

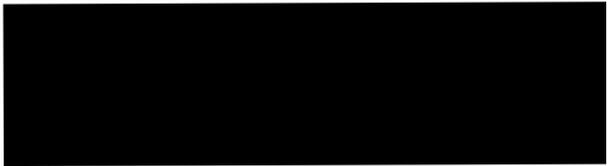
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

H2

PUBLIC COPY



FILE: [REDACTED] Office: VIENNA, AUSTRIA

Date: **AUG 11 2008**

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), and section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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.

A handwritten signature in black ink, appearing to read "R. P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Officer in Charge, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, the previous decision of the acting officer in charge will be withdrawn and the application declared moot.

The applicant is a native and citizen of Poland who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States.¹ The applicant is married to a

¹ The Acting Officer in Charge, in the first paragraph of her Decision, makes a brief reference to the fact that the applicant is inadmissible based on Fraud/Misrepresentation under section 212(a)(6)(C) of the Act, yet focuses her analysis on the applicant's inadmissibility due to the unlawful presence provisions of section 212(a)(9)(B) of the Act. Irrespective of the acting officer in charge's primary focus in her Decision, the AAO must analyze whether the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.

A review of the record indicates that the acting officer in charge determined that the applicant had failed to disclose, during his nonimmigrant visa interview in 1995, that he had previously been deported from the United States in 1984.

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.

The Department of State Foreign Affairs Manual states, in pertinent part, that in order to find an alien ineligible under section 212(a)(6)(C)(i) of the Act, it must be determined that:

- (1) There has been a misrepresentation made by the applicant;
- (2) The misrepresentation was willfully made; and
- (3) The fact misrepresented is material; or
- (4) The alien uses fraud to procure a visa or other documentation to receive a benefit....

DOS Foreign Affairs Manual, § 40.63 N2.

The Department of State's Foreign Affairs Manual [FAM] further provides, in pertinent part:

Materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa....

"A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:

- (1) The alien is excludable on the true facts; or

lawful permanent resident and thus seeks a waiver of inadmissibility in order to reside in the United States with his wife.

The acting officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on any qualifying relatives and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Acting Officer in Charge*, dated September 1, 2005.

In support of this appeal, the applicant submits Form I-290B, Notice of Appeal (Form I-290B) and a letter, dated September 7, 2005. In addition, the applicant's daughter, a U.S. citizen, submitted a status inquiry letter on May 12, 2006. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(1) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States...prior to commencement of proceedings...and again seeks admission within 3 years of the date of such alien's departure or removal...is inadmissible.

(2) The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might have resulted in a proper determination that he be excluded." (Matter of S- and B-C, 9 I&N 436, at 447.)

DOS Foreign Affairs Manual, § 40.63 N. 6.1. Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis to be persuasive.

In this case, the record indicates that the applicant was not deported. He left the United States on August 30, 1984, pursuant to a voluntary departure order requiring him to depart from the United States on or before September 1, 1984. The applicant did not have an obligation to disclose his voluntary departure order in lieu of deportation with the consular officer. The applicant's omission is not a material misrepresentation. 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 US 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) and *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961). The AAO thus concludes that the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act.

In the present application, the record indicates that the applicant entered the United States with a valid visitor visa in April 1996. Based on extensions granted to the applicant, he was permitted to remain in the United States until July 1997. However, the applicant overstayed the period of authorized stay and voluntarily departed the United States in January 1998. As such, the applicant accrued unlawful presence from July 1997 until his departure in January 1998.²

The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(I) of the Act for being unlawfully present in the United States for a period of more than 180 days but less than one year. Pursuant to section 212(a)(9)(B)(i)(I), the applicant is barred from again seeking admission within three years of the date of his departure.

The applicant's last departure occurred in January 1998. It has now been more than three years since the departure that made the applicant inadmissible pursuant to section 212(a)(9)(B) of the Act. A clear reading of the law reveals that the applicant is no longer inadmissible.

The AAO finds that the acting officer in charge erred in concluding that the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) and/or section 212(a)(9)(B) of the Act. As such, the waiver application is unnecessary and the issue of whether the applicant established extreme hardship to a qualifying relative is moot and will not be addressed. Accordingly, the appeal will be dismissed, the prior decision of the acting officer in charge is withdrawn and the application for a waiver of inadmissibility is declared moot.

ORDER: The appeal is dismissed, the prior decision of the acting officer in charge is withdrawn and the application for a waiver of inadmissibility is declared moot.

² The AAO notes that the acting officer in charge, in her Decision, referenced the fact that the applicant had previously entered the United States on a visitor's visa in December 1979 with permission to remain for a one month period, yet had remained until August 30, 1984, when he departed to Poland pursuant to a voluntary departure order. As the unlawful presence provisions under section 212(a)(9)(B) of the Act were not enacted until April 1, 1997, this referenced period of unauthorized stay, from 1980-1984, is irrelevant and does not need to be considered by the AAO in the instant appeal.