



U.S. Citizenship  
and Immigration  
Services

43

[Redacted]

FILE:

[Redacted]

Office: VIENNA DISTRICT OFFICE

Date: **OCT 22 2004**

IN RE:

[Redacted]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act (INA), 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, Director  
Administrative Appeals Office

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protect privacy

**DISCUSSION:** The waiver application was denied by the Officer-in-Charge, Vienna. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Poland. The applicant was found inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (INA, the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II). The record reflects that the applicant is the spouse of a U.S. citizen. He seeks a waiver of inadmissibility in order to immigrate to the United States and reside with his wife.

The officer-in-charge found that the applicant failed to establish extreme hardship to his U.S. citizen spouse and did not merit a favorable exercise of discretion. The application for waiver was denied accordingly.

On appeal, the applicant contends that he was not unlawfully present in the United States, that the officer-in-charge erred in taking into account for purposes of discretion the applicant's 1993 entry without inspection and failure to timely depart under an immigration judge order of voluntary departure, and that he established that refusal of his admission would result in extreme hardship to his U.S. citizen wife. The entire record was reviewed and considered in rendering a decision on the appeal.

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 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 U.S. 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 such immigrant would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

8 U.S.C. § 1182(a)(9)(B).

In the present application, the record indicates that the applicant last entered the United States on or about February 16, 1993, when he was apprehended by U.S. Border Patrol in Blaine, Washington, shortly after

crossing the United States-Canada border. He was served with an Order to Show Cause on the same date. Deportation proceedings were convened later that year in Portland Oregon. The applicant failed to appear for his hearing. A friend appeared at the hearing and reported to the immigration judge that the applicant had already departed the United States. The immigration judge found the applicant deportable *in absentia* and ordered voluntary departure by December 9, 1993, with an alternative order of deportation if the applicant fails to timely depart the United States. Despite the claim of his friend, the applicant failed to timely depart the United States.

The applicant filed a Form I-485, *Application to Register Permanent Residence or Adjust Status*, on November 23, 1994, based on his selection under the Diversity Visa program on October 5, 1994. In March 1997, the applicant's attorney made an inquiry to the former Immigration and Naturalization Service (INS) regarding his case, in which he admitted the applicant's presence in the United States and failure to timely depart under the voluntary departure order. *Letter of Daniel L. Kahn* (March 12, 1997). Upon motion by counsel, immigration court reopened his deportation proceedings. *Order of the Immigration Judge* (August 15, 1997). Proceedings were then administratively closed to confer jurisdiction on INS for purposes of adjudicating the adjustment application. *Order of the Immigration Judge* (November 12, 1997). The application for adjustment was the denied based on the unavailability of further visa numbers for Diversity Visa winners for fiscal year 1995. *Decision on Application for Status as Permanent Resident* (July 18, 1998).

The applicant's deportation proceedings were reopened and calendared for a hearing. The applicant was again granted voluntary departure on January 31, 2000, with the period for departure to expire on September 1, 2000, and an alternate order of deportation in the even the applicant failed to depart. *Order of the Immigration Judge* (January 31, 2000). The applicant married his current U.S. citizen spouse on July 20, 2000, shortly after his prior marriage was terminated by divorce. *King County Certificate* (July 22, 2000); *Decree of Dissolution* (July 3, 2000). On July 24, 2000, the applicant changed his name, adopting the surname of his wife, which she acquired by marriage to a former husband. *Order Changing Name, State of Washington, King County District Court* (July 24, 2000). It appears from INS records that the applicant departed the United States and returned to Poland on September 1, 2000. On October 30, 2000, the applicant's wife filed on his behalf a Form I-130, *Petition for Alien Relative*, which was approved on June 19, 2001. The instant waiver application was filed in connection with his application to immigrate to the United States as the spouse of a U.S. citizen.

The accrual of unlawful presence for purposes of inadmissibility determinations under section 212(a)(9)(B)(i)(II) of the Act begins no earlier than the effective date of this amended section, April 1, 1997. On April 1, 1997, the applicant was present in the United States after unlawful entry and had a pending adjustment application. The proper filing of an affirmative application for adjustment of status has been designated as an authorized period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum of Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations* (June 12, 2002). The application for adjustment was denied on July 18, 1998, thus starting the accrual of unlawful presence under the Act. The deportation proceedings, which had been administratively closed for the applicant to pursue adjustment, were reconvened in 1999. For aliens, such as the applicant, who entered without inspection, time spent in deportation proceedings counts towards the accrual of unlawful presence under section 212(a)(9)(B)(i)(II) of the Act. *See Memorandum of*

*Paul Virtue, Office of Programs* (September 19, 1997). Periods of voluntary departure temporarily suspend the accrual of unlawful presence. *Id.* The applicant therefore accrued unlawful presence from July 18, 1998, the denial of his adjustment application, until January 31, 2000, the date voluntary departure was granted, or a period of over one year and six months. The applicant is seeking admission within 10 years of his September 2000 departure from the United States. The applicant is, therefore, 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.

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 is 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 to the alien herself is not a permissible consideration under the statute. The qualifying relative in this case is the applicant's spouse.

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, 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. 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, reviewed in its entirety and in light of the *Cervantes-Gonzalez* factors, cited above, does not support a finding that the applicant's spouse faces extreme hardship if she remains in the United States and the applicant is refused admission. The AAO notes that the applicant submitted no new evidence of hardship on appeal. In support of the hardship claim, the record shows that the applicant's wife is suffering from depression due to separation from her husband. The record shows that she faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse is removed from the United States. Congress provided for a waiver of inadmissibility, but under limited circumstances. In limiting the availability of the waiver to cases of "extreme hardship," Congress did not intend that a waiver be granted in every case where a qualifying relationship exists. U.S. court decisions have repeatedly held that

the common results of removal are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991), *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996); *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996) (holding that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship); *Matter of Shaughnessy*, 12 I&N Dec. 810 (BIA 1968) (holding that separation of family members and financial difficulties alone do not establish extreme hardship). “[O]nly in cases of great actual or prospective injury . . . will the bar be removed.” *Matter of Ngai*, 19 I&N Dec. 245, 246 (BIA 1984).

The record is silent as to the hardship the applicant’s spouse would face if she relocated to Poland, her country of birth, to avoid separation from the applicant. Therefore, the applicant’s spouse faces, as all spouses facing deportation or refusal of admission of a spouse, the decision of whether to remain in the United States or relocate to avoid separation. The BIA has held, “[t]he mere election by the spouse to remain in the United States, absent [a determination of exceptional hardship] is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed.” *See Matter of Mansour*, 11 I&N Dec. 306, 307 (BIA 1965).

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act, the burden of proving eligibility rests with the applicant. INA § 291, 8 U.S.C. § 1361. Here, the applicant has not met that burden. The AAO therefore finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under INA § 212(a)(9)(B)(v), 8 U.S.C. § 1186(a)(9)(B)(v).

As the applicant has failed to established statutory eligibility, no purpose would be served in addressing the issue of whether he merits a favorable exercise of discretion. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.