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

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[redacted]

FILE: [redacted] Office: LOS ANGELES Date: JUL 20 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:

[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, Chief
Administrative Appeals Office

DISCUSSION: The District Director, Los Angeles, California, denied the waiver application, and it 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 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 for more than 180 days, but less than one year, and seeking readmission within 3 years of her last departure from the United States. The applicant is the spouse of a U.S. citizen. She 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), in order to reside in the United States with her spouse.

The district director 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 the District Director*, dated July 30, 2004.

The record shows that, on August 4, 2000, the applicant was admitted to the United States as a nonimmigrant under the Visa Waiver Pilot Program (VWPP) until November 3, 2000. On September 7, 2000, the applicant's U.S. citizen husband, [redacted] (Mr. [redacted], filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On June 27, 2001, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on the Form I-130. On August 5, 2002, the applicant appeared at Citizenship and Immigration Services' (CIS) Los Angeles District Office. The applicant testified that she was admitted as a nonimmigrant under the VWPP on July 21, 1999 until September 1, 1999 and did not depart the United States until the end of July 2000.

On January 13, 2003, the applicant filed the Form I-601 with documentation supporting her claim that the denial of the waiver would result in extreme hardship to her family members.

On August 9, 2002, the Form I-130 was approved. On February 22, 2005, the Director, California Service Center, denied a second Form I-130 because Mr [redacted] had failed to provide sufficient evidence to qualify the applicant for classification as a spouse pursuant to section 201(b)(2)(A)(i) of the Act, 8 U.S.C. § 1151(b)(2)(A)(i). *See Director's Decision,* dated February 22, 2005. There is no evidence in the record that the approval of the initial Form I-130 has been revoked. The AAO, therefore, finds that the accompanying Form I-485 remains valid and the Form I-601 is necessary.

On appeal, counsel contends that prior counsel did not fully develop the applicant's waiver application and that her husband would suffer extreme hardship. *See Applicant's Brief,* dated September 23, 2004. In support of her contentions, counsel submitted the above-referenced brief, a psychological report for the applicant's spouse, an affidavit from the applicant's spouse's mother and medical documentation reflecting that the applicant was pregnant. The entire record was reviewed in rendering a decision in this case.

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

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

> (I) 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 (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such aliens' departure or removal is inadmissible.

The record indicates that the applicant entered the United States under the VWPP on July 21, 1999 with authorization to remain in the country until September 1, 1999. However, the applicant did not depart the United States until July 2000. The decision of the district director found that the applicant's departure triggered the tabulation of unlawful presence provisions under the Act and that she accrued unlawful presence from September 1, 1999, the date on which her nonimmigrant status expired, until July 2000, the date of her departure from the United States. The district director found that the applicant is inadmissible to the United States under section 212(a)(9)(B)(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. Counsel does not contend the district director's finding of inadmissibility. Pursuant to section 212(a)(9)(B)(i)(I), the applicant was barred from again seeking admission within three years of the date of her departure.

An application for admission or adjustment is a "continuing" application adjudicated based on the law and facts in effect on the date of the decision. *Matter of Alarcon*, 20 I&N Dec. 557 (BIA 1992). There has been no final decision made on the applicant's Form I-485, so the applicant, as of today, is still seeking admission by virtue of adjustment under section 245(i) of the Act. The applicant's departure occurred in July 2000. It has been more than three years since the departure that made the inadmissibility issue arise in her application. The AAO notes that the district director erred in finding the applicant inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act because, at the time the Form I-601 was adjudicated, it had been three years since the applicant's departure. A clear reading of the law reveals that the applicant is no longer inadmissible pursuant to section 212(a)(9)(B)(i)(I) of the Act.

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.

(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.

The AAO finds that the applicant was an intending immigrant that willfully misrepresented herself as a nonimmigrant.

The Department of State developed the 30/60-day rule which applies when, "an alien states on his or her application for a B-2 visa, or informs an immigration officer at the port of entry, that the purpose of his or her visit is tourism, or to visit relatives, etc., and then violates such status by ...Marrying and takes [sic] up permanent residence." *Id.* at § 40.63 N4.7-1(3). Although the AAO is not bound by the Foreign Affairs Manual, it finds its analysis in these situations to be persuasive. In the case at hand, at the time the applicant last entered the United States, she was already married to a U.S. citizen and intended to remain in the United States with her spouse. The record reflects that the applicant married Mr. [redacted] on June 7, 2000. The applicant presented herself for admission as a visitor to the United States on August 4, 2000, at which time she made a willful misrepresentation of a material fact by failing to indicate that she was married to a U.S. citizen. Moreover, the applicant took up permanent residence with her husband immediately after her entry and her husband filed an immigrant visa petition on her behalf less than 60-days after her entry. Additionally, if the applicant did not have immigrant intent and intended to process through a consular office overseas, she would have left the United States prior to the expiration of her authorized stay of 90 days. Moreover, the applicant's testimony in regard to her previous overstay in the United States established that she was returning to a permanent address in the United States. The AAO therefore finds that the applicant was an intending immigrant that willfully misrepresented herself as a nonimmigrant.

Hardship to the alien herself is not a permissible consideration under the statute. A section 212(i) waiver is therefore dependent upon a showing that the bar to admission imposes an extreme hardship on the U.S. citizen or lawfully resident spouse or parent of the applicant.

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560 at 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an alien has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful

permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566. The BIA has held:

> Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

The record reflects that Mr[redacted] is a U.S. citizen by birth who has resided in the United States his entire life. The applicant and her spouse may have a child who is a U.S. citizen by birth. The record reflects further that the applicant and Mr.[redacted] are in their 30's and Mr.[redacted] has some health concerns.

Counsel contends that Mr.[redacted] will suffer financial and emotional hardship whether he remains in the United States without the applicant or travels to Sweden in order to reside with the applicant. Mr[redacted] is employed in the entertainment industry. The applicant is currently employed as a personal assistant. Mr.[redacted] has a history of severe depression since 1999 and is a recovering alcoholic. Counsel submitted a psychological report for the applicant's spouse indicating that, since 1999, Mr.[redacted] has been treated for severe depression and alcoholism and is dependent on his relationship with his mother and the applicant in dealing with these issues. The psychological report goes on to indicate that the psychiatrist is concerned Mr[redacted] will be unable to receive proper treatment in Sweden and that separation from either the applicant or his mother could escalate his severe depression and could lead to a relapse into alcohol abuse. Mr.[redacted] in his affidavit, states that he does not speak Swedish and he would find it extremely hard to find employment in any industry, let alone his chosen profession, without those language skills. Mr.[redacted] also states that he has developed notoriety in the entertainment industry in the United States, which is key to his business and which he would have to abandon if he moved to Sweden. Counsel contends that even though healthcare is available in Sweden, Mr.[redacted] may not have access to it due to the applicant's removal from the Swedish Registry. Counsel also states that the separation from his family members in the United States and his inability to **follow his chosen career path would have an extremely detrimental impact on Mr.**[redacted] **severe depression** and alcoholism. Counsel's contention is supported by the affidavits and psychological report in the record. Mr.[redacted] in his affidavit, and supported by other affidavits and psychological documentation, contends that even though he would able to follow his chosen career path in the United States and has the support of his family, the absence of the applicant would have an extremely detrimental impact on his severe depression and alcoholism.

The adjustment to a new language and culture and the economic hardships Mr.[redacted] faces are not uncommon to alien and families upon deportation. However, the hardship Mr.[redacted] faces is substantially greater than that which aliens and families upon deportation would normally face when combined with his history of severe

depression and alcoholism. Mr [redacted] has no ties to Sweden and he has significant family ties in the United States, including his mother. A finding of extreme psychological hardship is the inevitable conclusion of the combined force of the submitted affidavits and psychological report. A discounting of the extreme hardship Mr. [redacted] would face in either the United States or Sweden if his wife were refused admission is, therefore, not appropriate. The AAO therefore finds that the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors, cited above, supports a finding that Mr. [redacted] faces extreme hardship if the applicant is refused admission.

The AAO also finds that the applicant merits a waiver of inadmissibility as a matter of discretion.

In discretionary matters, the alien bears the burden of proving that positive factors are not outweighed by adverse factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582 (BIA 1957). The adverse factors in the present case are the willful misrepresentation for which the applicant seeks a waiver and the unlawful presence she accrued during her prior travel to the United States. The favorable and mitigating factors in the present case are the extreme hardship to the applicant's husband if she were refused admission, her otherwise clean background, the applicant's stable employment, payment of taxes and the applicant's husband's significant ties to the United States.

The AAO finds that, although the immigration violation committed by the applicant was serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.