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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**



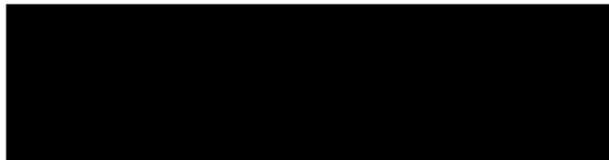
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Date: **AUG 02 2012** Office: NEW YORK, NEW YORK FILE:

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. section 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of the Dominican Republic who was found to be 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 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 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 U.S. citizen father.

The District Director concluded that based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative. The application was denied accordingly. *See Decision of the District Director*, dated December 15, 2006.

On appeal, the AAO determined that because the approval of a previous Form I-130, *Petition for Alien Relative*, filed by the applicant's former wife was revoked due to a finding that the applicant entered into the marriage for the purpose of evading the immigration laws of the United States, the applicant is statutorily ineligible for any Form I-130 approval, and thus no point would be served in adjudicating his Form I-601 waiver application. Consequently, the appeal was dismissed. *See Decision of the Administrative Appeals Office*, dated September 2, 2009.

On September 21, 2009 counsel for the applicant filed Form I-290B, *Notice of Appeal or Motion*, to the Administrative Appeals Office. On the Form I-290B, in Part 2, counsel indicated that he was filing a motion to reconsider by marking box E. *See Form I-290B*, dated September 14, 2009.

The regulation at 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The AAO finds that the applicant has met the requirements of 8 C.F.R. § 103.5(a)(3), and the motion will be granted and the application reconsidered.

The record has not been supplemented on motion to reconsider. The record contains, but is not limited to: a statement from counsel on the Form I-290B; denials of Forms I-601 and I-485; statements from the applicant and his father; a copy of the applicant's father's naturalization certificate; a copy of the approval notice for the Form I-130 filed on the applicant's behalf by his father; a copy of the applicant's birth certificate; and documentation regarding the applicant's prior

marriage fraud, the marriage fraud finding by the New York District Director, and the subsequent revocation of the underlying Form I-130.

On motion, counsel asserts that: the Administrative Appeals Office (AAO) did not properly review “the main issue in this case,” which is whether extreme hardship to the applicant’s qualifying relative has been established; the AAO failed to consider that there is an approved Form I-130 filed by the applicant’s father on his behalf and that because of the approved I-130, section 204(c) of the Act is “immaterial to the issue at hand”; it was improper for the AAO to impose a § 204(c) bar because the District Director never raised the issue in denying the waiver application and it is “improper for the AAO to deny a waiver on a legal issue that was not raised by the USCIS”; and the AAO has no jurisdiction to review petitions or issues under section 204(c) of the Act. *See Form I-290B, Notice of Appeal or Motion*, received September 21, 2009.

Counsel is correct that appellate jurisdiction over the denial or revocation of a Form I-130 petition rests with the Board of Immigration Appeals (BIA). However, no appeal of a Form I-130 has come before the Administrative Appeals Office in the present matter nor has the AAO engaged in improper review thereof. Pursuant to 8 C.F.R. § 205.2, the approval of a Form I-130 petition is revocable when the necessity for the revocation comes to the attention of USCIS. In the present matter, the necessity for revocation has come to the attention of the AAO as a result of its *de novo* appellate review authority of the record. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff’d*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis). That the District Director did not address the prior marriage fraud determination made by her predecessor in August 1980 does not shield the applicant from the application of section 204(c) of the Act, and does not bar subsequent USCIS officers from properly examining the record and applying current law. The AAO does concede, however, that its dismissal of the applicant’s Form I-601 waiver application on appeal has left unresolved whether the current Form I-130 approval should be revoked. The AAO will now remand the matter to the District Director to resolve this issue, discussed further below.

The record reflects that on January 24, 1979 a Form I-130, *Petition for Alien Relative*, was approved on the applicant’s behalf as the spouse of a lawful permanent resident, [REDACTED]. The approved Form I-130 was returned for revocation by the American Consulate at Santo Domingo, Dominican Republic to the New York District Director, because the marriage appeared to have been entered into solely for immigration purposes. [REDACTED] was requested to appear for interviews on April 24, 1980 and May 22, 1980 to respond to a number of investigative findings. She failed to respond or appear. On June 25, 1980, the applicant was served with a notice of intent to revoke the approval of the Form I-130 petition on his behalf. The notice detailed the grounds set forth for revocation and granted a period of fifteen days within which to offer evidence in opposition to the revocation action. No evidence in opposition was submitted. The District Director concluded that the approval of the Form I-130 should be revoked for marriage fraud, and on August 11, 1980 ordered it so revoked.

On July 29, 1997 a Form I-130, *Petition for Alien Relative*, was filed on the applicant's behalf by his U.S. citizen father. The Form I-130 petition was approved on August 8, 1997. The applicant seeks admission to the United States as an immigrant based on the approved Form I-130 petition, and he filed the present Form I-601 application for a waiver of his inadmissibility under section 212(a)(6)(C)(i) of the Act.

Section 204(c) of the Act provides that no alien relative petition shall be approved if:

- (1) the alien has previously been accorded, or has 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 [Secretary] to have been entered into for the purpose of evading the immigration laws or
- (2) the Attorney General [Secretary of Homeland Security] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

No waiver is available for violation of section 204(c) of the Act.

There is evidence in the record demonstrating that the applicant entered into his marriage to [REDACTED] for the purpose of evading U.S. immigration laws. Accordingly, pursuant to section 204(c) of the Act, the applicant is permanently ineligible to have any Form I-130 relative petition approved on his behalf, including the Form I-130 petition filed by his father that serves as the underlying basis for the present Form I-601 waiver application. In light of this permanent bar, no purpose would be served in adjudicating the applicant's Form I-601 waiver application under section 212(i) of the Act, as there is no basis for his eligibility for permanent residence in the United States. As previously noted, pursuant to 8 C.F.R. § 205.2, the approval of a Form I-130 petition is revocable when the necessity for the revocation comes to the attention of USCIS. The record supports that the approval of the Form I-130 petition filed on the applicant's behalf by his father should be revoked.

Should the AAO make a determination that the applicant is to be granted a waiver of inadmissibility under section 212(i) of the Act only to have the approved Form I-130 petition subsequently revoked on the basis of the applicant's ineligibility under section 204(c) of the Act, the waiver would have no effect.

Therefore, the AAO remands the matter to the District Director to initiate proceedings for the revocation of the approved Form I-130 petition. Should the approval of the Form I-130 be revoked, the District Director will issue a new decision dismissing the applicant's Form I-601 application as unnecessary. 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 petition is not to be revoked, the District Director shall forward the matter to the AAO for a decision addressing the merits of the applicant's Form I-601 waiver application.

ORDER: The motion to reconsider is granted. The matter will be remanded to the District Director for further proceedings consistent with this decision.