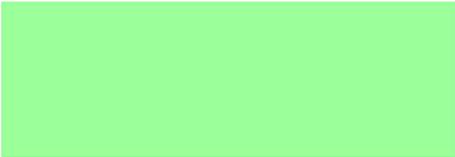


(b)(6)

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

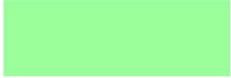


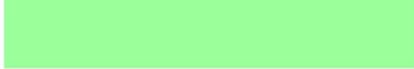
U.S. Citizenship
and Immigration
Services



Date: **JUL 01 2014**

Office: SAN BERNARDINO, CA

FILE: 

IN RE: 

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:

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.

Thank you,

A handwritten signature in black ink that reads "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, San Bernardino, California. The matter 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 record reflects that the applicant is a native and citizen of Ethiopia who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for filing a frivolous asylum claim. The applicant is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(i) of the Act.

In a decision, dated October 17, 2013, the field office director found that the applicant had failed to establish extreme hardship to her U.S. citizen spouse as a result of her inadmissibility. The application was denied accordingly.

On appeal, counsel states that the applicant's spouse will suffer extreme hardship as a result of the applicant's inadmissibility and that the applicant warrants a favorable exercise of discretion. Counsel submits additional evidence of hardship with the appeal.

The record shows that the applicant has a long history of making willful material misrepresentations in an effort to gain immigration benefits under the Act. The applicant first entered the United States with a B1 visitor's visa on September 10, 1999. Then, on October 27, 1999, she filed an asylum application based on a false identity and country of origin. On January 18, 2000, the applicant was placed in removal proceedings and on March 21, 2000, while in removal proceedings, she married a U.S. citizen. An immigration judge ordered the applicant removed from the United States, she appealed this decision to the Board of Immigration Appeals (BIA), and the appeal was dismissed on December 23, 2003. The applicant did not depart the United States. On September 12, 2001, the Alien Relative Petition (Form I-130) related to her March 2000 marriage was denied under section 204(c) of the Act as a marriage that was entered into solely for the purposes of circumventing the immigration laws of the United States. On October 19, 2009, the applicant filed her second Form I-130 based on a different marriage. This petition was approved on May 25, 2011. In addition, after filing a joint motion to reopen and dismiss, the applicant's removal proceedings were terminated on January 23, 2012, to allow the applicant to apply for adjustment of status.

The record does not indicate that the immigration judge in the applicant's case made a finding that she filed a frivolous asylum claim.

8 C.F.R. § 1208.20 states:

For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. ...

In accordance with 8 C.F.R. § 1208.20 and section 208(d)(6) of the Act, the BIA has formulated a four-part test to determine if a respondent has filed a frivolous application: (1) the respondent must receive notice of the consequences of filing a frivolous application; (2) the Immigration Judge must make a specific finding that the alien knowingly filed a frivolous application; (3) there must be sufficient evidence that a material element was deliberately fabricated; and (4) there must be an indication that the respondent has been afforded a sufficient opportunity to account for any discrepancies or implausible aspects of the claim. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007). In the applicant's case, the immigration judge found that the applicant had not received proper notice of the consequences of filing a frivolous application. He found that although the applicant's asylum application was false and based on fabricated facts, he could not find that the filing was frivolous. Although, as was determined by the director, the applicant can be found inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact to gain an immigration benefit based on her fraudulent asylum application, she is not subject to the restrictions for filing a frivolous asylum application.

However, the record indicates that the applicant is also subject to section 204(c) of the Act for entering into a marriage based solely on evading the immigration laws of the United States.

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

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.

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

8 C.F.R. § 204.2(a)(ii). 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).

As stated above, the record includes a Form I-130, filed on behalf of the applicant, which was denied on September 12, 2001 by the Assistant District Director, San Diego Office, because the applicant's marriage was determined to be entered into solely for the purposes of evading the immigration laws of the United States. The record indicates that this finding was made based on the applicant's answers during her adjustment interview, the lack of documentation in the record regarding the bona fides of the relationship, numerous corrections made on the marriage certificate, and the applicant's history of fraudulent representations.

The Act clearly places the burden of proving eligibility for entry or admission to the United States on the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361 ("Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document . . ."). Furthermore, it is incumbent upon the applicant to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the applicant submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, specifically with respect to marriage fraud, the BIA has made clear that once there is evidence of marriage fraud from a former spouse, the burden of proof shifts to the applicant. *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988) ("where there is evidence in the record to indicate that the beneficiary has been an active participant in a marriage fraud conspiracy, the burden shifts to the petitioner to establish that the beneficiary did not seek nonquota or preference status based on a prior fraudulent marriage"); *Matter of Phillis*, 15 I&N Dec. 385, 386 (BIA 1975) ("where there is reason to doubt the validity of the marital relationship, [the burden shifts to the applicant to] present evidence to show that it was not entered into for the primary purpose of evading the immigration laws").

Based on the above, we remand the matter to the field office director to evaluate whether the applicant is subject to section 204(c) of the Act for entering into a marriage for the sole purpose of evading the immigration laws of the United States and whether the decision, dated September 12, 2001 is valid. 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. The applicant's current Form I-130 and ability to obtain any future benefit under the Act is directly related to the September 12, 2001 decision by the assistant district director.

If the field office director determines that the applicant is subject to section 204(c) of the Act, no further action is required. If, however, the field office director finds that the applicant is not subject to section 204(c) of the Act, the record is to be returned to the AAO for adjudication of the appeal of the Form I-601.

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