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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: PHILADELPHIA, PA Date: APR 2 1 2010

IN RE: [redacted]

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

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).

Michael Shumway

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting District Director, Philadelphia, Pennsylvania, 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 pursuant to 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 committed crimes involving moral turpitude; and section 212(a)(1)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(1)(A)(iii), as an alien classified as having a mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety or welfare of the alien or others. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director 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 Ground of Excludability (Form I-601) accordingly.

On appeal, counsel asserts that the applicant provides health insurance for his wife, who receives treatment for depression and has high blood pressure, heart issues, and artery problems. Counsel declares that obtaining private health insurance would be prohibitively expensive for the applicant's spouse because of her pre-existing conditions, and counsel states that the applicant's wife is self-employed and cannot obtain insurance through an employer. Counsel contends that the director failed to properly consider the psychological problems of the applicant's spouse, which are shown by [redacted] psychiatric evaluation; or the applicant's rehabilitation after his marriage. Counsel states that [redacted] conveys that for several years the applicant's spouse received treatment for depression. Counsel maintains that the applicant and his wife recently bought a house and the applicant is needed to renovate the house in order to make it habitable.

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.

The record reflects that on February 24, 1998, the applicant was convicted of petty theft in violation of California Penal Code § 484(a), and burglary in violation of Cal. Penal Code § 459-460(B). The judge suspended imposition of the sentence and placed the applicant on conditional probation for three years, and was ordered to make restitution. For the petty theft conviction, the applicant was also ordered to serve 145 days in jail. On February 20, 1998, the applicant was convicted of shoplifting in California, for which he was granted summary probation for 24 months and fined. In Florida, on June 5, 1995, the applicant pled nolo contendere and was convicted of shoplifting and ordered to pay a fine. On February 10, 1996, he was arrested for battery (count 1) and larceny/petty theft (count 2) in Florida, and he pled nolo contendere to battery and retail theft on November 6, 2000. The judge withheld adjudication of guilt and imposition of his sentence; the applicant was placed on probation for six months, and was ordered to make restitution and pay fines. On March 30, 1998, in Florida, the applicant was convicted of retail and farm theft or resisting arrest and petit theft, and was ordered to pay fines.

In *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009), the Ninth Circuit Court of Appeals held that petty theft under Cal. Penal Code § 484 constitutes a crime involving moral turpitude because the offense requires "the specific intent to deprive the victim of his property permanently." *Id.* at 1159-1161. The shoplifting offense which the applicant committed in California on February 20, 1998, and was convicted of, is a crime involving moral turpitude. *Id.* at 1159-1161. In view of the fact that the applicant was convicted of committing two crimes involving moral turpitude and because counsel does not dispute his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. we need not consider whether the applicant's other criminal convictions involve moral turpitude.

A waiver is available for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. 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) . . . 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 . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the 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 wife. The qualifying relative here is the applicant's naturalized citizen spouse and his stepchildren. If extreme hardship to the 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 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). 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 a qualifying relative 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.

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).

Extreme hardship to the applicant's spouse must be established in the event that she remains in the United States without the applicant, and alternatively, if she joins the applicant to live in the Poland. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

With regard to remaining in the United States without the applicant, the applicant's wife states in her affidavit dated March 10, 2006, that she has a close relationship with her husband. She indicates that her husband and sons renovated a house on that she and the applicant own, and the house they purchased on in Philadelphia needs renovations. She contends that she relies on her husband's health insurance. The letter by dated July 18, 2006, states that the applicant's wife has a history of kidney stones, acid reflux disease, atypical chest pain, hypertension, left ventricular hypertrophy, carotid atherosclerosis, colonic diverticulosis, and degenerative disease of the lumbar spine. stated that the applicant's spouse's health care is covered through the applicant's insurance. The psychiatric evaluation by dated March 2, 2006, stated that the applicant's wife asserts her life will be ruined if her husband is deported. conveyed that although the applicant's spouse was prescribed by her primary physician, the applicant's spouse indicated that has been ineffectual in treating her depression in recent months. diagnosed the applicant's wife with major depressive disorder. The letter by dated June 22, 2006, conveys that the applicant's wife received treatment for depression for the past few years, and he states that even though her condition recently improved, the possible removal of her husband would likely cause a relapse in her condition.

Family separation must be considered in determining hardship. *See, 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"). However, courts have found that family separation does not conclusively establish extreme hardship. In *Hassan v. INS,* 927 F.2d 465, 468 (9th Cir. 1991), the Ninth Circuit upheld the 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). *Perez v. INS,* 96 F.3d 390, 392 (9th Cir. 1996), states that "[e]xtreme hardship" is hardship that is "unusual or beyond that which would normally be expected" upon deportation and "[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).

The record reflects that the applicant's spouse is now 63 years old. She has health problems and has a history of treatment for depression. In light of the applicant's spouse's history of depression and statement that removal of the applicant will result in a relapse of her depression, we find that the emotional hardship of the applicant's spouse is "unusual or beyond that which would normally be expected" upon an applicant's removal or bar to admission to the United States.

With regard to joining the applicant to live in Poland, the applicant's wife states in her affidavit dated March 10, 2006, that her ties to the United States are her two sons and grandchildren and her involvement in her church and the Republican Party. She conveys that she has a sister living in Poland with whom she does not have a close relationship. The applicant's wife states that her status as a refugee from Poland will not be looked upon favorably, she and the applicant do not own a house in Poland, she will not be able to obtain employment on account of her age, and she will not be able to obtain health insurance. The applicant conveys in the affidavit dated March 10, 2006, that he is 57 years old and because of his age will not find employment in Poland as a mechanic. He states that he takes medication for a blood clot and routinely has blood tests for heart disease. He asserts that he cannot afford to purchase a house in Poland and that he has no family in Poland.

Although the applicant and her husband contend that they cannot afford to purchase a house in Poland, they have not demonstrated that their assets in the United States, such as the houses they own, are not sufficient to enable them to live in Poland; or presented any evidence to show an inability to afford health care in Poland. Furthermore, the applicant has presented no documentation to show that he will be unable to obtain employment as a mechanic or in other employment for which he qualifies. Although the applicant's spouse indicates that she will be separated from her sons and grandchildren and life in the United States if she lived in Poland, she has not fully demonstrated how her emotional hardship as a result of separation from her family and life in the United States is "unusual or beyond that which would normally be expected" upon an applicant's removal or bar to admission to the United States. We note that the applicant's spouse is a citizen of the United States, and she has provided no documentation in which to establish that she will be recognized as having held refugee status and will be treated unfavorably for that reason.

The hardship factors asserted in this case are the emotional hardship of separation from life and family members in the United States, and not being able to afford health insurance or a house, or being able to obtain employment in Poland. The AAO recognizes that the applicant's spouse will experience emotional hardship due to separation from her family members and life in the United States; however, she has not fully demonstrated that her emotional hardship is "unusual or beyond that which would normally be expected" upon an applicant's removal or bar to admission to the United States. Although the AAO acknowledges that the applicant is 61 years old, we find that he has not submitted any documentation in which to show that he will be unable to obtain employment in Poland. Furthermore, no documentation has been presented to establish that they will be unable to afford health care or housing in Poland. Thus, the applicant has not established that the combination of hardship factors demonstrate that his wife will experience extreme hardship if she joined him to live in Poland.

The applicant has shown that his wife will experience extreme hardship if she remained in the United States without him; however, he has not demonstrated that she will experience extreme hardship if she joined him to live in Poland. Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under sections 212(h) of the Act.

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.

The applicant was also found inadmissible under section 212(a)(1)(A)(iii) of the Act,

8 U.S.C. § 1182(a)(1)(A)(iii), as an alien classified as having a mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety or welfare of the alien or others. Section 212(a)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182 makes ineligible for admission to the United States any alien:

> (iii) who is determined (in accordance with regulations prescribed by the Secretary of Health and Human Services in consultation with the [Secretary of Homeland Security]—
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> > (I) to have a physical or mental disorder and behavior associated with the disorder that may pose, or has posed, a threat to the property, safety, or welfare of the alien or others, or
> >
> > (II) to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior....

A USCIS policy memorandum provides guidance for determining inadmissibility under INA § 212(a)(1). That memorandum states:

> DHS officers determine that a health-related ground of inadmissibility exists based on the findings of a civil surgeon's medical examination. . . . Where a civil surgeon's mental status evaluation diagnoses the presence of alcohol abuse or alcohol dependence, and there is evidence of harmful behavior associated with the disorder, a Class A medical condition is certified on Form I-693, Report of Medical Examination of Alien Seeking Adjustment of Status. DHS officers then determine that the alien is inadmissible, based on the Class A condition certified on the medical report. *Memorandum by William R. Yates, Associate Director for Operations, Page 2, January 16, 2004.*

In the present case, the applicant was examined by a civil surgeon on April 16, 1999. The civil surgeon did not certify the applicant as having a Class A condition. Because the applicant does not have a Class A condition, the director erred in finding him inadmissible under section 212(a)(1)(A) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under sections 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.