U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VIENNA, AUSTRIA Date: NOV 04 2004

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i)

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

DISCUSSION: The waiver application was denied by the Officer in Charge (OIC) in Vienna, Austria. 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 the Poland 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 10 years of his last departure from the United States. The applicant is married to a lawful permanent resident of the United States and seeks a waiver of inadmissibility in order to reside in the United States with his wife and children.

The OIC found that based on the evidence in the record, the applicant had failed to establish extreme hardship to his lawful permanent resident spouse. The application was denied accordingly. *Decision of the Officer in Charge,* dated July 24, 2003.

On appeal, counsel asserts that the applicant's spouse will suffer extreme hardship if she continues to be separated from the applicant, because she relies on the applicant to help care for their autistic teenage son. *Counsel's brief*, dated September 18, 2003.

In support of these assertions, counsel submits copies of records relating to the medical and educational history of the applicant's child. 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 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 on a visitor visa on February 6, 1997 with an authorized stay not to exceed February 28, 1997. The applicant remained in the United States until July 2, 2000. The applicant, thus, accrued unlawful presence from April 1, 1997, the date of enactment of unlawful presence provisions under the Act, until his departure on July 2, 2002. On November 14, 2002, the applicant's wife and children were given immigrant visas under the Diversity Lottery Visa Program. The applicant's visa was denied due to his previous overstay. On March 18, 2003, the applicant's wife entered the United States, where she now resides with their two children. The applicant is seeking admission within 10 years of his July 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 the alien himself experiences upon deportation is irrelevant to section 212(a)(9)(B)(v) waiver proceedings. 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals 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 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.

Counsel asserts that the applicant's spouse will face extreme hardship if she continues to be separated from the applicant. Counsel indicates that the applicant's spouse will suffer financial hardship if the applicant is not allowed to enter the United States, because the economic conditions in the applicant's region of Poland are weak and unemployment is high. In support of this contention, counsel submits a statement from the Jaslo, Poland District Labor Office. This statement contains some unemployment statistics, but no information specific to the applicant's employment situation. The record indicates that the applicant's wife has received an offer of employment and that she receives financial support from U.S. relatives. It must be pointed out that the U.S. Supreme Court has held that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship. *INS v. Jong Ha Wang,* 450 U.S. 139 (1981), and there is insufficient evidence on the record to determine that the applicant's wife will suffer extreme financial hardship if the applicant is not permitted to join her in the United States.

Counsel also states that the applicant's younger child requires more than usual care, because he is autistic, and the applicant's absence places a great burden on the applicant's wife in this respect. Counsel submits a medical certificate from the mental health clinic in Poland where the applicant's son received treatment from 1992 to 2003. This certificate states, "The presence of both parents near the boy and their co-operation determine the success of the treatment effects and their consolidation. Extended time of parents' separation may intensify his autistic disturbances." The record also indicates that the applicant's sister in the United States provides a great deal of support to the applicant's wife, who has located a treatment center that appears to be able to assist in their son's medical care.

The AAO recognizes the challenges present in raising a child with special needs. However, given the brevity of the medical information provided, and the fact that familial and medical support is currently available for the applicant's wife and son, the AAO cannot conclude that the record establishes extreme hardship to the applicant's spouse if she remains in the United States.

It is noted that the applicant's wife made the relatively recent decision to leave Poland knowing that the applicant might not be able to join her in the United States. The record reflects that her son attended a special education center in their city in Poland and had received treatment at the same medical facility for eleven years. The applicant stated in her affidavit dated April 1, 2003 that her husband had always been a "breadwinner" for the family, and the record indicates that he works as a self-employed land surveyor. In her April 1, 2003 affidavit, the applicant's wife indicated that her parents and brother all live in Poland. In view of the availability of medical care, special education, familial ties, and spousal support in Poland, the evidence on the record does not establish that the applicant's wife would suffer extreme hardship if she returns to Poland to join the applicant.

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.