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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



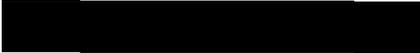
H6

SEP 05 2012

DATE:
271

Office: FRANKFURT, GERMANY

FILE: 

IN RE: Applicant: 

APPLICATION: 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:

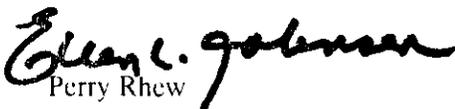
SELF-REPRESENTED

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 \$630. 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,


Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Frankfurt, Germany, and the denial appealed to the Administrative Appeals Office (AAO), which dismissed the appeal. The matter is now before the AAO on a motion to reopen. The motion is granted, the previous decision affirmed, and the waiver application denied.

The applicant is a native and citizen of Belgium 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 one year or more and seeking admission within ten years of his last departure. The applicant 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 his U.S. citizen spouse.

The field office director found the applicant had failed to establish that the bar to his admission would result in extreme hardship to a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility accordingly. *Decision of the Field Office Director*, April 26, 2010. On de novo review, the AAO found that extreme hardship to a qualifying relative had been shown, but determined that the applicant was not entitled to discretionary relief because the negative factors outweighed the positive factors and, therefore, dismissed the appeal. In addition, the AAO noted two additional grounds of inadmissibility: section 212(a)(9)(A)(ii)(II) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii)(II), for having departed the country with a removal order pending, and section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for procuring admission to the country by fraud or willful misrepresentation of a material fact.

In the motion to reopen, the applicant elaborates several points not fully addressed in his attorney's brief, including several extenuating circumstances he claims will cast the negative factors in a different light and lead the AAO to a favorable exercise of discretion. *See* Form I-290B, Notice of Appeal or Motion and Applicant's Cover Letter, both dated August 30, 2010.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). Therefore, we limit our review to such newly presented facts as are supported by the evidence. And, as our prior decision found extreme hardship to a qualifying relative to have been established, we proceed directly to consider whether these new facts warrant concluding that the positive factors outweigh the negative factors and support an exercise of discretion favorable to the applicant. New evidence submitted in support of the motion consists primarily of financial documentation, including a social security statement, tax returns, a bank statement, telephone bills, and a list of expenses.

Section 212(a)(9)(B) states in pertinent part:

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.

After entering the United States as a B-2 nonimmigrant in 1970, the applicant remained beyond his authorized period of stay. On December 11, 1973, an immigration judge granted him 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 under the grant of voluntary departure, but rather remained in the country until June 21, 2006, when he returned to Belgium, thereby triggering an inadmissibility for unlawful presence of one year or more. In addition to this inadmissibility addressed by the field office director, we previously noted that the applicant incurred an inadmissibility for seeking admission within ten years after departing with a removal order pending and, further, determined that he was also inadmissible for procuring U.S. admission by misrepresenting his immigrant intent during several Visa Waiver Program (VWP) entries during 2006 and 2007.¹ See *Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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

Certain Aliens Previously Removed

....

(ii) Other Aliens. – Any alien not described in clause (i) who—

(I) has been ordered removed under section 240 or any other provision of law, or

¹ The record reflects that the applicant returned to the United States on September 18, 2006, June 19, 2007 and September 2, 2007 under the VWP and was again seeking admission under the VWP when he was refused admission on February 20, 2008.

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien *convicted of an aggravated felony*) is inadmissible.

(iii) Exception. – Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the [Secretary] has consented to the alien's reapplying for admission.

Section 212(a)(6)(C)(i) of the Act provides, in pertinent part:

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)(1) of the Act provides:

The [Secretary] may, in the discretion of the [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 [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 [...].

As the applicant met his burden of showing denial of the waiver application would cause extreme hardship to a qualifying relative, new information provided on motion is relevant only to review of our determination that he was not entitled to discretionary relief based upon a balancing of positive and negative considerations:

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-Morales, 21 I&N Dec. 296, 301 (BIA 1996).

The AAO must then "balance 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).

We find the documentary evidence offered with the motion insufficient to change our prior balancing of the equities in this case. First, we note that the August 30, 2010 explanatory letter submitted by the qualifying relative is not itself documentary evidence and may be considered only to the extent its content is substantiated by such evidence. Second, the documents provided are almost entirely financial in nature. Finally, this documentation fails to address the negative factors enumerated in our prior decision:

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.

AAO Decision, August 10, 2010.

As unsupported explanations of the applicant's criminal record are not documentary evidence, the record contains no new evidence mitigating the negative factors in this case.

Regarding factors favorable to the applicant, we repeat the observation in our underlying decision that, although the record establishes extreme hardship, this is but one favorable factor in determining whether the Secretary should exercise discretion. *See Matter of Mendez, supra*. While the AAO acknowledges applicant's inclusion of his 2010 Social Security Statement and post-2000 tax returns to bolster his claim to have paid taxes, the record shows no reported income from 1975 through 1993 and the tax returns are insufficient to establish a history of reporting income and paying taxes. However, even if the claims in the applicant's February 20, 2008 sworn statement to have paid taxes throughout his employment in the United States were accepted as true, counting this as a favorable

factor fails to overcome the substantial weight of adverse factors in this case. The AAO finds that adding a history of tax compliance to the favorable factors previously recognized -- 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 -- is insufficient to establish he merits a favorable exercise of discretion.

In discretionary matters, the applicant bears the full burden of proving 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 prior decision of the AAO will be affirmed.

ORDER: The motion is granted. The prior decision of the AAO is affirmed. The waiver application is denied.