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U.S. Citizenship and Immigration Services

[redacted]

H3

FILE: [redacted] Office: FRANKFURT, GERMANY Date: FEB 06 2009

IN RE: Applicant: [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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Ellen C. Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Frankfurt, Germany, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant, [redacted], is a native of Germany and a citizen of Turkey 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.

The applicant sought a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act so as to join his U.S. citizen spouse in the United States. The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the OIC*, dated July 24, 2006. The applicant submitted a timely appeal.

The AAO will first address the finding of inadmissibility. Section 212(a)(9) of the Act provides, in pertinent part:

> (B) Aliens Unlawfully Present
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> > (i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission within 3 years of the date of such alien's departure or removal, or
> > >
> > > (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.

Unlawful presence accrues when an alien remains in the United States after period of stay authorized by the Attorney General has expired 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, 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 was a crewmember on a cruise ship when he entered the United States without inspection on September 7, 2001, deserting his ship docked at the Port of Houston, and remaining in the country until his departure to Turkey on June 28, 2005. The applicant therefore accrued unlawful presence from September 7, 2001 until June 28, 2005, and when he departed from the United States he triggered the ten-year-bar, rendering him inadmissible under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1101(a)(9)(B)(i)(II).

The waiver for unlawful presence is under section 212(a)(9)(B) of the Act, which 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) 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 the applicant and to his or her child is not a consideration under section 212(a)(9)(B)(v) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(a)(9)(B)(v) of the Act, 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 U.S. citizen spouse. Once extreme hardship is established, it is one of the favorable factors to be considered in determining whether the Secretary should exercise discretion. *See Matter of Mendez,* 21 I&N Dec. 296 (BIA 1996).

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[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-060539 (April 4, 1998).

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

On appeal, counsel states that Citizenship and Immigration Services (CIS) erred in its application of the law and its factual findings by not considering all of the relevant hardship factors, such as the health condition of the applicant's mother-in-law, and the medical and educational hardship to the applicant's 13-year-old daughter. Counsel states that the applicant's spouse, if she joined her husband in Turkey, would abandon the physical care and financial assistance she provides to her mother, would no longer be able to financially assist her oldest daughter in college, and would expose herself and her youngest daughter to living in a country where they do not know the language, and where her daughter would receive a lower level of health care and would not have educational assistance for her learning disabilities. Counsel states that the applicant's spouse would not find employment as an occupational therapist or in a clerical position because she lacks knowledge of the Turkish language, and would not be qualified for manual labor because she has asthma and elevated blood sugar.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; 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). Counsel is correct in that *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors, which relate to the applicant's qualifying relative, 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 AAO agrees with counsel in that the factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-,* 21 I&N Dec. 381, 383 (BIA 1996). The trier of fact considers the entire range of hardship factors in their totality and then determines "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).

In support of the waiver application are a psychological evaluation of the applicant's spouse and the curriculum vitae of the evaluator, medical records of his spouse and his mother-in-law, information about occupational therapists in the United States, documentation of country conditions in Turkey, a decision issued by the AAO, and a letter dated January 8, 2006 by the applicant's spouse.

The applicant's wife indicates that she is an only child, her father died, and her mother has breast cancer for which she had surgeries, radiation treatment, and is currently taking medication. She states that she pays her mother's mortgage, and drives her mother because her mother lost her ability to drive. She states that she financially assists her oldest daughter, who is in college, and that her youngest daughter has a learning disability, necessitating that she attend private school and have an on-site school teacher tutor. The applicant's wife conveys that she has asthma, psoriasis, and diffuse

arthritis. She states that neither she nor her youngest daughter would be able to learn the Turkish language easily, impacting her ability to find employment and her daughter's education. *Letter of the applicant's spouse, dated January 8, 2006.*

The record contains a psychological evaluation dated August 18, 2006, of the applicant's spouse and her daughter by [redacted] Mr. [redacted] conveys that the applicant's wife stated that "she feels depressed and anxious," and that she began experiencing panic attacks several years ago, which were treated with the prescription medication Xanax. [redacted] states that the applicant's spouse "is operating at the psychological level of an immature adolescent." He conveys that the applicant's wife stated that she was adopted, has been married four times, and has felt depressed periodically throughout her life, and works 70-hour weeks to pay her mother's mortgage and keep her mind off her problems. [redacted] diagnosed the applicant's spouse with Major Depressive Disorder, recurrent, moderately severe, and Panic Disorder. He states that the applicant's wife:

> [H]as been depressed and anxious over the course of her life, that her level of depression and anxiety waxes and wanes and is experienced by her on an almost daily basis, and that her current level of depression and anxiety is the alchemy of her underlying chronic depression and a secondary depression imposed on her in reaction to her current circumstances.

He states that the applicant's spouse "would undergo an extreme psychological regression if she could not be reunited with her husband," which regression would involve an increase in depression and anxiety, and in the frequency of her panic attacks. He anticipates that she would become unable to work and, eventually, incapable of caring for her daughter and mother. He states that the applicant's step-daughter's psychological development has already been compromised by separation from her biological father. He states that the applicant's spouse is not psychologically equipped to live in Turkey and that she is her mother's primary care giver.

The medical records of the applicant's spouse show she has asthma for which she uses an inhaler; and those of her mother show her mother has hypertension, Parkinson disease, mild restrictive lung disease, and breast cancer for which she underwent surgery and radiation treatments.

An analysis of the factors in *Matter of Cervantes-Gonzalez* is appropriate here. It is noted the AAO will analyze extreme hardship in the event that the qualifying relative accompanies the applicant overseas or, in the alternative, that he or she remains in the United States. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In rendering this decision, the AAO will carefully consider and give proper weight to the evidence in the record.

Counsel is correcting in stating that family separation must be considered in determining hardship. *See, e.g., Salcido-Salcido v. INS,* 138 F.3d 1292, 1293 (9th Cir. 1998) ("the most important single hardship factor may be the separation of the alien from family living in the United States").

Furthermore, U.S. court and administrative decisions have held that the consequences of deportation imposed on citizen children of school age must be considered in determining extreme hardship. For example, in *Matter of Kao & Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan; she had lived her entire life in the United States and was completely integrated into an American lifestyle; and uprooting her at this stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS,* 695 F.2d 181, 186 (5th Cir. 1983), the Circuit Court indicated that "imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language," must be considered in determining whether "extreme hardship" has been shown. And, in *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Circuit Court found the BIA abused its discretion in concluding that extreme hardship had not been shown in light of fact that aliens' five-year-old citizen daughter, who was attending school, would be uprooted from the country where she lived her entire life and taken to land whose language and culture were foreign to her.

Although hardship to the applicant's children, particularly to her youngest daughter who would accompany her to live in Turkey, is not a consideration under section 212(a)(9)(B)(v) of the Act, the hardship endured by the applicant's spouse, as a result of her concern about the well-being of her children, is a relevant consideration.

The AAO finds that the record reflects that the applicant's mother-in-law has serious health problems and that the applicant conveys that she is her mother's primary care giver. It shows that the applicant's spouse was diagnosed with recurrent and moderately severe Major Depressive Disorder and a Panic Disorder and is not psychologically equipped to live in Turkey. There is no documentation, however, showing that the applicant financially assists her mother or oldest daughter or indicating that her youngest daughter requires special educational assistance. Nevertheless, the AAO finds that considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the hardship factors of the applicant's spouse's living in a country where she is unfamiliar with the language and culture, of being separated from her mother who has serious health problems and for whom she is the primary caregiver, of her concern about the effect of living in Turkey would have on her youngest daughter, and of her psychological state as described by Mr. Samuel, rise to the level of "extreme" hardship if she joins the applicant in Turkey.

Furthermore, the AAO finds that the totality of the record is sufficient to establish that the applicant's spouse would suffer extreme hardship if she were to remain in the United States without her husband. In light of the detailed psychological evaluation of the applicant's spouse, which describes her as "operating at the psychological level of an immature adolescent," and given the health problems of the applicant's mother-in-law, for whom his spouse is the primary care giver, the

AAO finds that the applicant's spouse would experience extreme hardship without the emotional support of her husband.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The favorable factors in this matter are the extreme hardship to the applicant's spouse and her U.S. citizen children and his lack of a criminal record. The unfavorable factors in this matter are the applicant's entry into the United States without inspection and his unlawful presence.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's flagrant breach of the immigration laws of the United States, the AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(a)(9)(B)(v) of the Act the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The waiver application is approved.