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



U.S. Citizenship
and Immigration
Services

[Redacted]

DATE: **JUN 15 2015**

[Redacted]

IN RE: Applicant:

[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:

[Redacted]

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for 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 Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the Director for further proceedings consistent with this decision.

The record reflects that the applicant is a native and citizen of India 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 willful misrepresentation of a material fact in order to procure an immigration benefit. The applicant's spouse and two children are U.S. citizens. 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.

The Director found that the applicant established extreme hardship to a qualifying relative, but the Director denied the Form I-601, Application for Waiver of Grounds of Inadmissibility (Form I-601), as a matter of discretion. *Decision of the Director*, dated July 2, 2011. The applicant filed a motion to reopen and reconsider with the Director and the Director affirmed the previous decision. *Second Decision of the Director*, dated September 19, 2014.

On appeal, the applicant, through counsel, contests the section 212(a)(6)(C)(i) inadmissibility finding by asserting that he did not commit a material misrepresentation; and alternatively, he asserts that his favorable factors outweigh his unfavorable factors, and the Form I-601 should therefore be approved as a matter of discretion. *Brief in Support of Appeal*, dated November 13, 2014.

The record includes, but is not limited to, statements from the applicant and his spouse, medical records, financial records, photographs and immigration records. The entire record was reviewed and considered in rendering this decision on the appeal.

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 Secretary of the Department of Homeland Security (Secretary)] may, in the discretion of the [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 [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.

In this case, the record reflects that the applicant was the beneficiary of a Form I-130, Petition for Alien Relative (Form I-130), filed on his behalf by [REDACTED], a U.S. citizen, on August 19, 2004 and approved on September 25, 2004. A Notice of Intent to Revoke (NOIR) was issued on April 27, 2009, because, according to the Director of the California Service Center, a U.S. consular officer in [REDACTED] concluded that this marriage was not *bona fide* and was for the sole purpose of obtaining an immigrant visa. The petitioner did not respond to the NOIR, and the Form I-130 was subsequently revoked on July 6, 2009. A Consular Return/Case Transfer Cover Sheet, dated July 24, 2007, reflects that the U.S. consular section concluded the relationship on which the Form I-130 was based was created solely for immigration purposes. The record also reflects that the applicant submitted information that he was previously married and provided a death certificate for a non-existent spouse with that Form I-130. The applicant asserts that he is not very educated; though he was not previously married, an agent assisting him advised him to state that he was widowed due to the large difference in age between him and the petitioner; he did not understand why he had to submit false information, as the age difference did not matter to him; and the agent prepared all of the forms, which referenced the previous non-existent marriage.

On July 2, 2010, the applicant married his current wife, who filed a Form I-130 on his behalf on December 15, 2011. The Form I-130 was approved on May 8, 2012, and the applicant filed the immigrant visa application underlying the instant waiver appeal.

The applicant asserts that, although he misrepresented himself as married and submitted a death certificate with his ex-wife's Form I-130, this was not a material misrepresentation, as he was eligible for the Form I-130 benefit regardless of the incorrect information.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision in order to be considered material. *Kungys* at 771-72. The BIA has held that a misrepresentation made in connection with an application for a visa or other documents, or for entry into the United States, is material if either:

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 proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

The applicant does not dispute that he provided false information that he had been married and a death certificate for a non-existent spouse with his ex-wife's Form I-130. The applicant, however,

would not have been inadmissible on the true facts: that he had never been previously married and was not a widower. Moreover, his misrepresentations did not shut off a line of inquiry relevant to his eligibility and which might well have resulted in proper determination that he be found inadmissible. He is therefore not inadmissible under section 212(a)(6)(C)(i) of the Act for submitting the false document.

However, the finding that he married his ex-wife solely for immigration purposes, as indicated in the 2009 revocation of the Form I-130 she filed on his behalf, renders him inadmissible under section 212(a)(6)(C)(i) of the Act for willful misrepresentation of a material fact in order to procure an immigration benefit.

An application or petition that fails to comply with the technical requirements of the law may be denied by us 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 we conduct 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 . . . by reason of a marriage determined by the [Secretary] to have been entered into for the purpose of evading the immigration laws or
- (2) the [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). U.S. Citizenship and Immigration Services (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).

After a careful *de novo* review of the record, we find that the applicant appears to be subject to section 204(c) of the Act for having entered into a marriage for the purpose of evading the immigration laws. In this case the record reflects that upon interviewing and investigating the applicant, a U.S. consular officer concluded that the relationship on which his first Form I-130 petition was based was created solely for immigration purposes. Therefore, because evidence in the record casts doubt on the validity of the applicant's actual first marriage, the burden of proof shifts to the applicant to show that he has *not* engaged in marriage fraud. 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 if there is reason to doubt the validity of the marital relationship, the burden shifts to the applicant to establish that it was not entered into primarily to evade immigration laws. *Matter of Phillis*, 15 I&N Dec. 385, 386 (BIA 1975).

In this case, the record reflects that upon interviewing and investigating the applicant, a U.S. consular officer concluded that the relationship on which his first Form I-130 petition was based was created solely for immigration purposes. Therefore, because there is evidence in the record to doubt the validity of the marriage, the burden of proof shifts to the applicant to show that he has *not* engaged in marriage fraud.

We find that the record contains evidence to indicate that the applicant engaged in marriage fraud, specifically, the 2007 consular finding that the applicant entered into a marriage for immigration purposes; and the 2009 revocation by USCIS of the Form I-130 filed on his behalf by his former spouse. The applicant has not met his burden of proof in showing he is eligible for an immigrant visa, and he has not resolved the inconsistencies in the record by independent, competent, objective evidence. Significantly, the applicant did not submit any evidence, such as letters from friends or family, to show that his marriage to [REDACTED] was *bona fide*, before the I-130 petition she filed on his behalf was revoked.

Therefore, we find that the applicant entered into a fraudulent marriage for the purpose of obtaining an immigration benefit. As such, he is permanently barred from obtaining a visa to enter the United States. See 8 U.S.C. § 1154(c). This finding, however, is not based on the applicant's submission of false documentation about a non-existent marriage, showing he is a widower, with the revoked Form I-130. See *Matter of Christo's, Inc.*, 26 I&N Dec. 537 (AAO 2015)(finding 204(c) inapplicable in cases where alien has not entered into a marriage but falsifies documents to represent that a nonexistent marriage exists)(citations omitted). Rather it is based on the U.S. consular officer's conclusion that the relationship on which his first Form I-130 petition was based was created solely for immigration purposes and the subsequent revocation of that petition on that basis by USCIS.

In light of this permanent bar, although we are sympathetic to the applicant's spouse's circumstances, particularly given the finding of extreme hardship she would experience without the applicant, no purpose would be served in addressing whether the applicant's case warrants a favorable exercise of discretion.

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 USCIS. Therefore, we remand the matter to the Director to initiate proceedings for the revocation of the Form I-130 that was approved on May 8, 2012. Should the approved Form I-130 petition be revoked, the Director will issue a new decision dismissing the applicant's Form I-601 as moot. In the alternative, should it be determined that the applicant is not subject to section 204(c) of the Act, and therefore not subject to section 212(a)(6)(C)(i) of the Act, and that the Form I-130 is not to be revoked, then the Director will issue a new decision addressing the mootness of the applicant's Form I-601.

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