of competent jurisdiction." *Young, supra* at 471. In *Higgins v. Higgins,* the District Court of Appeals, Third District of Florida, makes clear that, instead of validating a subsequent marriage, where one party was already legally married to another person, "there could be no valid marriage between the parties at that time." *Higgins, supra,* at 123.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). A petitioner must demonstrate that the beneficiary is eligible for the classification when the petition is filed. *See* 8 C.F.R. § 103.2(b)(12),

[2] The correct case name is *Higgins v. Higgins,* not *Higuins v. Higuins* as counsel writes in the NOIR response.

[3] "Whoever, having a husband or wife living, marries another person shall, except in the cases mentioned in s. 826.02, be guilty of a felony of the third degree..." Fl Stat. Ann. §826.01 (2014).

see also Matter of Atembe, 19 I&N Dec. 427 (BIA 1986).[4] In this case, it does not appear that the applicant was legally free to marry the I-130 petitioner on 2009, and consequently, that he was eligible for classification as the spouse of a United States citizen when the visa petition was filed on October 9, 2009. Nor has the applicant provided sufficient legal support to establish that his 2012, Florida divorce from his first spouse validates his 2009 marriage to the I-130 petitioner.

Therefore, we remand the matter to the Field Office Director review revocation proceedings on the approved I-130 petition. Should the approved Form I-130 petition be revoked, the Form I-601 will be unnecessary as the applicant will lack an underlying petition and the appeal will be dismissed. In the alternative, should it be determined that the Form I-130 is not to be revoked, the Field Office Director will return the appeal of the Form I-601 to the AAO for review.

ORDER: The matter is remanded to the Field Office Director for further proceedings consistent with this decision.

[4] The record does not reflect that the applicant and the I-130 petitioner have remarried after the applicant's 2012, divorce.