

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
20 Massachusetts Avenue NW
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



(b)(6)

DATE: **APR 08 2013**

Office: NEW DELHI

FILE: [REDACTED]

IN RE: [REDACTED]

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

Thank you,

for 

Ron Rosenberg

Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, New Delhi, India, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the field office director for further proceedings consistent with this decision.

The applicant is a native and citizen of India 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 having attempted to procure admission to the United States through fraud or misrepresentation. The applicant is the spouse of a U.S. citizen and is the beneficiary of an approved Petition for Alien Relative. 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 her U.S. citizen spouse.

The director concluded that the applicant had failed to demonstrate extreme hardship to her qualifying spouse and denied the application accordingly. *See Decision of Field Office Director*, dated June 7, 2012. The director also found that the applicant had failed to demonstrate that she merited a waiver in the exercise of discretion. *Id.*

On appeal, counsel for the applicant asserts that the Field Office Director failed to consider certain hardship factors and positive discretionary factors. Counsel states that the applicant and the qualifying spouse have been in a relationship for many years and that it is difficult for them to be separated. Counsel also contends that the qualifying spouse is responsible for caring for his young sons and his elderly parents while working long hours to support his family. Counsel notes that the qualifying spouse relies on his mother for childcare assistance but that she is ill and is limited in her ability to help. Counsel also states that the qualifying spouse is experiencing financial difficulties. Counsel contends that in the aggregate, these factors amount to extreme hardship for the qualifying spouse. *Counsel's Brief.*

The record includes, but is not limited to: statements from the qualifying spouse and the applicant; financial records; medical records regarding the qualifying spouse and his parents; a psychological evaluation and a follow-up letter from the qualifying spouse's therapist; and a letter from the qualifying spouse's friends. The entire record was reviewed and considered in rendering a decision on the appeal.

In the present case, the record reflects that the applicant married a U.S. citizen, [REDACTED] in 1997 and that he filed a Form I-130 on the applicant's behalf in 1998. The petition was approved in 2002, but the marriage was later found to be fraudulent on the basis of an overseas investigation as well as an interview with the applicant. The Form I-130 was revoked in a decision dated June 2, 2009. In the meantime, the applicant had divorced [REDACTED] on November 24, 2004 and married the qualifying spouse on March 6, 2005. The qualifying spouse filed a Form I-130 on the applicant's behalf and it was approved on December 17, 2008. On appeal, the applicant admits that she never lived with [REDACTED] and that she married him in an attempt to gain an immigration benefit.

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An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 204(c) of the Act, 8 U.S.C. § 1154(c), 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 of Homeland Security] to have been entered into for the purpose of evading the immigration laws or
- (2) the Attorney General [Secretary] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

8 C.F.R. § 204.2(a)(ii) further 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). Further, 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).

In this case, the record shows that the applicant indicated during her consular interview that she had married the qualifying spouse in 1995, prior to marrying [REDACTED], the U.S. citizen spouse who originally filed a Form I-130 on her behalf. The AAO acknowledges that the applicant claims on appeal that she did not marry the qualifying spouse until 2005, after her divorce from [REDACTED] in November 2004. However, regardless of the dates of the applicant's two marriages, other evidence in the record still demonstrates that the applicant's marriage to [REDACTED] was fraudulent and was entered into for immigration purposes. First, the applicant states in her affidavit on appeal that although she and [REDACTED] were married from December 17, 1997 until November 24, 2004, they never lived together. She also states that she and the qualifying spouse became engaged in 1993 and that they lived together prior to their marriage. Counsel's brief also indicates that the applicant and the qualifying spouse began living together in 1998 and that the applicant's marriage "scheme was [her] desperate attempt to immigrate to the U.S. in order to live with [the qualifying spouse]." Furthermore, an overseas investigation revealed that the applicant's relatives and neighbors all stated that the applicant was married to the qualifying spouse, not to [REDACTED] and that she had two sons with the qualifying spouse. Additionally, the investigation revealed that [REDACTED] is the qualifying spouse's cousin and that the applicant married him in order to immigrate to the United States more quickly than she could have done through marriage to the qualifying spouse.

The record contains substantial and probative evidence that the applicant's marriage to Mr. [REDACTED] was entered into for the sole purpose of evading the immigration laws and she is therefore subject to the provisions of section 204(c) of the Act. 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).

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. Therefore, the AAO remands the matter to the field office director to initiate proceedings for the revocation of the Form I-130 approved on December 17, 2008. Should the approved Form I-130 petition be revoked, the director will issue a new decision dismissing the applicant's Form I-601 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 is not to be revoked, then the director will issue a new decision addressing the merits of the applicant's Form I-601 waiver application. If that decision is adverse to the applicant, it will be certified for review to the AAO.

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