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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship
and Immigration
Services



FILE:



Office: COPENHAGEN, DENMARK

Date:

MAY 11 2004

IN RE:

Applicant:



APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B) of the Immigration and Nationality Act; 8 U.S.C. § 1182(a)(9)(B).

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Officer in Charge, Copenhagen, Denmark. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen/reconsider. The motion will be dismissed.

The record reflects that the applicant is a native and citizen of Sweden. The applicant 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. The applicant is married to a U.S. citizen and she is the beneficiary of an approved Petition for Alien Relative. The applicant seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen husband and child.

The acting officer in charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to her U.S. citizen husband. The application was denied accordingly. *See* Acting Officer in Charge Decision, dated September 13, 2002.

On appeal, counsel asserted that the Immigration and Naturalization Service (Service, now Citizenship and Immigration Services, CIS) abused its discretion by not considering and analyzing, in the aggregate, the hardship factors in the applicant's case. Counsel asserted that the applicant's U.S. citizen husband would move to Sweden if the applicant's waiver application was not granted. Counsel asserted that as a result, the applicant's husband (Mr. [REDACTED]) would suffer extreme hardship due to his separation from immediate family members in California, due to the loss of his professional dream to provide dental services to low-income patients in his father's dental office in California, and due to his inability to work as a dentist in Sweden.

In a decision dated September 4, 2003, the AAO found that Mr. [REDACTED] was aware that the applicant was inadmissible to the U.S. when he married her in Sweden in August 2001. The AAO found that under *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999), Mr. [REDACTED] previous knowledge of the applicant's inadmissibility seriously undermined his extreme hardship claim. The AAO found further that Mr. [REDACTED] had not established that he would suffer financial or professional hardship in either the U.S. or Sweden, as he had not completed his dental education or ever worked as a dentist. In addition, the AAO noted that U.S. Court decisions had repeatedly held that economic hardship and emotional hardship caused by severing family and community ties do not, in themselves, constitute extreme hardship.

In a motion to reopen/reconsider, filed November 5, 2003, new counsel for the applicant asserts that the legal analysis contained in the AAO decision is flawed.¹ Counsel acknowledges that the applicant's motion is untimely filed, but asserts that the AAO should grant the present motion in its discretion because former counsel did not receive the AAO decision until September 12, 2003, eight days after the date that the decision was issued. Counsel asserts that the applicant therefore had only a brief amount of time to hire new counsel and have a motion to reopen/reconsider prepared. Counsel concluded that the delay in filing was therefore reasonable and not the fault of the applicant.

¹ The record reflects that the applicant retained a new attorney [REDACTED] and that a new Attorney of Record, Form G-28, was signed by the applicant on October 3, 2003. On November 5, 2003, the applicant's new attorney filed the present motion.

Counsel asserts further on motion that the AAO's use of legal guidelines set forth in *Matter of Cervantes-Gonzalez, supra*, and *Matter of Pilch*, 21 I&N Dec. 627 (1996) were in error because the applicant's case is factually distinguishable from those cases. Counsel additionally asserts that the applicant and her husband have a newborn U.S. citizen child, and that the AAO erred in not addressing extreme hardship that the applicant's child would face if the applicant's waiver application were denied.²

8 C.F.R. § 103.5(a) states in pertinent part:

- (1) [A]ny motion to reconsider an action by the Service filed by an applicant or petitioner must be filed within 30 days of the decision that the motion seeks to reconsider. Any motion to reopen a proceeding before the Service filed by an applicant or petitioner, must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and was beyond the control of the applicant or petitioner.

....

- (4) Processing motions in proceedings before the Service. A motion that does not meet applicable requirements shall be dismissed.

The record reflects that the AAO decision dismissing the applicant's appeal was dated September 4, 2003, and that the applicant's motion to reopen/reconsider was filed two months later, on November 5, 2003, well after the 30 days allowed under 8 C.F.R. § 103.5. The AAO notes that counsel provided no evidence on motion to establish that the applicant or prior counsel received the September 4, 2003, AAO decision in an untimely manner. Counsel also provided no details or information to establish that the subsequent two-month delay in filing a motion to reopen/reconsider was reasonable or beyond the applicant's control based on a perceived need, by the applicant, to find new counsel in her case. Counsel failed to assert or establish that the applicant's previous counsel was ineffective. Counsel additionally failed to demonstrate that it was reasonable for the applicant to wait until October 3, 2003 to obtain new counsel in her case. Furthermore, counsel failed to demonstrate that it was reasonable, or otherwise beyond the applicant's control, to wait an additional month after obtaining new counsel before actually filing her motion to reopen/reconsider with CIS, on November 5, 2003.

Because the applicant failed to establish that her motion to reopen/reconsider was filed in a timely manner or that it was reasonable or beyond her control to file the motion late, the motion will be dismissed pursuant to 8 C.F.R. § 103.5(a).

ORDER: The motion is dismissed.

² The AAO notes that the birth certificate submitted on motion indicates that the applicant's child was born in Sweden on September 9, 2003, after the AAO rendered a decision in the applicant's case. The AAO notes further that under section 212(i) of the Act, 8 U.S.C. 1182(i), only hardship to the applicant's U.S. citizen or lawful permanent resident parent or spouse may be considered for extreme hardship purposes.