U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

H6

Date: NOV 0 4 2011 Office: LONDON, ENGLAND FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B)(v) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(v), and 212(i) of the Act, 8 U.S.C. § 1182(i)

ON BEHALF OF APPLICANT:

[redacted]

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,

Ellen C. Johnson

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, London, England. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the district director for further proceedings consistent with this decision.

The record reflects that the applicant is a native and citizen of Poland and resident of the United Kingdom who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, and section 212(a)(6)(C)(i) of 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 is married to a U.S. citizen and seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), and section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside with his wife in the United States.

The district director found that the applicant established extreme hardship to a qualifying relative. However, the district director denied the application as a matter of discretion due to the applicant's repeated and persistent violations of U.S. immigration laws and the fact that the applicant's statement did not indicate remorse for his past actions. *Decision of the District Director*, dated August 9, 2011.

On appeal, counsel contends the extreme hardship the applicant's wife would suffer should be heavily weighed. According to the applicant, the district director put too much emphasis on the adverse factors in the case, the precise factors for which the applicant is seeking a waiver. The applicant states that although he did perform some illegal work, he worked legally for many years, that he did not leave after being granted voluntary departure because he had an appeal pending during that time, that he has never attempted to come back to the United States illegally, and that he has no criminal record or other indication of bad moral character.

The record contains, *inter alia*: a copy of the marriage certificate of the applicant and his wife, Ms. [redacted] indicating they were married on August 15, 1994; statements from the applicant; statements from [redacted], a sworn statement from the applicant's first wife, [redacted] decisions from an immigration judge, the Board of Immigration Appeals, and the Court of Appeals for the Ninth Circuit; letters of support; copies of tax returns and other financial documents; letters from [redacted] physicians and copies of her medical records; and an approved Petition for Alien Relative (Form I-130) that was filed on August 10, 2007. The entire record was reviewed and considered in rendering this decision on the appeal.

In this case, the record shows that the applicant entered the United States in February 1990 using a visitor's visa. In July 1990, the applicant married [redacted], a U.S. citizen, who filed a Form I-130, Petition for Alien Relative (Form I-130), on his behalf. The Form I-130 was approved and the applicant was permitted to adjust his status to that of a permanent resident on a conditional basis. On August 14, 1992, Ms. [redacted] signed a sworn statement stating that she married the

applicant because he had offered her $5,000 to marry him, that she had actually received $2,500 in payment, that the marriage was purely for business, and that the marriage was never consummated. *Record of Sworn Statement in Affidavit Form*, dated August 14, 1992. Ms. requested that the Form I-130 be withdrawn because the marriage was entered into for the purpose of fraud and profit with the intent of obtaining U.S. immigration documents. *Letter from* , dated August 14, 1992. In January 1993, the legacy INS sent the applicant a Notice of Intent to Rescind the applicant's resident status based on marriage fraud. The record contains a copy of the divorce decree, showing that Ms. and the applicant divorced on August 26, 1993.

On August 5, 1994, the applicant married his current wife, Ms. who filed a Form I-130 on his behalf on August 30, 1994. On October 24, 1994, the district director of the San Francisco district office denied the Form I-130 based on the applicant's previous fraudulent marriage to Ms. . *Decision of the District Director*, dated October 24, 1994. On the same day, the district director issued the applicant a Termination of Conditional Residence Status, terminating the applicant's status as a permanent resident, and issued an Order to Show Cause, placing the applicant in deportation proceedings before an immigration judge.

On December 5, 1994, Ms. filed another Form I-130. On April 6, 1995, the district director again denied the Form I-130 due to marriage fraud. *Decision of the District Director*, dated April 6, 1995. On April 24, 1995, the applicant filed an appeal of the district director's decision to the Board of Immigration Appeals (BIA), contending, *inter alia*, that "[t]he district director abused his discretion by relying on a statement, obtained from the respondent's ex-wife under intimidation and threats after the INS went to place of employment, and by not allowing the respondent opportunity to provide rebuttal evidence." The applicant also contended to the BIA that the divorce decree, which states that the applicant and Ms. lived together as husband and wife for approximately eighteen months, contradicts Ms. sworn statement. On September 15, 2003, the BIA affirmed the district director's denial of the Form I-130.

In the meantime, on June 16, 2003, an immigration judge granted the applicant voluntary departure with an alternate order of deportation. The applicant filed an appeal of this decision to the BIA, arguing that the government should have produced Ms. as a witness. In a decision dated February 1, 2005, the BIA rejected the applicant's argument, finding that the burden of persuasion and production falls on the applicant, not on the government. The BIA stated that the applicant was permitted to voluntarily depart the United States within thirty days of its decision and that if the applicant fails to depart, he shall be removed as provided in the immigration judge's order.

The applicant failed to timely depart the United States and was subsequently deported on March 27, 2006. After having been deported, in May 2006, the applicant filed motions to reconsider and reopen with the immigration judge. The immigration judge denied the motions, and the BIA affirmed the denial of the motions on January 31, 2007. The applicant appealed the BIA's decision to the Court of Appeals for the Ninth Circuit, which denied the petition for review in an unpublished decision on November 17, 2009.

On August 10, 2007, Ms. filed another Form I-130 on her husband's behalf. This Form I-130 was approved on July 9, 2008. The applicant filed an immigrant visa application in November 2008, which was denied on September 11, 2009, after the consular officer found the applicant to be inadmissible to the United States. On May 26, 2010, the applicant filed a Form I-601. The district director in London denied the Form I-601 after finding the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year, and section 212(a)(6)(C)(i) of 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 district director found that even though the applicant established extreme hardship to a qualifying relative, the applicant's repeated and persistent violations of U.S. immigration laws and lack of remorse did not warrant a favorable exercise of discretion. *Decision of the District Director*, dated August 9, 2011. The instant appeal followed.

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 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).

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).

After a careful *de novo* review of the record, the AAO finds that the applicant is inadmissible under section 204(c) of the Act for marriage fraud. The AAO recognizes that the applicant has consistently contested this finding. However, 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").

In this case, the record shows that the applicant's first wife, Ms. [redacted] signed a sworn statement conceding that she and the applicant had entered into a fraudulent marriage in order to obtain immigration benefits. *Record of Sworn Statement in Affidavit Form, supra.* In addition, Ms. [redacted] signed a second document requesting that the Form I-130 be withdrawn due to marriage fraud. *Letter from* [redacted] *supra.* 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.

In support of his application, the record contains a declaration and a letter from the applicant. The applicant states that he met Ms. [redacted] in March 1990 through his friend, [redacted] who was working at a hair salon with Ms. [redacted]. He states that Ms. [redacted] mother and several of her friends, including [redacted] attended their wedding ceremony in July of 1990. He states that he and Ms. [redacted] lived in an apartment in Las Vegas called

Mountain Vista together until December 1990 and that they moved to another apartment building called Desert Springs. According to the applicant, in May of 1991, Ms. decided to go to Mississippi, came back to Las Vegas for short periods of time, but ended up staying in Mississippi. The applicant states he moved out of the apartment in May of 1992. The applicant states they "simply grew apart" and contends he does not understand Ms. actions or why she told the immigration service that their marriage was fraudulent. He states Ms. "should have to explain to the court why she wrote that letter to the Immigration Service asking to withdraw the visa petition [because he] do[es] not believe that it is fair to take away [his] permanent resident status based on [her] letter . . . ." *Declaration of* undated; *see also Letter from* , dated September 1, 2009 ("I don't understand why she accused me of all allegations.").

The AAO finds that the record contains substantial and probative evidence to indicate that the applicant engaged in marriage fraud. The applicant has not met his burden of proof in showing he is eligible for an immigrant visa and he has failed to resolve the inconsistencies in the record by independent, competent, objectlve evidence. Significantly, aside from his own statements, the applicant has not submitted any objective evidence that his marriage to Ms. was a bona fide marriage, such as letters from friends or family, photos of the couple, or copies of apartment leases from . Notably, in contrast, in support of his Form I-130 filed by Ms. the applicant's current wife, the applicant submitted fourteen separate items to show a bona fide marriage, including, but not limited to: photos, a Certificate of Title for the couple's car, documentation of the couple's car loan, Vehicle Registrations in both the applicant's and his wife's names, and numerous other documents in both the applicant's and his wife's names, such as insurance statements, bank account statements, bills, rent receipts, and lease agreements. *List of Documents Submitted in Support of Immediate Relative Visa Petition.*

In a similar case, *Ghaly v. INS*, 48 F.3d 1426 (7th Cir. 1995), the applicant's ex-wife withdrew a visa petition she had filed on the applicant's behalf because she conceded the marriage was fraudulent. The applicant's ex-wife signed an affidavit admitting she was paid $1,500 to marry the applicant so that the applicant could get a green card to stay in the United States. *Ghaly*, 48 F.3d at 1427-28. In response to a Notice of Intent to Revoke, the applicant submitted seven statements to rebut the allegation of marriage fraud, including a notarized letter from the applicant's ex-wife who stated that she and the applicant "married because [they] honestly thought [they] cared about each other," but that they "married too soon after meeting and [had] tremendous cultural differences." *Id.* at 1428-29. The rebuttal evidence also included an affidavit from the man who purportedly introduced the applicant to his ex-wife and who claimed the marriage was based on mutual love and affection. *Id.* at 1429. In addition, the applicant denied marrying for any fraudulent or illegal purpose. *Id.* The district director revoked the visa petition, finding that the rebuttal evidence was insufficient in overcoming the evidence of marriage fraud. The AAO upheld the district director's decision and the Seventh Circuit Court of Appeals subsequently affirmed. The Court found that "[a]side from Dr. own affidavit, no other rebuttal statement refuted that Dr. arranged to marry Ms. for a fee in order to obtain his green card." *Id.* at 1435. Furthermore, the Court found that "Dr. was afforded a full opportunity to rebut the information on which the INS's decision was based." *Id.*

The applicant in the instant case has far less evidence than the applicant in *Ghaly*. Moreover, in addition to the opportunity the applicant had to respond to the Notice of Intent to Revoke as the applicant had in *Ghaly*, the applicant in this case has also had multiple opportunities in numerous courts to challenge the finding that he engaged in marriage fraud. Although not every decision specifically addressed the issue of marriage fraud, the district director at the San Francisco district office twice denied the applicant's Form I-130 for marriage fraud, a finding that the BIA affirmed in one of the cases. *See also Matter of Phillis*, 15 I&N Dec. 385, 387 (BIA 1975) ("The evidence submitted by the petitioner, principally in the form of his testimony denying fraud, is insufficient to overcome the inference of fraud.").

Therefore, the AAO finds that the applicant entered into a fraudulent marriage for the purpose of obtaining immigration benefits. As such, he is permanently barred from obtaining a visa to enter the United States. *See* 8 U.S.C. § 1154(c). In light of this permanent bar, although the AAO is sympathetic to Ms. Baranski's circumstances, no purpose would be served in addressing extreme hardship or 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 the Service. Therefore, the AAO remands the matter to the district director to initiate proceedings for the revocation of the Form I-130 that was approved on July 9, 2008. Should the approved Form I-130 petition be revoked, the district 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 that the Form I-130 is not to be revoked, then the district 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 pursuant to 8 C.F.R. § 103.4.

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