identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H5

FILE: Office: VIENNA, AUSTRIA DATE: NOV 29 2010

IN RE: Applicant:

APPLICATION: Application for Waiver of Grounds of Inadmissibility pursuant to sections 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Tario Syed for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The application was denied by the Officer in Charge, 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 pursuant to sections 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having attempted to procure admission into the United States by fraud or willful misrepresentation and having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States. The applicant is the fiancée of a United States citizen. She seeks a waiver of inadmissibility in order to reside in the United States with her U.S. citizen fiancée.

The Officer in Charge found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to her qualifying relative. The application was denied accordingly. *Decision of the Officer in Charge,* dated June 12, 2008.

On appeal, the applicant's spouse contends that United States Citizenship and Immigration Services (USCIS) failed to consider the extreme hardship he would encounter should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion.*

In support of these assertions the record includes, but is not limited to, a statement from the applicant's spouse; package receipts; money transfer receipts; a medical bill; training certificates; a statement from the employer of the applicant's spouse; a condominium purchase agreement; and a psychological evaluation for the applicant's spouse. The entire record was reviewed and considered in rendering a decision on the appeal.

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

> (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.

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.

The record reflects that on April 24, 2004 the applicant attempted to gain admission to the United States in Chicago, Illinois by presenting her passport and B1/B2 visa. *Form I-275, Withdrawal of Application for Admission/Consular Notification.* During secondary inspection, she stated that she gained admission to the United States on July 23, 2002 as a B-2 visitor for pleasure. *Id.* She was admitted for six months, until January 22, 2003. *Id.* She admitted she did not depart the United States until February 2, 2004. *Id.; Record of Sworn Statement*, dated April 24, 2004. She also admitted that she had a friend at LOT Polish airlines turn in her original Form I-94 on December 13, 2002 to the airline. *Id.* As such, the applicant had her friend misrepresent her date of departure on her behalf. The AAO notes that the submission of the Form I-94 (the misrepresentation made on behalf of the applicant) was not made before a government official, and was not made to procure a benefit under the Act. *See FAM 40.63, N4.3, Section 212(a)(6)(C)(i) of the Act.* Therefore, the submission of the Form I-94 would not render the applicant inadmissible under Section 212(a)(6)(C)(i) of the Act.

The Officer in Charge states that the applicant claimed on several occasions that she had already departed the United States in December 2002. *Decision of the Officer in Charge,* dated June 12, 2008. However, the applicant did not misrepresent her prior departure date in her April 24, 2004 sworn statement. The record does not include evidence that she misrepresented her departure date at any other time in a manner which would make her inadmissible under Section 212(a)(6)(C)(i) of the Act. As such, the applicant is not inadmissible under Section 212(a)(6)(C)(i) of the Act.

However, the applicant accrued unlawful presence from January 23, 2003, the date after her B-2 status expired, until she departed the United States on February 2, 2004. In applying for an immigrant visa, the applicant is seeking admission within ten years of her February 2, 2004 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year.

Section 212(a)(9)(B)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . 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 on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a

favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (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 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 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.* 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 deportation, 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. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *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.*

We observe that 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., In re 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).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-,* 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

If the applicant's fiancée joins the applicant in Poland, the applicant needs to establish that her fiancée will suffer extreme hardship. The applicant's fiancée was born in Poland. *Approved Form I-129F, Petition for Alien Fiancé(e).* The record does not address whether the applicant's fiancée has family members who reside in Poland. The record does not address how the applicant's fiancée would be affected if he resides in Poland. The record does not address whether the applicant's fiancée speaks Polish and how his language abilities, or lack thereof, would affect his adjustment to Poland. The record does not address employment opportunities for the applicant's fiancée in Poland, nor does the record document, through published country conditions reports, the economic situation in Poland and the cost of living. The record makes no mention of whether the applicant's fiancée suffers from any type of health condition, physical or mental,[1] that would require treatment in Poland and if so, whether he would be able to receive adequate care. When looking at the record before it, the AAO does not find that the applicant has demonstrated extreme hardship to her fiancée if he were to reside in Poland.

If the applicant's fiancée resides in the United States, the applicant needs to establish that her fiancée will suffer extreme hardship. As previously noted, the applicant's fiancée was born in Poland. *Approved Form I-129F, Petition for Alien Fiancé(e).* The applicant's fiancée notes that he spends much of his time in the house alone just doing something to keep him going. *Statement from the applicant's fiancée*, undated. A psychological evaluation for the applicant's fiancée based on several meetings diagnoses him as having Major Depressive Disorder and recommends that he be reunited with the applicant. *Psychological evaluation from Danuta McDaniel, MA, LCPC, CADC,* dated August 15, 2007. The applicant's fiancée was also prescribed the antidepressant Paxil for his difficulty socializing, sleeping, getting up and going to work. *Id.* The applicant's fiancée notes that he and the applicant want to have children and this is their last chance. *Statement from the applicant's fiancée*, undated. The applicant's fiancée also asserts that he is not doing well financially. *Id.* The record includes a medical bill for the applicant's fiancée, a condominium purchase agreement for $107,900.00, and money transfer receipts showing money sent to the applicant by her fiancée. *See medical bill, condominium purchase agreement, and money transfer receipts.* While the record does not include tax statements, earnings statements or W-2 Forms showing the annual earnings of the applicant's fiancée, the AAO acknowledges the documented expenses of the applicant's fiancée. When looking at the aforementioned factors, particularly the

---

[1] The AAO notes that while the record includes a psychological evaluation for the applicant's fiancée, this evaluation addresses the effect of a separation upon the applicant's fiancée and does not address whether the applicant's fiancée has a psychological condition that would require treatment in Poland. *See Psychological evaluation from Danuta McDaniel, MA, LCPC, CADC,* dated August 15, 2007.

psychological health conditions of the applicant's spouse as documented by a licensed healthcare professional and the financial expenses of the applicant's fiancée as documented in the record, the AAO finds that the applicant has demonstrated extreme hardship to her fiancée if he were to reside in the United States.

However, as the record has failed to establish the existence of extreme hardship to the applicant's qualifying relative caused by the applicant's inadmissibility to the United States if he relocates to Poland, the applicant is not eligible for a waiver of her inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act. Having found the applicant 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. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

The AAO notes that the Officer-in-Charge denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. *Matter of Martinez-Torres,* 10 I&N Dec. 776 (reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application. As the applicant is inadmissible under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act, no purpose would be served in granting the applicant's Form I-212.

ORDER: The appeal is dismissed.