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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H6

[redacted]

FILE: [redacted] Office: [redacted] Date: AUG 10 2010

IN RE: Applicant: [redacted]

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[redacted]

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Frankfurt, Germany and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of [redacted] who was found to be inadmissible to the United States under 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 admission within ten years of his last departure. The applicant is the spouse of a United States citizen and 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.

The Field Office Director found that the applicant had failed to establish that the bar to his admission would result in extreme hardship to a qualifying relative, his U.S. citizen spouse. She denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the Field Office Director,* dated April 26, 2010.

On appeal, counsel for the applicant contends that the Field Office Director acted contrary to law by failing to consider the hardship factors in the applicant's case objectively and cumulatively. He further states that the Field Office Director's finding that the adverse factors in the applicant's case outweighed the positive was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. *Form I-290B, Notice of Appeal or Motion*; Counsel's *brief,* dated May 5, 2010.

In support of the waiver, the record includes, but is not limited to, counsel's brief, statements from the applicant, his spouse, his parents, his daughter, his mother-in-law, his brother-in-law and his sister-in-law; a letter from the applicant's spouse's supervisor at work; medical documentation relating to the applicant's spouse health, mental and physical; a printout of an article on ulcerative colitis; medical documentation relating to the applicant's mother- and brother-in-law; printouts of online real estate listings; bank statements, telephone billing and travel records; a social security statement for the applicant's spouse; and documentation relating to the applicant's criminal record in Belgium and the United States. The entire record was reviewed and considered in reaching a decision in this matter.

Section 212(a)(9)(B) states 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.

The record indicates that the applicant entered the United States as a B-2 nonimmigrant in 1970 and remained in the United States when the validity of his visa expired. On December 11, 1973, an immigration judge granted the applicant voluntary departure until April 11, 1974, with an alternate order of removal. The grant of voluntary departure was subsequently extended until June 1, 1974. The applicant did not depart the United States under the grant of voluntary departure, but remained until June 21, 2006, when he returned to Belgium.[1] Accordingly, the applicant accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until his departure in 2006. As he accrued unlawful presence in excess of one year and is seeking immigrant admission within ten years of his last departure from the United States, which occurred on January 15, 2008, he is inadmissible pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Beyond the decision of the Field Office Director, the AAO also finds that the applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act.[2]

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

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[1] In that the record indicates that the applicant departed the United States while an order of removal was outstanding, he is also inadmissible to the United States under section 212(a)(9)(A)(i)(II) of the Act as he is seeking admission within ten years of his 2006 departure. To apply for an exception to a section 212(a)(9)(A)(i)(II) inadmissibility, the applicant must file the Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal. Individuals who are outside the United States and who must also seek waivers of inadmissibility under section 212(g), (h) or (i) of the Act must submit the Form I-212 and I-601 together. 8 C.F.R. § 212.2(d).

[2] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the all of the grounds for denial are not identified in the initial decision. *See 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); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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 after his June 21, 2006 departure, the applicant returned to the United States on September 18, 2006, June 19, 2007 and September 2, 2007 under the Visa Waiver Program (VWP) and was again seeking admission to the United States under the Visa Waiver Program when he was refused admission on February 20, 2008. In a sworn statement given by the applicant on February 20, 2008, he testified that when he had entered the United States on September 18, 2006, he had falsely stated to the immigration inspector that he was entering the United States to travel to Las Vegas on a three-week gambling vacation when he was, in fact, returning to his 30-year U.S. residence. When asked why he had overstayed his authorized period of stay following this admission, the applicant stated that he did so because he lived in the United States and had come back to resume his life. In response to a question about his reasons for staying beyond his authorized period of stay following his September 2, 2007 admission under the Visa Waiver Program, the applicant again indicated that he had remained in the United States because of his spouse and the fact that his life was in the United States.

A copy of the Form I-94W arrival/departure card presented by the applicant on February 20, 2008 also indicates that the applicant answered "No" to the following questions on the Form I-94W: Question B, which asks if the arriving alien has ever been arrested or convicted for an offense or crime involving moral turpitude and [redacted] which asks if he or she has ever been excluded and deported or been previously removed, or sought to procure a visa or entry into the United States by fraud or misrepresentation. While the [redacted] notes the applicant's claim that he was confused as to the meaning of Question B, he offers no similar explanation as to why he answered [redacted] in the negative. Instead, the applicant acknowledged in his September 20, 2008 sworn statement that he had knowingly failed to comply with the December 11, 1973 order granting him voluntary departure with an alternate order of removal. Further, as just discussed, he was aware at the time he applied for VWP admission in 2008 that he had misrepresented himself as a nonimmigrant when he entered the United States in September 2006 and September 2007 under the Visa Waiver Program.

Based on his use of the Visa Waiver Program to return to his residence in the United States, as well as his failure to provide truthful answers to the admissibility questions on the Form I-94W, the

applicant is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) for having sought a benefit under the Act through the willful misrepresentation of a material fact.[3]

Section 212(a)(9)(B)(v) and section 212(i) waivers of the bars to admission resulting from violations of section 212(a)(9)(B)(i)(II) and section 212(a)(6)(C)(i) of the Act are dependent first upon a showing that the bars would result in extreme hardship for the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or other family members would experience if his waiver request is denied is not directly relevant to a determination of his eligibility for a waiver under section 212(a)(9)(B)(v) or section 212(i). The only relevant hardship in the present case is the hardship that would be suffered by the applicant's spouse if the applicant's waiver application is denied. Hardship experienced by nonqualifying relatives will be considered only to the extent that it affects the applicant's spouse. If extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. [redacted] (BIA 1996).

[redacted]z, 22 I[redacted] (BIA 1999) provides a list of factors the Board of Immigration Appeals (BIA) deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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 AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Belgium or the United States, as she is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in the adjudication of this case.

The applicant needs to establish that if the applicant's spouse joins the applicant in Belgium, she will suffer extreme hardship. On appeal, counsel contends that relocation would result in extreme hardship for the applicant's spouse based on her health; her separation from her family; financial hardship, including the loss of her pension and health benefits; and her inability to learn a new language or adapt to life in Belgium. Counsel states that the applicant's spouse suffers from ulcerative colitis, degenerative disc disease and depression, and that she would be unable to continue

[3] The AAO also notes that the applicant may be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude. The record establishes that the applicant was convicted of theft in Belgium in 1962 and that the applicant has testified that he was convicted of petit larceny in Nevada in 1985 for which he paid a fine. The AAO does not, however, find it necessary to address the applicant's potential inadmissibility under section 212(a)(2)(i)(I) of the Act. If the applicant is able to satisfy the requirements of sections 212(a)(9)(B)(v) and 212(i), he will also satisfy the waiver requirements in section 212(h) of the Act.

her medical treatment in [redacted] for a significant period of time if she relocated. Counsel indicates that the applicant has lost his resident status in Belgium because of his many years in the United States and, until such time as he regains his residency, the applicant's spouse would be unable to apply for public medical coverage. Counsel also states that because the applicant and his spouse have never worked in Belgium, they are ineligible for Belgian retirement benefits and would, therefore, be unable to pay for private health insurance. Counsel further states that the high unemployment rates in Belgium and the fact that the applicant's spouse is 59 years old and speaks only English would preclude her from being able to obtain employment in Belgium, even if her employment skills could be transferred outside the United States. Counsel also contends that, if the applicant's spouse joined him in Belgium, she would lose full retirement benefits from her government employment; would be separated from her family, all of whom reside in the United States, and would have to abandon her ill and elderly mother for whom she is the only caregiver.

In a statement dated [redacted], the applicant's spouse states that relocation to [redacted] would result in financial, emotional and physical stress that would negatively affect her health. She contends that she would experience significant stress as a result of leaving the United States where she has lived her entire life. She further notes that relocation would require her to abandon her sick mother; be separated from her children and grandchildren; leave her job and lose her pension; and sell her home, her only investment, in a bad real estate market. Relocation to Belgium would also be stressful, the applicant's spouse claims, because she is unable to speak French and would be unable to find employment or obtain health insurance.

The record contains substantial documentation of the applicant's spouse's medical conditions, specifically ulcerative colitis, degenerative disc disease of the cervical and lumbar spine, and depression/anxiety. The AAO notes that medical documentation submitted subsequent to the filing of the appeal establishes that the applicant's spouse underwent hip replacement surgery on June 21, 2010 in connection with her back problems. A July 27, 2010 letter from [redacted] indicates that she will require four to six months for recovery. [redacted] observes that the record supports the applicant's spouse's claim that her medical conditions worsen when she is under stress. [redacted], the applicant's spouse's primary physician, states in a July 23, 2009 letter submitted for the record that the applicant's spouse's colitis and disc disease are exacerbated by stress. A progress note, dated July 15, 2009, from [redacted], Desert Gastroenterology Associates, indicates that the applicant's spouse is experiencing flare-ups of her colitis as a result of stress. [redacted] writes that he hopes that the applicant's spouse's stress will decrease so that her disease may be brought under control.

The record also includes a February 9, 2010 email message to the applicant's spouse from the [redacted] consulate in Los Angeles regarding how to establish eligibility for medical benefits in [redacted]. The email indicates that the applicant must first register his and his spouse's marriage, and that his spouse may then register with municipal authorities, a process that takes a few weeks. The email also indicates that the receipt of medical benefits can be subject to a six-month waiting period.

Having considered the evidence of record, the AAO finds it to demonstrate that the applicant's spouse would experience extreme hardship if she joined him in Belgium. The record establishes that

the applicant's spouse suffers from ulcerative colitis and severe back pain, and that her conditions worsen when she is under stress. The AAO acknowledges the stress created by the normal disruptions and difficulties created by relocation, e.g., the loss of current employment, separation from family and adjustment to a new culture, and the potential impact that such stress would have on the applicant's health. Further, while it does not find the record to contain sufficient evidence to establish that the applicant's spouse would not have ready access to adequate medical care in Belgium, it notes that relocation would require her to seek care for chronic, serious health problems in an unfamiliar healthcare system from medical providers who may not speak English and with whom she would otherwise have difficulty communicating. Moreover, in moving to Belgium, the applicant's spouse would lose her current healthcare providers who are familiar with her medical history and needs. When the normal hardships of relocation and those created by the applicant's spouse's medical conditions are considered in the aggregate, the AAO finds the applicant to have established that relocation would result in extreme hardship for his spouse.

The AAO also finds the record to demonstrate that the applicant's spouse would experience extreme hardship if she continued to reside in the United States without him. Counsel asserts that the applicant's spouse's health problems have been exacerbated by the applicant's absence. He also contends that she is experiencing financial hardship as she is supporting the applicant who is not employed in Belgium.

Although counsel states that he has submitted evidence of money transfers sent by the applicant's spouse to her husband, the bank account summary in the record fails to identify the individual holding the account or the purpose of the transfers noted in the summary. The AAO also observes that the record indicates that the applicant retired in August 2006, with more than 30 years employment in the United States and that he has a social security account in his name. No evidence in the record indicates that, because the applicant resides in Belgium, he is not receiving social security, pension and other retirement benefits based on his employment in the United States.

The record does, however, establish that the applicant's absence has had a significant, negative impact on his spouse's medical conditions. The medical progress note from [redacted] Desert Gastroenterology Associates, indicates that the applicant's spouse's colitis has flared up as a result of the stress created by the applicant's problems. The July 23, 2009 statement from the applicant's spouse's primary physician, [redacted], reports that the loss of the applicant's support has resulted in numerous exacerbations of the applicant's spouse's colitis and disc disease. A family leave notice issued by the Parks & Recreation Department in North Las Vegas, dated December 11, 2008, grants family leave to the applicant's spouse as a result of colitis flare-ups. A letter from [redacted], Park Services Manager, states that the applicant's absence has affected the health and job performance of his spouse and that she has referred her to the Department's Employee Assistance Program. The record also contains documentation of the applicant's spouse's treatment for severe anxiety in the form of a July 22, 2009 certification completed by psychiatrist [redacted] who states that he will be treating the applicant's spouse on a weekly basis. A psychological evaluation of the applicant's spouse, conducted on February 10, 2010 by psychologist [redacted], concludes that the applicant's spouse is suffering from major depressive disorder, single episode, severe, with significant risk for suicide; generalized anxiety

disorder; mood disorder, secondary to medical condition; anxiety disorder, secondary to medical condition; dyssomnia, secondary to medical and psychiatric conditions; pain disorder with medical and psychological components; psychological factors affecting physical condition; and dependent personality disorder. [redacted] also notes that he administered the Anger Inventory, the Beck Anxiety Inventory, Beck Depression Inventory-2 and the Beck Hopelessness Scale to the applicant's spouse and that test results were consistent with his findings from the applicant's spouse's history and mental status examination.

Based on the documented impacts of separation on the applicant's spouse's mental and physical health, the AAO finds the record to establish that she would suffer extreme hardship if the applicant's waiver application were to be denied and she remained in the United States.

In that the applicant has established that the bars to his admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> In evaluating whether . . . relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country. " *Id.* at 300. (Citations omitted).

The adverse factors in the present case are the applicant's unlawful presence for which he now seeks a waiver, as well as his unlawful residence in the United States prior to April 1, 1997; his misuse of and misrepresentations under the Visa Waiver Program; his failure to comply with the terms of the nonimmigrant visa on which he initially entered the United States in 1970; his failure to comply with the grant of voluntary departure issued by an immigration judge in 1973 or the alternate order of

removal; his long period of unauthorized employment in the United States; his 1962 conviction for theft in Belgium and his convictions for carrying a concealed weapon and for petty larceny in the United States in 1972 and 1985 respectively; and his arrests in 1994 for robbery and in 1996 for violating a domestic protection order, neither of which resulted in conviction.

Counsel asserts that the applicant's case includes sufficient hardship factors on which to base a favorable exercise of discretion. The AAO notes, however, that although the record establishes extreme hardship to the applicant's spouse, extreme hardship is but one favorable factor in a determination of whether the Secretary should exercise discretion. *See Matter of Mendez, supra.* Counsel also contends that the applicant's adult U.S. citizen daughter relies on him for financial and emotional support. While the AAO acknowledges counsel's claim, it does not find the record to demonstrate her dependence on the applicant, and it will not be considered here. The AAO also notes that the applicant, in his February 20, 2008 sworn statement, claims to have paid taxes throughout his employment in the United States. Again, the record does not support this claim and the AAO will not count it as a favorable factor. Based on the record before it, the AAO finds the favorable or mitigating factors in the present case to be the applicant's U.S. citizen spouse, his U.S. citizen daughter, and the extreme hardship to his spouse if his waiver application is denied.

The applicant's driving violations and criminal convictions are at least 25 years in his past and his arrests for robbery and violating a domestic protection order, neither of which resulted in formal charges, occurred more than 14 years ago. The same, however, cannot be said of the applicant's violations of immigration law. The applicant entered the United States for the first time in 1970 and failed to abide by the terms of his nonimmigrant visa. When granted voluntary departure by an immigration judge in 1973, he did not comply, remaining unlawfully in the United States for another 33 years, working without authorization. Since his 2006 departure from the United States, the applicant has continued to violate U.S. immigration law, returning to his U.S. residence using the Visa Waiver Program (VWP), misrepresenting his purpose in entering the United States to immigrant inspectors at the port-of entry, and twice overstaying his 90-day period of admission. The applicant's last attempt to enter the United States under the Visa Waiver Program took place as recently as February 20, 2008.

The AAO notes that a finding of extreme hardship carries considerable weight in the exercise of discretion and has carefully considered the extent to which the applicant's spouse's hardship mitigates the numerous negative factors in this case. In reaching its decision, the AAO has taken particular notice of the applicant's three nonimmigrant admissions to the United States since 2006 and his attempted nonimmigrant entry on February 20, 2008, in which he misrepresented or sought to misrepresent himself as a nonimmigrant visitor. In his sworn statement, the applicant failed to indicate there were extenuating circumstances or emergent reasons, including his spouse's health, that led him to use the Visa Waiver Program to return to the United States, rather than seek an immigrant visa through consular processing. His assertion, on February 20, 2008, that he was attempting to return to the United States to make everything legal does not excuse his fourth attempt to enter the United States as a VWP nonimmigrant. The AAO finds the applicant's repeated misuse of the Visa Waiver Program, when added to his years of unlawful residence and employment in the United States, to reflect a long-term and continuing disregard for U.S. immigration law, and to be a

significant negative factor in his case. Thus, while the AAO regrets the hardship that the applicant's spouse will face as a result of a denial of the applicant's waiver request, it does not find the favorable factors in the present matter to outweigh the negative and will not favorably exercise the Secretary's discretion.

In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret,* 15 I&N Dec. 620 (BIA 1976). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.