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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]

FILE: [redacted] Office: GUANGZHOU, CHINA Date: FEB 0 2 2011

IN RE: [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:

SELF-REPRESENTED

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,

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Guangzhou, China. The matter is now before the Administrative Appeals Office (AAO) on appeal. The matter is remanded to the OIC (now field office director) for further proceedings consistent with this decision.

The applicant is a native and citizen of the China who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for willful misrepresentation of a material fact. The applicant's parents are U.S. citizens and he seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to be admitted to the United States.

The OIC concluded that the applicant had 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.

In a letter submitted on appeal, the applicant asserts that his parents will suffer extreme hardship if his waiver is denied.

In support of the appeal, the record contains, but is not limited to, letters from the applicant, a letter from the applicant's father, the applicant's father's naturalization certificate, the applicant's mother's naturalization certificate, the applicant's birth certificate, the applicant's parent's tax returns, the applicant's divorce certificate, and declarations from the applicant regarding his marital status. The entire record was reviewed and considered in rendering this decision.

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

> (i) 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.

Section 212(i) of the Act provides that:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien 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 Attorney General [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.

The OIC determined that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for changing his name "in an effort to avoid detection on a misrepresentation or fraud." The OIC further noted that the applicant stated he had a previous marriage that he failed to report during his

immigrant visa interview. The OIC determined that the applicant is additionally inadmissible for having "lied to the consular officer during the first interview about his bigamous marriage." *I-601 Denial*, dated May 5, 2008.

The OIC has provided two factors on which to base the finding of 212(a)(6)(C)(i) inadmissibility. The first factor is that the applicant changed his name in an effort to avoid detection on a misrepresentation or fraud. Since the OIC failed to specify the underlying misrepresentation or fraud, the AAO will assume that the misrepresentation relates to the second factor, the applicant's failure to disclose his bigamous marriage.

On appeal, the applicant asserts, "For my entire life, I use my name as and I have this name only." The applicant notes that during his two immigrant visa interviews, he used the name , and his passport reflects his use of this name. The AAO finds that the record supports the applicant's assertions. The record reflects that the applicant has used the name as translated from Chinese characters, during the course of his immigration proceedings. Accordingly, the AAO does not find that the applicant misrepresented his identity to procure an immigration benefit.

In regard to the second issue, whether the applicant misrepresented his marital status to a consular officer, the applicant asserts:

> My ex-wife was engaged in a bigamous relationship when she married me. According to the American understanding, the marriage was not considered valid. Therefore in the 1st interview I stated my self [sic] as never married. But according [to] the Chinese Law, the marriage is terminated only when I had finished a divorce process. There was where the misunderstanding came from. I thought my marriage was not considered valid so that I did not state that.

The record contains a divorce decree dated September 25, 2007, from Guangdong Province, China, which provides that the applicant and registered their marriage on June 28, 2000, and they divorced by judgment on December 26, 2002 in Guangzhou City. The decree states that the divorce became effective on August 3, 2003. The applicant's *Memorandum Report of Interviewing Applicant for Immigrant Visa* states that during his April 5, 2006 interview at the consulate, he did not indicate that he was ever married. He noted that at the time he was already divorced because his spouse was engaged in a "bigamous relationship."

The record reflects that the applicant's U.S. citizen mother and his U.S. citizen father, filed two separate immigrant petitions on his behalf on October 27, 1999. The Petition for Alien Relative (Form I-130) filed by the applicant's mother was approved on May 4, 2002, and the applicant was placed in the F2B preference category as the unmarried son of a permanent resident. However, the applicant was, at the time of the Form I-130 approval, married to applicant's mother became a naturalized U.S. citizen on March 29, 2005, which was subsequent to the approval of the Form I-130 she filed on the applicant's behalf. Although applicant's marriage could have resulted in an automatic revocation of the underlying Form I-130

because there is no preference category for married sons or daughters of permanent residents, as noted by the OIC, the applicant was engaged in a bigamous marriage. The applicant's bigamous marriage was considered invalid for immigration purposes. *See* 8 C.F.R. § 205.1(a)(3)(i)(I); *Matter of H*, 9 I&N Dec. 640 (BIA 1962).

The record reflects that the applicant submitted two immigrant visa applications to the consulate, respectively dated August 22, 2005 and May 29, 2007. The AAO finds that the applicant misrepresented his marriage to his first immigrant visa application, which was filed based on the underlying approval of his mother's Form I-130. The applicant indicated that he is "single (never married)" on this application. The applicant filed with the immigrant visa application supporting documentation that further advanced his misrepresentation. The applicant submitted a *Family Composition Sheet*, dated March 24, 2006, to the consulate where he indicated that he has never been married, and a declaration, dated March 16, 2006, stating that he has "never registered a marriage" during his residence in China.

However, the AAO does not find that the record supports that the applicant's failure to disclose his prior marital status, whether or not intentional, to be a *material* misrepresentation. The Board of Immigration Appeals (BIA) articulated the test for materiality in *Matter of S- and B-C-* as "(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 a proper determination that he be excluded." 9 I&N Dec. 436, 447 (BIA 1960).

Pursuant to the first part of this test, the applicant is not inadmissible based on the true facts, to the extent we have been able ascertain those facts from the record. The AAO notes that at the time of the applicant's immigrant visa application, he remained the unmarried son of a U.S. citizen, and thus, qualified for F1 preference status. The applicant's status as a divorced individual did not alter his eligibility for the F1 preference category. Further, the misrepresentation is not material under the second part of the test because the record does not show that the applicant's failure to disclose his prior marriage shut off a line of inquiry relevant to his eligibility that could have resulted in his inadmissibility to the United States. A misrepresentation is generally material only if by it the alien could receive a benefit for which he would not otherwise have been eligible. *See Kungys v. United States,* 485 U.S. 759 (1988). The record does not show that a determination has been made that the applicant entered into marriage with for the purpose of evading the immigration laws. *See* Section 204(c) of the Act, 8 U.S.C. § 1154(c). Since the record does not show that the applicant engaged in or attempted to engage in marriage fraud to procure immigration benefits, his failure to disclose his marriage did not shut off a line of inquiry relevant to his eligibility for immigrant status. Therefore, the AAO does not have a basis on which to find the applicant's misrepresentation of his marital status to be material.[1]

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[1] 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 AAO will remand the matter to the field office director (formerly the OIC) for additional clarification on the nature of the applicant's inadmissibility. Should the field office director again find that applicant inadmissible under section 212(a)(6)(C)(i) of the Act, the field office director shall issue a new decision on the applicant's Form I-601 including an explanation of the specific fact or facts misrepresented, the U.S. government official to whom the misrepresentation was made, the immigration benefit sought, and the materiality of the misrepresentation to obtaining that benefit. If the decision is to deny the Form I-601, the field office director shall certify the decision for review to the AAO pursuant to 8 C.F.R. § 103.4, and shall forward to the AAO any evidence supporting the finding of inadmissibility. Should the field office director find that the applicant has committed marriage fraud and is ineligible for immediate relative or preference status pursuant to section 204(c) of the Act, the matter shall be referred to the office that approved the underlying Form I-130 petition for revocation proceedings. Should the applicant be found *not* inadmissible or ineligible, the OIC will issue a new decision dismissing the applicant's Form I-601 as moot and return the matter for consular processing of the applicant's visa application.

ORDER: The matter is remanded to the field office director for further proceedings consistent with this decision.