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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE:



Office: ROME, ITALY (COPENHAGEN)

Date:

SEP 01 2009

IN RE:



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), and section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider, as required by 8 C.F.R. 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Senior Special Agent, Immigration and Customs Enforcement (ICE) in Copenhagen, Denmark. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Denmark who 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 and seeking readmission within ten years of his last departure from the United States. The applicant was also found to be 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 admission into the United States by fraud or willful misrepresentation in 2004. The applicant is married to a lawful permanent resident and seeks a waiver of inadmissibility in order to reside in the United States.

In a decision dated July 15, 2005, the Senior Special Agent found that the applicant had not shown extreme hardship to a qualifying family member as a result of his inadmissibility to the United States and denied the application accordingly. The Senior Special Agent noted that on October 22, 2004 the applicant's waiver application was approved and then rescinded for further investigation.

In a Notice of Appeal to the AAO (Form I-290B), dated August 11, 2005, the applicant states that the approval of his waiver application, dated October 22, 2004, was valid, definitive, and binding. He further states that the subsequent denial of his waiver application should be found invalid and the 2004 approval should be reinstated. The applicant submits additional documentation of hardship on appeal.

The AAO notes that U.S. Citizenship and Immigration Services (USCIS), or ICE, can reopen an application or proceeding on its own motion. 8 C.F.R. §103.5(a)(5)(ii) states:

Motions to reopen or reconsider in other than special agricultural worker and legalization cases—

...

(5) Motion by Service officer--

(ii) Service motion with decision that may be unfavorable to affected party. When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

The AAO finds that the Senior Special Agent erred in not notifying the applicant of the reopening of his application and not providing him thirty days to submit additional evidence. Nevertheless, the applicant has now been given the opportunity to submit additional evidence on appeal and the applicant's entire record has been reviewed on appeal.

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 adjudicating officer did 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)(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.

In the present application, the record indicates that the applicant entered the United States as a visitor under the Visa Waiver Program on February 21, 2000 with an authorized period of stay until May 20, 2000. On the applicant's waiver application he states that he remained in the United States until February 2004. Therefore, the applicant accrued unlawful presence from May 20, 2000, the date his authorized period of stay expired, until February 2004, when he departed from the United States. In applying for an immigrant visa, the applicant is seeking admission within ten years of his February

2004 departure from the United States. Therefore, the applicant is inadmissible to the United States under section 212(a)(9)(B)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

In addition to his unlawful presence, the applicant is also inadmissible for attempting to procure admission to the United States by fraud or willfully misrepresenting a material fact. 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.

In March 2004 the applicant filed an immigrant visa application based on an approved Alien Relative Petition (Form I-130) filed by his lawful permanent resident spouse. On his immigrant visa application the applicant stated that he had been residing in Denmark since 2000. The American Embassy in Copenhagen, Denmark then requested that the applicant submit documentation establishing that he was physically present in Denmark from 2000 to 2004. In his response dated March 30, 2004, the applicant stated that he established a residence in a third country, other than Denmark, which offers a "more hospitable tax environment", and that his interest in avoiding tax complications in Denmark makes it so that he cannot satisfy the request of establishing a physical presence in Denmark from 2000 to 2004. On February 5, 2005 the applicant was provided the opportunity to submit evidence of his residing in a third country outside Denmark or the United States. On March 8, 2005 the applicant submitted copies of yearly bank statements from his bank in Denmark mailed to a U.S. residence in Arizona. Thus, the AAO finds that the applicant misrepresented his residence from 2000 to 2004, the effect of which would have concealed the applicant's inadmissibility under section 212(a)(9)(B)(II) of the Act and allowed him to obtain an immigrant visa to the United States had embassy officials not demanded further evidence. Therefore, the applicant is also inadmissible under section 212(a)(6)(C)(i) of the Act for misrepresenting a material fact in an attempt to obtain a visa.

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:

(2) 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.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from section 212(a)(9)(B)(i)(II) of the Act and a section 212(i) waiver of the bar to admission resulting from section 212(a)(6)(C) of the Act are dependent first upon a showing that the bar imposes an extreme hardship to the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship the applicant experiences due to separation is not considered in section 212(a)(9)(B)(v) and section 212(i) waiver proceedings unless it is shown to cause hardship to the applicant's spouse. 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).

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

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).

The AAO notes that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d

465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

The AAO notes that extreme hardship to the applicant’s spouse must be established in the event that she resides in Denmark and in the event that she resides in the United States, as she is not required to reside outside of the United States based on the denial of the applicant’s waiver request. The AAO will consider the relevant factors in adjudication of this case.

In a statement, dated May 28, 2004, the applicant’s spouse states that she is a native of Japan who moved to Denmark in 1988 and then the United States in 1993. She states that six years ago she obtained lawful permanent residence in the United States as an outstanding researcher in the field of neuroscience. She states that the United States offers her professional opportunities that she would not have in Japan, Denmark, or anywhere else in the world. She states that her career is at risk because without the applicant in the United States she is experiencing difficulty with keeping up her motivation and concentration. The applicant’s spouse also states that she has developed a strong attachment to the United States, purchasing her first home two years ago and preparing to apply for U.S. citizenship. She states further that she feels her personal safety and wellbeing are at risk in the United States without the applicant being able to immigrate. She states that as a Japanese citizen who has no relatives or close friends in the United States, she does not feel safe or comfortable living alone. She states that living without her spouse is not an option and she will have to abandon everything to be with him, including her status as a lawful permanent resident. Finally, the applicant’s spouse states that her ties to Japan have weakened considerably and that she and her husband would probably not be permitted to live together in Denmark, which has recently tightened its immigration laws to make it much more difficult for a foreign spouse of a Danish citizen to obtain a residence permit. The AAO notes that the record does not contain documentation to substantiate the applicant’s spouse’s claims about the superiority of professional opportunities in the United States or the unavailability of professional opportunities in Denmark. The AAO also notes that the inability to pursue a chosen profession does not constitute extreme hardship. *See Matter of Pilch*, 21 I&N Dec. 627, 631 (BIA 1996).

The applicant states, in a letter dated August 11, 2005, that Danish immigration laws make family reunification contingent upon the Danish resident national being able to prove his ability to support his spouse, provide suitable accommodation, and to present a bank guarantee of approximately \$10,000. He states that he is currently unable to fulfill any of these conditions and his ability to do so in the future is uncertain. The AAO notes that the applicant does not submit any documentation to substantiate his claims concerning his spouse’s ability to immigrate to Denmark under Danish law. Furthermore, he submits no evidence that he would not be able to meet the requirements of the Danish immigration laws. Thus, while these statements are a form of evidence and have been

considered, without supporting documentation they are of little probative value to the determination of extreme hardship.

The record does include a letter from a psychiatrist, [REDACTED], from Arizona State University, dated September 15, 2004. [REDACTED] states that she saw the applicant's spouse for a psychiatric evaluation. She states that the applicant's spouse complains of impaired concentration and motivation. [REDACTED] concludes that these symptoms seem to be directly related to the applicant being unable to return to the United States. She states that her current diagnosis for the applicant's spouse is Adjustment Disorder with Mixed Depression and Anxiety. She states that the applicant's spouse's symptoms are manifested by her inability to concentrate fully at work and to perform highly focused, abstract thinking, which is a change from her previous level of functioning.

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter is based on one meeting between the applicant's spouse and the psychiatrist. The record fails to reflect an ongoing relationship with the applicant's spouse or any history of treatment for the disorder and/or symptoms suffered by the applicant's spouse, thereby rendering [REDACTED] findings speculative and diminishing the report's value in determining extreme hardship.

Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

A review of the documentation in the record fails to establish the existence of extreme hardship to the applicant's spouse caused by the applicant's inadmissibility to the United States. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.