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

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[redacted]

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FILE: [redacted] Office: COPENHAGEN Date: OCT 28 2005

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:

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, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Sweden who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission to the United States by fraud or willful misrepresentation. The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to enter the United States and reside with her U.S. citizen husband.

The acting 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 Excludability (Form I-601) accordingly. *Decision of Acting Officer in Charge*, dated May 5, 2004.

On appeal, counsel for the applicant contends that the applicant did not engage in fraud or misrepresentation, and thus she is not inadmissible under section 212(a)(6)(C)(i) of the Act. *Brief in Support of Appeal.* Counsel further contends that if the applicant is prohibited from entering the United States her spouse will suffer economic and emotional hardship. *Id.*

The record contains a brief from counsel; a statement from the applicant's husband in support of the appeal; documentation of travel and communication expenses as a result of the applicant's separation from her husband; letters from family and friends of the applicant and her husband; a letter from the former employer of the applicant's spouse, and; documentation of the applicant's prior U.S. immigration history and related applications. The entire record was reviewed and considered in rendering this decision.

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 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.

The record reflects that the applicant was a student at the Art Institute of Fort Lauderdale, Florida in F-1 status from approximately August 1994 to September 1998. The applicant explained that she lost her Swedish passport in the United States that contained her F-1 visa around the time of the conclusion of her studies. She was issued a new Swedish passport on November 12, 1998, and she traveled to Sweden. On November 19, 1998, the Citizenship and Immigration Services (CIS) Texas Service Center issued the

applicant an employment authorization card, valid from January 11, 1999 to August 11, 1999, ostensibly pursuant to her F-1 status to complete optional practical training (OPT.) The record reflects that this document was addressed to the applicant's address in Miami, Florida. In Sweden, the applicant applied for a new F-1 visa so that she could enter the United States and complete her OPT. The applicant explained that the F-1 visa application process took longer than expected. She wished to enter the United States to spend the New Year's Eve holiday with her spouse (who was her fiancé at the time.) On December 28, 1998, the applicant traveled to the United States and sought entry at Memphis, Tennessee pursuant to the visa waiver program. The applicant contends that she intended to remain in the United States for a temporary period of up to three months, after which she intended to return to Sweden and complete processing of her F-1 visa. The applicant notes that she inquired about the process of obtaining approval for OPT with inspectors upon her attempted entry.

Upon her attempted entry, inspectors observed that the applicant did not have a return airline ticket to Sweden. In questioning the applicant, inspectors learned that the applicant had $200 in her possession, she owned a car in the United States, and her fiancé was a U.S. citizen. The record contains a Form I-213, Record of Deportable/Inadmissible Alien, and Form I-831, Continuation Page, that note that an inspector had a telephone conversation with the applicant's spouse, in which the applicant's spouse indicated that the applicant intended to work in the United States and to contribute to housing payments. The record contains a transcript of an interview with the applicant in which she stated that she had previously worked in the United States pursuant to her F-1 status. When the applicant was asked why her spouse indicated that he thought she would work in the United States on her visit, the applicant answered: "Because he thought that I didn't need a visa to work and I didn't tell him that I do need a visa." An inspector determined that the applicant was attempting to live and work in the United States, which are not permitted under the visa waiver program. The inspector refused the applicant's admission pursuant to 8 C.F.R. 217.4(b) for violation of sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) and 8 U.S.C. § 1182(a)(7)(A)(i)(I).

The acting officer in charge did not discuss the underlying ground for inadmissibility in her decision. However, on appeal counsel asserts that the applicant did not engage in fraud or misrepresentation, and thus she is not inadmissible under section 212(a)(6)(C)(i) of the Act. Counsel states that the applicant's intent upon her attempted entry on December 28, 1998 was to remain in the United States temporarily as a visitor. Counsel provides that the applicant's questions during inspection regarding the OPT process were directed at future possibilities of working lawfully in the United States, and she did not intend to work during her stay under the visa waiver program. Counsel asserts that, at most, the applicant should have been refused entry only under section 212(a)(7)(A)(i)(I) of the Act as an intending immigrant without proper entry documentation.

Upon review, counsel's assertions are persuasive and the record does not support that the applicant engaged in fraud or misrepresentation. It is fundamental to the notion of fraud or misrepresentation that an individual has willfully or knowingly presented false information and/or documentation in order to conceal or fabricate facts. In the present matter, the record does not show that the applicant has presented fraudulent documentation at any time during her U.S. immigration history. The evidence of record further does not support that the applicant answered questions untruthfully during inspection upon her attempted entry on December 28, 1998. The inspecting officer found that the applicant failed to meet her burden to show that her intent was to enter the United States for a temporary period under the visa waiver program. The inspecting officer referenced facts that he deemed to suggest that the applicant's intent was to live and work in the

United States for an indefinite period. However, the record lacks any clear evidence or information to disprove the statements made by the applicant such to show that she engaged in fraud or misrepresentation.

An alien is permitted to apply for any immigration benefit for which he or she may be eligible. However, the failure to meet the burden to establish eligibility for the benefit sought does not, by itself, render the application to be fraudulent. Accordingly, the fact that the applicant failed to satisfy the inspecting officer that she intended to enter the United States as a temporary visitor does not, by itself, support that she engaged in fraud or misrepresentation. As the inspector identified no clear evidence or information to support that the applicant engaged in fraud or misrepresentation, a finding of inadmissibility pursuant to section 212(a)(6)(C)(i) of the Act was not proper.

It is noted that statements that the applicant made during her inspection on December 28, 1998 have been shown to be plausible and credible. For example, at issue was whether the applicant intended to work in the United States. Inspectors noted that the applicant's spouse indicated his belief that the applicant would work in the United States during her stay under the visa waiver program. The applicant responded to this fact by suggesting that her husband did not understand that she required a visa. The record reflects that the applicant's approved employment authorization card, valid from January 11, 1999 to August 11, 1999, had been sent to her address in Miami, Florida. It is plausible that the applicant's husband was aware of the issuance of the employment authorization card, and that he believed that it alone was sufficient authorization for the applicant to work in the United States during the covered period. The applicant's indication that her husband was not aware that she also needed a visa (in order to enter the United States in F-1 status) reflects that the applicant was herself aware that additional steps were needed before she could engage in lawful employment. The record does not reflect that the applicant intended to work during her stay under the visa waiver program, or that she made false statements in this regard. In fact, the applicant did subsequently receive an F-1 visa, she entered the United States, and she worked legally pursuant to her approved OPT period.

Based on the foregoing, the record does not support that the applicant engaged in fraud or misrepresentation in order to procure admission to the United States. Thus, the applicant is not inadmissible pursuant to section 212(a)(6)(C)(i) of the Act. Therefore, the applicant does not require a waiver of inadmissibility, and the application is deemed moot.

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