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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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#3



FILE: [REDACTED] Office: FRANKFURT, GERMANY Date: SEP 30 2008

IN RE: [REDACTED]

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

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Officer-in-Charge (OIC), Frankfurt, Germany, denied the waiver application. The matter is now on appeal before the Administrative Appeals Office (AAO) in Washington, DC. The appeal will be dismissed. The application will be denied.

The applicant [REDACTED] is a native and citizen of Poland who was found 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. Ms. [REDACTED] sought a waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), which the OIC denied, finding that [REDACTED] failed to establish hardship to a qualifying relative. *Decision of the OIC, dated February 6, 2006.* The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility pursuant to section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II).

Section 212(a)(9)(B)(i)(II) of the Act provides that any alien (other than an alien lawfully admitted for permanent residence) who has been unlawfully present in the United States for one year or more, and again seeks admission within 10 years of the date of such alien's departure or removal, is inadmissible.

Unlawful presence accrues when an alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled. Section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii). The periods of unlawful presence under sections 212(a)(9)(B)(i)(I) and (II) are not counted in the aggregate.¹ For purposes of section 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997.²

The three- and ten-year bars of sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), are triggered by a departure from the United States following accrual of the specified period of unlawful presence. If someone accrues the requisite period of unlawful presence but does not subsequently depart the United States, then sections 212(a)(9)(B)(i)(I) and (II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I) and (II), would not apply. *See* DOS Cable, note 1. *See also Matter of Rodarte*, 23 I&N Dec. 905 (BIA 2006)(departure triggers bar because purpose of bar is to punish recidivists).

The record reflects that the applicant entered the United States from Poland on a visitor's visa in January 2003 and voluntarily departed from the country in January 2005. Although the record does not specify when Ms. [REDACTED] authorized stay in the United States was to expire, Customs and Border Protection officials typically authorize a period of admission of up to six months in the United States in B-2 non-immigrant status, so it is clear that [REDACTED] accumulated at least 12 months of unlawful presence in the United

¹ Memo, Virtue, Acting Assoc. Comm. INS, Grounds of Inadmissibility, Unlawful Presence, June 17, 1997 INS Memo on Grounds of Inadmissibility, Unlawful Presence (96Act.043); and Cable, DOS, No. 98-State-[REDACTED]

² *See* DOS Cable, note 1; and IIRIRA Wire #26, HQIRT 50/5.12.

States when she departed in January 2005 and triggered the ten-year-bar of section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The AAO will now address the finding that granting a waiver of inadmissibility is not warranted.

Section 212(a)(9)(B) of the Act provides that:

- (v) Waiver. – The Attorney General [now Secretary, 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.

A waiver of inadmissibility under section 212(a)(9)(B)(v) of the Act is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, *i.e.*, the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to an applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant’s naturalized citizen spouse, [REDACTED]. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

“Extreme hardship” is not a definable term of “fixed and inflexible meaning” and establishing extreme hardship is “dependent upon the facts and circumstances of each case.” *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). The Board of Immigration Appeals (BIA) in *Matter of Cervantes-Gonzalez* lists the factors it considers relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. 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. *Id.* at 565-566. The BIA indicated that these factors relate to the applicant’s “qualifying relative.” *Id.* at 565-566.

In *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996), the BIA stated that the factors to consider in determining whether extreme hardship exists “provide a framework for analysis,” and that the “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” It further stated that “the trier of fact must consider the entire range of factors concerning hardship in their totality” and then “determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994)).

Applying *Cervantes-Gonzalez* here, extreme hardship to [REDACTED] must be established in the event that he remains in the United States, and alternatively, that he joins his wife to live in Poland. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The AAO summarizes counsel's statements on appeal in the following manner. Counsel states that the OIC should not hold [REDACTED] and her husband culpable for their mistaken belief that adjustment of status needed to occur in Poland. He asserts that [REDACTED] met the extreme hardship factors in *Matter of Nagi*, 19 I&N Dec. 245 (BIA 1994), and that discretion should be granted because his hardship equals or exceeds [REDACTED]'s unlawful stay in the United States. He claims that [REDACTED]'s **mental evaluation shows that he is depressed because of separation from his wife.** Counsel states that Mr. [REDACTED] owns a long-haul semi-truck for which he paid \$53,000 and is now worth \$26,000. He states that [REDACTED] makes monthly payments of \$900 for the truck and would lose the investment in the truck if he were to join his wife in Poland. Counsel claims that [REDACTED] being treated for depression and anxiety syndrome and there is a negative stereotype about mental illness and its treatment in Poland. Counsel indicates that that [REDACTED]'s family ties, his father, sister, and step-mother, are in Ohio.

[REDACTED] and his spouse were married on July 21, 2003. *Certified Copy of Marriage Record.*

The April 20 2006 letter by [REDACTED] stated that separation has been emotionally damaging on him and his wife and has negatively impacted their health. He stated that he has been working as a truck driver for five years and is self-employed and does not wish to drop everything if his wife is not allowed in the country. He indicated that he does not want his marriage destroyed.

The psychological evaluation by [REDACTED] a licensed professional clinical counselor and independent chemical dependency counselor, stated that [REDACTED] arrived at his office complaining of depressive symptoms since separation from his wife. He indicated that [REDACTED]'s mother and one of his sisters live in Poland and that [REDACTED] has been in the United States for 11 years. [REDACTED] stated that [REDACTED] conveyed that he and his wife wish to have children and his wife wants to work as a flight attendant in the United States. [REDACTED] diagnosed [REDACTED] with the following: Axis I – 296.23, Major Depressive disorder, severe with no psychosis; Axis II – N/A; Axis III – N/A; Axis IV – issues with wife being in Poland, financial difficulties due to expenses incurred traveling to Poland and time taken off work; and Axis V – 55 (Current) (highest prior to wife going to Poland). [REDACTED] stated that it is his clinical opinion that [REDACTED] has a Major Depressive disorder that will likely dissipate if his wife returns to the United States, but will become more severe and chronic, possibly requiring medication, if she is unable to do so.

The document related to [REDACTED]'s truck shows an original loan amount of \$47,120 and the current principal of \$25,107 and the maturity date of July 1, 2008.

The letter dated February 14, 2006 by the specialist neurologist in Poland conveys that [REDACTED] is being treated in their outpatient clinic due to depression and anxiety syndrome caused by a difficult life situation and that she requires antidepressants.

The record contains documents and articles relating to mental health in Poland.

The letter by [REDACTED]'s sister and the one by his father convey that he has a close relationship with his wife and that he is in pain without her. The record contains letters by friends of [REDACTED] and his wife attesting to their close relationship.

In rendering this decision, the AAO has considered all of the evidence in the record.

Counsel presents a psychological evaluation to prove that [REDACTED] will experience extreme emotional hardship if separated from his wife for 10 years. Although the input of a mental health professional is respected and valuable, the submitted evaluation is based on a single interview between [REDACTED] and [REDACTED]. The record shows that [REDACTED] with [REDACTED] complaining of depressive symptoms, but it fails to reflect an ongoing relationship between a mental health professional and [REDACTED] or any history of treatment for the depression and anxiety order he is experiencing. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering [REDACTED] findings speculative and diminishing the evaluation's value in determining extreme hardship.

[REDACTED] is being treated for depression and anxiety syndrome, as indicated in the letter by the specialist neurologist; however, as previously stated by the AAO, her emotional hardship is not a consideration under section 212(a)(9)(B)(v) of the Act, and will be considered only to the extent that it results in hardship to her husband.

The documents and articles relating to mental health in Poland must be considered to the extent that they convey hardship to [REDACTED]. The AAO notes that counsel proposes to use the articles to show that in Poland there is a negative stereotype toward mental illness and its treatment. The AAO notes that the applicant is receiving treatment and medication in Poland for depression and anxiety, and that no documentation has been presented to prove that she has been stereotyped or mistreated because of her condition.

With regard to family separation, courts have stated that "the most important single hardship factor may be the separation of the alien from family living in the United States," and also, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (citations omitted); *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1424 (9th Cir. 1987) (remanding to BIA) ("We have stated in a series of cases that the hardship to the alien resulting from his separation from family members may, in itself, constitute extreme hardship.") (citations omitted).

However, the AAO notes that family separation does not categorically establish extreme hardship. *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991), shows the Ninth Circuit upheld the BIA's finding that deporting the applicant and separating him from his wife and child was not conclusive of extreme hardship as it "was not of such a nature which is unusual or beyond that which would normally be expected from the respondent's bar to admission." (citing *Patel v. INS*, 638 F.2d 1199, 1206 (9th Cir. 1980) (severance of ties does not constitute extreme hardship). The court in *Shoostary v. INS*, 39 F.3d 1049 (9th Cir. 1994), upheld the finding of no extreme hardship if Shoostary's lawful permanent resident wife and two U.S. citizen children are separated from him. *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), indicates that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and that "[t]he common results

of deportation or exclusion are insufficient to prove extreme hardship.” (citing *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir.1991). In *Sullivan v. INS*, 772 F.2d 609, 611 (9th Cir. 1985), the Ninth Circuit stated that deportation is not without personal distress and emotional hurt; and that courts have upheld orders of the BIA that resulted in the separation of aliens from members of their families.

The record conveys that [REDACTED] is very concerned about separation from his wife. The AAO is mindful of and sympathetic to the emotional hardship that is undoubtedly endured as a result of separation from a loved one. After a careful and thoughtful consideration of the record, however, the AAO finds that the situation of [REDACTED], if he remains in the United States, is typical to individuals separated as a result of removal and does not rise to the level of extreme hardship as required by the Act. The record before the AAO is insufficient to show that the emotional hardship experienced by [REDACTED] is unusual or beyond that which is normally to be expected upon removal. See *Hassan, Shooshtary, Perez, and Sullivan, supra*.

The psychological evaluation indicates that [REDACTED] has financial difficulties due to expenses incurred traveling to Poland and time taken off work. However, no documentation has been submitted to establish that [REDACTED] has extreme financial hardship on account of his wife living in Poland. It is noted that the Biographic Information shows that [REDACTED] was employed in Poland before she traveled to the United States.

Counsel indicates that [REDACTED] would experience extreme hardship if he lived in Poland because he would lose his investment in his truck. However, *Chokloikaew v. INS*, 601 F.2d 216 (5th Cir. 1979), indicates that “[e]conomic detriment, including a loss of investment, does not compel a finding of “extreme hardship.” And loss of investment in a luncheonette in *Asikese v. Brownell*, 230 F.2d 34 (U.S. App. D.C. 1956), did not in itself constitute extreme hardship.

[REDACTED] stated that he has close ties to his immediate family members who live in Ohio. As previously stated, *Hassan, Shooshtary, Perez, and Sullivan, supra*, indicate that separation from one’s family need not constitute extreme hardship. Furthermore, the psychological evaluation relays that [REDACTED] will have immediate family members, his mother and sister, in Poland.

In considering the hardship factors raised here, the AAO examines each of the factors, both individually and cumulatively, to determine whether extreme hardship has been established. It considers whether the cumulative effect of claims of economic and emotional hardship would be extreme, even if, when considered separately, none of them would be. It considers the entire range of factors concerning hardship in their totality and then determines whether the combination of hardships takes the case beyond those hardships ordinarily associated with removal.

The record fails to support a finding of significant hardships over and above the normal economic and social disruptions involved in removal so as to warrant a finding of extreme hardship if [REDACTED] were to remain in the United States without his spouse; and alternatively, if he were to join her to live in Poland. Having carefully considered each of the hardship factors raised, both individually and in the aggregate, it is concluded that these factors do not in this case constitute extreme hardship to a qualifying family member for purposes of relief under 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

Having found ██████████ statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

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 remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. ██████████ has not met that burden. Accordingly, the appeal will be dismissed and the application will be denied.

ORDER: The appeal is dismissed. The application is denied.