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

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 14 2013 Office: VIENNA, AUSTRIA File:

IN RE: Applicant:

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

ON BEHALF OF APPLICANT:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Vienna, Austria, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Poland who was found to be inadmissible to the United States under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude, and section 212(a)(6)(C) of the Act, 8 U.S.C. § 1182(a)(6)(C), for having attempted to procure a visa to the United States through willful misrepresentation of a material fact. He is seeking a waiver of inadmissibility in order to immigrate to the United States to live with his U.S. citizen wife.

The district director concluded the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and, accordingly, denied the Application for Waiver of Grounds of Inadmissibility (Form I-601). *Decision of District Director,* July 31, 2012.

On appeal, counsel for the applicant asserts that the district director erred in finding that the applicant is inadmissible. As to the applicant's conviction, counsel does not contest that it involved moral turpitude but contends that the petty offense exception applies. With regard to the applicant's attempt to obtain a visa through misrepresentation, counsel claims that the misrepresentation was not material. Furthermore, counsel states that the field office director erred in finding that the qualifying spouse would not suffer extreme hardship if the applicant's waiver application were denied. He explains that the qualifying spouse will suffer extreme hardship due to her medical and emotional conditions and her financial situation. Finally, counsel contends that the applicant merits a favorable exercise of discretion.

The record includes, but is not limited to: statements from the applicant, the qualifying spouse, and the qualifying spouse's friends; letters from the qualifying spouse's doctor and psychologist; medical records regarding the qualifying spouse; financial records; documentation relating to the qualifying spouse's education and employment; letters of recommendation and an employment offer letter for the applicant; and information about carpal tunnel syndrome and the healthcare system in Poland. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
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> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

> (ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if –
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> > (I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or
> >
> > (II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general . . . .
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> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so

applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708. If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to present any and all evidence bearing on an alien's conduct leading to the conviction. The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703 (citations omitted).

The record reflects that the applicant was convicted on December 23, 2003 under Article 286, Section 1 of the Polish Penal Code for switching price tags on items in a supermarket in order to pay less for the items. At the time of his conviction, Article 286, Section 1 of the Polish Penal Code provided:

> Whoever, with the purpose of gaining a material benefit, causes another person to disadvantageously dispose of his own or someone else's property by misleading him, or by taking advantage of a mistake or inability to adequately understand the action undertaken shall be subject to the penalty of deprivation of liberty for a term between six (6) months and eight (8) years.

Counsel correctly notes that "when a foreign conviction is the basis for a finding of inadmissibility, the conviction must be for conduct which is deemed criminal by United States standards. It is a necessary element that the act underlying the conviction be something forbidden by United States law." *Matter of Mcnaughton*, 16 I&N Dec. 569 (BIA 1978). However, counsel also offers that the conviction is comparable to second degree fraud in violation of D.C. Code § 22-3221(b), which states:

> A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.

Fraud has, as a general rule, been held to involve moral turpitude. The U.S. Supreme Court in *Jordan v. De George* concluded that, "Whatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases, the decided cases make it plain that crimes in which fraud was an ingredient have always been regarded as involving moral turpitude. . . . Fraud is the touchstone by which this case should be judged. The phrase 'crime involving moral turpitude' has without exception been construed to embrace fraudulent conduct." 341 U.S. 223, 232 (1951). In *Matter of Flores*, the Board stated that "where fraud is inherent in an offense, it is not necessary that the statute prohibiting it include the usual phraseology concerning fraud in order for it to involve moral turpitude." 17 I&N Dec. 225, 228 (BIA 1980); *see also Matter of Serna*, 20 I&N Dec. 579 (BIA 1992). In the instant case, though intent to defraud is not an explicit statutory element in Article 286, Section 1 of the Polish Penal Code, fraud is inherent in the offense because a conviction requires that the defendant have obtained property by intentionally misleading another or taking advantage of that person's mistake or inability to understand the situation. Therefore, the AAO finds that there is not a realistic probability that Article 286, Section 1 of the Polish Penal Code would be applied to conduct that does not involve moral turpitude. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 689 (A.G. 2008). By comparing the applicant's conviction to second degree fraud in violation of D.C. Code § 22-3221(b), counsel appears to concede that the statute under which the applicant was convicted involved fraud.

Furthermore, even if Article 286, Section 1 of the Polish Penal Code could be applied to conduct that does not involve moral turpitude, the record of conviction demonstrates that the applicant was convicted for fraudulent conduct. The judgment of the Polish court in which the applicant was convicted states that he was found guilty of "misleading a checker from the Castorama store about the actual value of the goods, obtaining under false pretences the goods . . . ." *See Judgment on Behalf of the Republic of Poland, District Court of Gorzów*, dated December 23, 2003. Therefore, the AAO finds that the applicant was convicted for a crime involving moral turpitude and that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Counsel for the applicant does not contest the finding that the conviction is a crime involving moral turpitude but alleges that the applicant is not inadmissible under section 212(a)(2)(A)(i)(I) of the Act because the petty offense exception applies. However, the petty offense exception only applies to convictions for which the maximum possible penalty did not exceed imprisonment for one year. Section 212(a)(2)(A)(ii) of the Act. The applicant was convicted under Article 286, Section 1 of the Polish Penal Code, which clearly states that the maximum penalty is imprisonment for eight years.

Citing *Matter of Scarpulla*, 15 I&N Dec. 139, 141 (BIA 1974), counsel avers that the applicant's eligibility for the petty offense exception should be based on the maximum penalty for the U.S. statute that is comparable to his foreign conviction, not on the punishment provided by the Polish statute under which he was actually convicted. Counsel therefore claims that because the applicant's conviction is similar to second degree fraud under D.C. Code § 22-3221(b), whether his conviction falls under the petty offense exception should be based on the sentence he would

have received if convicted under that statute. He further explains that a sentence under D.C. Code § 22-3221(b) depends on the value of the property obtained by fraud and that where the value was less than $250, the maximum term of imprisonment is 180 days. He asserts that while the value of the property the applicant obtained is not clear from the record, he was fined 500 *zloty*, or approximately $158, so he should be found to have obtained less than $250. However, the Board in *Matter of Scarpulla* stated that U.S. standards should be applied to determine whether a foreign conviction is a misdemeanor or a felony. 15 I&N Dec. at 141. The petty offense exception under section 212(a)(2)(A)(ii) of the Act does not depend on a crime's classification as a misdemeanor or a felony but on the maximum possible sentence allowed by the statute of conviction. In this case, the statute under which the applicant was convicted provides that the maximum possible sentence of imprisonment is eight years. Counsel has offered no persuasive authority for the contention that eligibility for the petty offense exception should be based on a source other than the actual statute of conviction, even for foreign convictions. Therefore, the AAO finds that the applicant's conviction does not fall within the petty offense exception and that he is inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant also contests the finding that he is inadmissible under section 212(a)(6)(C)(i) of the Act. Pursuant to section 291 of the Act, he bears the burden of demonstrating by a preponderance of the evidence that he is not inadmissible. *See also Matter of Arthur*, 16 I&N Dec. 558, 560 (BIA 1978). Where the evidence for and against admissibility "is of equal probative weight," the applicant cannot meet his burden of proof. *Matter of Rivero-Diaz*, 12 I&N Dec. 475, 476 (BIA 1967) (citing *Matter of M--*, 3 I&N Dec. 777, 781 (BIA 1949)).

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

> (i) 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.

To be considered material, a misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting, that is, having a natural tendency to affect, the official decision. *See Kungys v. United States*, 485 U.S. 759, 771-72 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964). The Board has held that a misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-49 (BIA 1960; AG 1961).

In the present case, the record reflects that during his visa interview with a consular officer, the applicant presented a falsified police clearance certificate which indicated that he had never been convicted of a crime. After the certificate was found to be fraudulent, he returned with a true copy of his conviction records. Counsel claims that the applicant's misrepresentation was not material because his conviction falls under the petty offense exception and does not render him inadmissible, so it would not have influenced the final decision on his visa application. However, as noted above, the AAO finds that the petty offense exception does not apply to the applicant's conviction. Therefore, the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for having attempted to procure a visa through willful misrepresentation of a material fact. The AAO will now consider the applicant's request for a waiver of inadmissibility.

Section 212(h) of the Act provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –
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> . . . .
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> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . . .

Section 212(i) of the Act provides:

> (1) 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.

A waiver under section 212(h) and 212(i) is dependent first upon a showing that the bar imposes an extreme hardship to a qualifying relative, who in this case is the applicant's U.S. citizen spouse. Hardship to the applicant himself will be considered only to the extent that it results in hardship to his spouse. If extreme hardship to a qualifying relative is established, the Secretary

then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* the Board of Immigration Appeals (Board) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful permanent resident or U.S. 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.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[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) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding

hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998) (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The qualifying spouse states that she is suffering extreme hardship in the applicant's absence and that she will continue to suffer such hardship if the waiver application is denied. She notes that she won the Diversity Visa Lottery and came to the United States on June 22, 2005 but that the applicant has been unable to join her here. She has therefore lived alone in the United States since that date. She states that she has been diagnosed with carpal tunnel syndrome, which causes pain and weakness in her hands and interferes with her ability to work and to carry out basic daily tasks such as cleaning her apartment or changing light bulbs. She asserts that she can lift very little weight, frequently drops things, and has trouble forming a grip. She notes that her job as a certified nursing assistant requires frequent lifting, pushing, and pulling, which aggravates her carpal tunnel syndrome. The qualifying spouse indicates that she needs surgery to treat her carpal tunnel syndrome and that she may become permanently disabled if she does not have surgery. However, she states that she cannot have surgery while the applicant is in Poland because she would need physical assistance and financial support during her rehabilitation, which could take many months.

Additionally, the qualifying spouse states that she is suffering financial hardship in the applicant's absence. She alleges that she struggles to support herself and to pay her mortgage and that she cannot afford necessary repairs on her apartment. She fears that she cannot afford to take time off for necessary surgery but that without surgery she will become unable to work due to her worsening carpal tunnel syndrome.

She also asserts that living alone in the United States has been very difficult for her emotionally. She states that she has been "completely alone with no close friends and relatives and with no one to help" her and that she misses the applicant. She claims that the difficulty of living alone combined with her stress and pain from carpal tunnel syndrome has led to depression, insomnia, and constant fatigue. Additionally, she fears that continued separation will affect the stability of her marriage.

The qualifying spouse also contends that she cannot relocate to Poland. She believes she would be unable to find work in Poland due to her age and she fears that she would become homeless. She states that she obtained training to become a certified nurse's aide in the United States but

would be unable to use her certification in Poland. She also notes that she has health insurance through her employer in the United States and would not have health insurance in Poland, so she fears that she would be unable to receive necessary medical treatment there.

A friend states that the qualifying spouse has worked hard in the United States and that carpal tunnel syndrome has made life difficult for her. *See Affidavit of Maryann Martin*, dated August 18, 2012. Another friend notes that the qualifying spouse has been "suffering not only physically but mentally from the separation from her husband for these seven years." *See Letter from Dr. Samuel and Lynn Berkowitz*, dated August 31, 2012.

Medical documentation in the record confirms that the qualifying spouse suffers from severe carpal tunnel syndrome. Her primary care physician writes that she needs surgery but that she will be unable to undergo such treatment "without the financial and emotional support" of the applicant. , dated August 25, 2012. The doctor further notes that without surgery, it is likely that the qualifying spouse's "condition will progress risking permanent disability and a situation where not only is she not able to use her hands but it is too late to have surgery, the situation having become irreversible." *Id.* The doctor concludes that "barring [the applicant] is clearly jeopardizing her safety." *Id.* The documentation also indicates that the qualifying spouse has consistently sought treatment for her carpal tunnel syndrome since 2006. Additionally, medical records state that the qualifying spouse has high blood pressure, "intermittent facial swelling," and depression with anorexia and insomnia. *See Medical Visit Notes, James Peterson, M.D.*, 2006-2012.

In a letter, the qualifying spouse's psychologist, Dr. states that the qualifying spouse is "a tired, stressful woman" who "reports significant pacing behaviors" as well as "poor concentration and tearfulness and a desire to 'give up, everything is black.'" dated March 21, 2012. also notes that "there has been a marked decompensation in this previously resilient and adaptive woman." *Id.*

Financial records confirm that the qualifying spouse earns between $340 and $490 per week, with an average income of approximately $1,600 per month. Her monthly expenses, including medical care, mortgage payments, utilities, and other necessities total approximately $1,700.

The AAO finds that the qualifying spouse will experience extreme hardship if she continues to be separated from the applicant. The record demonstrates that her carpal tunnel syndrome is a severe medical condition which causes her significant pain and negatively affects her ability to work and maintain her household. She requires surgery to correct her carpal tunnel syndrome and will likely become permanently disabled – losing the ability to use her hands – if she does not receive that surgery. However, without physical and financial support during her rehabilitation, the qualifying spouse may be unable to undergo surgery. Additionally, the record establishes that the qualifying spouse's average monthly income is barely sufficient to meet her basic financial responsibilities and that she sometimes struggles to pay her bills on time. The qualifying spouse has no relatives and few close friends in the United States, so she requires the

assistance and support of the applicant in this country in order to maintain her health, continue her work, complete household tasks, and support herself financially. Furthermore, documentation in the record shows that the qualifying spouse is suffering from depression which has caused anorexia and insomnia.

However, the AAO does not find that the qualifying spouse would suffer extreme hardship if she were to relocate to Poland to join the applicant. The qualifying spouse is originally from Poland. Though she has been residing in the United States for nearly eight years, the record does not show that she would unfamiliar with the language and culture of Poland. Nor does it show conclusively that she would be unable to use her work qualifications to acquire employment in Poland. She has not demonstrated that she could not receive the necessary treatment for carpal tunnel syndrome there.

We can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. A claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship from relocation, we cannot find that refusal of admission would result in extreme hardship to the qualifying relative(s) in this case. The AAO therefore finds that the applicant has not established extreme hardship to his U.S. citizen spouse as required under sections 212(h) and 212(i) of the Act.

Furthermore, we find that, even had extreme hardship been established, the applicant would not warrant a favorable exercise of discretion. In discretionary matters, the applicant bears the burden of proving eligibility in terms of equities in the United States which are not outweighed by adverse factors. *See Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957).

> 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).

Matter of Mendez, 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).

Positive factor in this case would include the hardship to the applicant's spouse, a job offer in the United States, and a letter of support from his church in Poland stating that he "lives an impeccably moral and decent life . . . ." *See* dated April 3, 2012.

The adverse factors are the applicant's conviction for a crime involving moral turpitude and his willful misrepresentation of a material fact. The applicant's conviction occurred in 2003 and in his statement he expresses regret for that "terrible, reprehensible and very bad thing." However, the record reflects that the applicant continues to deny responsibility for the fact that he willfully presented a falsified police clearance certificate to a consular officer in an effort to hide his criminal record. In his most recent Form I-601,[1] filed July 5, 2012, he states, "When applying for a visa, I submitted an original criminal record check that I obtained from the Polish government which stated that I had no criminal record. I thought this was fine because the government provided the document to me." However, the applicant is aware that the police clearance certificate has been known to be fraudulent since 2005. The AAO finds the applicant's continued refusal to accept responsibility for his willful misrepresentation of a material fact to be a serious negative factor which demonstrates a lack of good moral character. *See Matter of Mendez* at 301. Accordingly, the AAO finds that the applicant has failed to meet his burden of demonstrating that the adverse factors in this case outweigh the positive factors. *See Matter of T-S-Y-,* 7 I&N Dec. 582.

In proceedings for an application for a waiver of grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden and, accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

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[1] The applicant previously filed two other Form I-601 Applications for Waiver of Grounds of Inadmissibility. Those applications were denied on January 9, 2006 and February 6, 2012.