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U.S. Citizenship  
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Services

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FILE:

Office: FRANKFURT, GERMANY

Date: **MAR 18 2008**

IN RE: Applicant:

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:

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 "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

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 The appeal will be dismissed, the previous decision of the officer in charge will be withdrawn and the application declared moot.

The applicant is a native of Bosnia and Herzegovina and a citizen of Switzerland. The applicant was admitted to the United States on April 28, 1998 as a nonimmigrant visitor for pleasure, and changed status to that of F-1 nonimmigrant student on April 19, 2000. Based on a determination that the applicant was not maintaining nonimmigrant status, the applicant appeared before an immigration judge on October 8, 2002, and was granted voluntary departure from the United States on or before February 5, 2003. The applicant returned to Switzerland on February 3, 2003. On or about March 12, 2003, the applicant applied for a nonimmigrant visa at the American Embassy in Bern, Switzerland, which was refused. On May 15, 2003, the applicant attempted entry to the United States under the Visa Waiver Program, and was refused entry. On August 3, 2005, the applicant was denied an immigrant visa, as it was determined that the applicant was inadmissible 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 having attempted to procure a nonimmigrant visa to the United States by fraud or willful misrepresentation. *Letter from [REDACTED], Vice Consul, American Embassy, Bern, Switzerland, dated August 11, 2005.* The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with his U.S. citizen mother.

The officer in charge concluded that extreme hardship to a qualifying relative had not been established and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Officer in Charge, dated January 4, 2006.*

In support of the appeal, counsel submits the following documents, inter alia: a brief, dated April 26, 2006; a letter from the applicant's mother, dated October 25, 2005; a letter from the applicant's mother's partner, dated October 23, 2005; an evaluation from [REDACTED], dated October 13, 2005; a copy of the Form I-601 decision, dated January 4, 2006; a record of sworn statement with respect to the applicant's application for admission to the United States on May 15, 2003 under the Visa Waiver Program; a letter from [REDACTED], Member of Congress, dated October 27, 2005; a copy of the applicant's mother's naturalization certificate, issued October 22, 2003; a copy of the applicant's I-94, Departure Record, confirming B-2 status, issued on April 28, 1998; a copy of the applicant's change of nonimmigrant status request to F-1, dated April 19, 2000; a letter from [REDACTED], Cabrillo College, dated October 18, 2005; documentation pertaining to the applicant's scholastic achievements; a letter from the applicant's mother's physician, dated January 23, 2006; a letter from the applicant's psychiatrist, dated October 18, 2005; a letter from Professor [REDACTED], dated October 24, 2005; immigration documents issued to the applicant; court documents confirming the dismissal of charges made against the applicant in 2002; a declaration from the applicant, dated April 17, 2006; a declaration from the applicant's previous attorney, dated April 21, 2006; a letter and supporting medical documentation from the applicant's mother's physician, dated April 25, 2006; a declaration from the applicant, dated July 31, 2005; a letter from the applicant's mother's employer, dated October 12, 2005; and a letter from the applicant's friend, dated October 12, 2005. In addition, the applicant's mother sent the AAO a letter, dated November 27, 2007. The entire record was reviewed and considered in rendering a decision on the appeal.

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
- (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.

The decision indicates that the applicant's immigrant visa request was refused because of misrepresentations made by him when he applied for a nonimmigrant visa at the American Embassy in Bern, Switzerland on or about March 13, 2003 and/or when he applied for entry to the United States under the Visa Waiver Program, on May 15, 2003. The officer in charge determined that the applicant misrepresented himself by failing to disclose his mental health condition, namely bipolar disorder, by failing to disclose the fact that he had received voluntary departure in lieu of removal in October 2002, and by failing to disclose that he had violated the terms of his U.S. visa. Counsel asserts that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, as discussed below.

In the decision, the officer in charge first faulted the applicant for failing to disclose his bipolar disorder when he applied for a nonimmigrant visa and presented a Form DS-156, Application for Nonimmigrant Visa (Form DS-156) at the American Embassy in Bern in March 2003, and when he applied for admission to the United States under the Visa Waiver Program and presented a Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form (Form I-94W) in May 2003.

Both forms require that an applicant disclose if he has ever been afflicted with a communicable disease of public health significance, a dangerous physical or mental health disorder, or ever been a drug user. Based on the record, the applicant does not have a communicable disease, does not have a dangerous physical or mental disorder, and is not a drug user. In fact, [REDACTED] classified the applicant's condition of bipolar disorder as a Class B classification, concluding that "...we can assume that there will be no further agitation and threatening behaviour in the future and that this was a one time episode in the past before being diagnosed with bipolar disorder and treated for it..." *Letter from* [REDACTED], dated November 30, 2005. Thus, when the applicant marked "no" on the Form DS-156 and the Form I-94W, indicating he did not have a communicable disease or dangerous mental disorder, he did so correctly.<sup>1</sup> The AAO concludes that the applicant did not have an obligation to disclose his bipolar disorder. As such, the applicant did not misrepresent his mental health, and he is thus not inadmissible with respect to this issue.

The officer in charge further faulted the applicant for failing to disclose he had been the subject of a deportation order when he completed the Form DS-156 and the Form I-94W. With respect to the Form I-94W, said form requires that an applicant disclose if he has been excluded and deported or been previously removed. In 2002, the applicant was placed in removal proceedings, but was granted voluntary departure in lieu of a removal order. *Order of the Immigration Judge*, dated October 8, 2002. Thus, when the applicant marked "no" on the Form I-94W with respect to having been excluded and deported, or been previously removed, he did so correctly. As such, the applicant did not have an obligation to disclose his voluntary departure order in lieu of removal with respect to the Form I-94W.

The Form DS-156 requires that an applicant disclose if he has been the subject of a deportation hearing. The applicant marked "no" to this question, and as he explains,

...Looking back, I also think I may have misunderstood whether I had ever been the subject of deportation proceedings. While I understood that I was appearing before the immigration court in 2002, I never had a trial, or even an individual hearing with an Immigration Judge. Rather, I appeared with lots of other people in the court on three occasions and was granted voluntary departure from the

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<sup>1</sup> The record indicates that on the applicant's Form DS-230, Application for Immigrant Visa and Alien Registration, completed in July 2005, the applicant also marked "no" to the question regarding whether he had a communicable disease of public health significance or who has or has had a physical or mental disorder that poses or is likely to pose a threat to the safety or welfare of the alien or others, despite the officer in charge's assertions to the contrary. As such, in all three immigration applications completed by the applicant, his responses remained consistent, and based on the above discussion, accurate.

United States. The word 'deportation' was never mentioned with reference to my case during any of my court appearances. I understood that legally I was not being removed or deported from the United States, but was actually being allowed to leave voluntarily. I understood that my requesting voluntary departure I was conceding that I was removable, but I didn't understand at the time of the B-2 application that 'removal' and 'deportation' were legally equivalent terms....

Letter from [REDACTED] dated April 17, 2006.

If one were to interpret that the applicant should have marked "yes" to the above-referenced question, the fact that the applicant had been the subject of a deportation hearing would not have resulted in his inadmissibility as he had not been ordered removed, but had complied with a grant of voluntary departure. Therefore, being the subject of a deportation hearing is not material and 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 applicant is thus not inadmissible with respect to this issue.

Finally, in the decision, the officer in charge faulted the applicant for failing to disclose, on the Form DS-156, that he had violated the terms of his U.S. visa. The applicant states the following regarding this failure to disclose:

...First, it was my understanding that F-1 status was not actually a visa since, strictly speaking, a visa is a stamp in a passport, and I never had an F-1 visa stamp in my passport. Now I understand that the question may have been addressing my time as a student in the United States, but I did not realize this when I answered the question. I was also confused because when Immigration [REDACTED] provided me with time to secure admission at a new college without any objection from the government attorney, I took that to mean my student status remained valid and I simply needed to gain admission at a new school to continue my studies in the United States....

My answers...may have been legally incorrect, but I thought I was answering the questions correctly based on my understanding of what had happened in the United States. I made a mistake, but I did not attempt to hide my past, and I attempted to fill out the application by answering the questions honestly and consistent with the facts as I understood them at the time. Had I known that my answers on this form could ultimately lead to a permanent bar on my entry into the United States, I certainly would have made a copy of my B-2 application and sought legal assistance in completing the form....

*Id.* at 1.

Again, the AAO concludes that the applicant's failure to disclose his previous failure to maintain his nonimmigrant status in the United States was not a willful or material misrepresentation. As referenced above, the fact that the applicant had violated his student visa status would not have resulted in his inadmissibility or exclusion. Therefore, his failure to disclose the violation of student status is not material. As such, contrary to the officer in charge's conclusions, the applicant is not inadmissible based on the answers provided on the Form DS-156.

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