U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: VIENNA Date: AUG 0 8 2006

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Officer in Charge, Vienna, Austria, denied the waiver application. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Hungary who was found 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). The applicant is the spouse of a U.S. citizen and he seeks a waiver pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the Untied States with his spouse.

The officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of Officer In Charge,* dated June 24, 2004.

The record shows that, on December 26, 2000, the applicant was admitted to the United States as a B-2 nonimmigrant until June 25, 2001. There is no evidence in the record that the applicant filed an application to extend or change his nonimmigrant status. The applicant remained in the United States until July 4, 2003, when he returned to Hungary. On March 2, 2004, the applicant married his U.S. citizen spouse, Barbara Posthumus (Ms. Posthumus). On March 4, 2004, Ms. Posthumus filed a Petition for Alien Relative (Form I-130) on behalf of the applicant.

On April 21, 2004, the applicant filed the Form I-601 along with documentation supporting his claim that the denial of the waiver would result in extreme hardship to his family members.

On appeal, the applicant's spouse asserts that she and her family would suffer extreme hardship if the applicant were not granted a waiver. *Applicant's Spouse's Supplemental Affidavit,* dated July 12, 2004. In support of these assertions, the applicant submitted additional affidavits from him and his spouse, an affidavit from the applicant's daughter from a previous relationship, a family photograph and medical documentation in regard to the applicant's spouse. The entire record was reviewed and considered in rendering a decision in this case.

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

> (B) Aliens Unlawfully Present.-
>
> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
> >
> > . . . .
> >
> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

. . . .

> (v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The officer in charge based the finding of inadmissibility under section 212(a)(9)(B)(i)(II) of the Act on the applicant's admitted unlawful presence in the United States for more than one year. The applicant does not contest the officer in charge's determination of inadmissibility.

The AAO conducts the final administrative review and enters the ultimate decision for USCIS on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. Because the AAO engages in de novo review, the AAO may deny an application or petition that fails to comply with the technical requirements of the law, without remand, even if the district or service center director does not identify all of the grounds for denial in the initial decision. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, *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).

Section 212(a)(6)(C) of the Act provides, in pertinent part:

> (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.
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> . . . .
>
> (iii) Waiver authorized. – For provision authorizing waiver of clause (i), see subsection (i).

Section 212(i) of the Act provides:

> (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [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 Attorney General [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.

Section 212(a)(9)(C) of the Act states, in pertinent part:

> (C) Aliens unlawfully present after previous immigration violations.-
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> (i) In general.-Any alien who-
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> (I) has been unlawfully present in the United States for an aggregate period of more than 1 year,
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> . . . .
>
> and who enters or attempts to reenter the United States without being admitted is inadmissible.
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> (ii) Exception.- Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission. The Secretary, in the Secretary's discretion, may waive the provisions of section 212(a)(9)(C)(i) in the case of an alien to whom the Secretary has granted classification under clause (iii), (iv), or (v) of section 204(a)(1)(A), or classification under clause (ii), (iii), or (iv) of section 204(a)(1)(B), in any case in which there is a connection between—
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> (1) the alien's having been battered or subjected to extreme cruelty; and
>
> (2) the alien's--
>
> (A) removal;
>
> (B) departure from the United States;
>
> (C) reentry or reentries into the United States; or
>
> (D) attempted reentry into the United States.

The record reflects that, on October 8, 2003, the applicant applied for admission to the United States at the Miami, Florida, Port of Entry. The applicant was placed in secondary inspection after it was discovered that he had previously overstayed his last admission in December 2000. The applicant testified that he had remained in the United States for more than two years after the expiration of his nonimmigrant status. The applicant was denied admission pursuant to section 212(a)(7)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(7)(B)(i)(II), as an immigrant without valid documentation. The applicant's B-1/B-2 nonimmigrant visa was cancelled and the applicant was permitted to withdraw his application for admission. The applicant was returned to Hungary on October 9, 2003. On November 9, 2003, the applicant filed an Application for

Nonimmigrant Visa (Form DS-156) with the U.S. Consulate in Budapest. On the Form DS-156 the applicant indicated that he had only traveled to the United States in 1998 and remained in the United States for a period of two weeks. The applicant also indicated that his U.S. visa had never been cancelled or revoked, he had never been refused admission to the United States, he had never violated the terms of a U.S. visa and he had never been unlawfully present in the United States.

The AAO finds that the applicant is inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182 (a)(6)(C)(i), for attempting to procure a nonimmigrant visa in 2003 by willful misrepresentation or fraud.

The AAO also finds that the applicant is inadmissible under section 212(a)(9)(C)(i)(I) of the Act and is currently statutorily ineligible for an exception pursuant to section 212(a)(9)(C)(ii) of the Act. The record reflects that the applicant accrued unlawful presence from June 25, 2001, the date of expiration of his B-2 nonimmigrant status, until July 4, 2003, the date on which he departed the United States. On October 8, 2003, the applicant attempted to reenter the United States without being legally admitted by presenting a nonimmigrant visa (that was void pursuant to section 222(g) of the Act, 8 U.S.C. § 1202(g), because he had previously overstayed his nonimmigrant status) when he was an intending immigrant. Therefore, the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act. The AAO notes that an exception to this ground of inadmissibility is available to individuals classified as battered spouses under the cited sections of section 204 of the Act. *See also* 8 U.S.C. § 1154. There are no indications in the record that the applicant is or should be classified as such.

The AAO finds that since the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, he must receive permission to reapply for admission (Form I-212). An alien who is inadmissible under section 212(a)(9)(C)(i) of the Act may not apply for consent to reapply unless more than 10 years have elapsed since the date of the alien's last departure from the United States. *See Matter of Torres-Garcia,* 23 I&N Dec. 866 (BIA 2006). Thus, to avoid inadmissibility under section 212(a)(9)(C) of the Act, it must be the case that the applicant's last departure was at least ten years ago *and* that Citizenship and Immigration Services (CIS) has consented to the applicant's reapplying for admission. In the present matter, the applicant's last departure from the United States occurred on October 9, 2003, less than ten years ago. He is currently statutorily ineligible to apply for permission to reapply for admission. When the applicant is eligible to file the Form I-212, he may also need to file an application for waiver of the 212(a)(6)(C)(i) inadmissibility grounds pursuant to section 212(i) of the Act.

Inasmuch as the applicant is inadmissible and there is no waiver available for inadmissibility under section 212(a)(9)(C)(i)(I) of the Act, until 10 years after his last departure, no purpose would be served in discussing whether the alien is eligible for a waiver of the 212(a)(9)(B)(i)(II) inadmissibility grounds pursuant to section 212(a)(9)(B)(v) of the Act. Accordingly, the appeal is dismissed.

ORDER: The appeal is dismissed.