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



U.S. Citizenship
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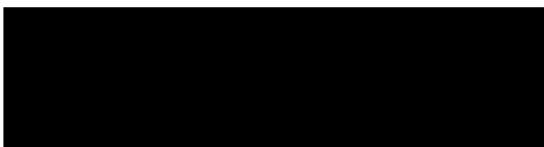
Date:

JAN 31 2011

IN RE: Applicant: 

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

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.

Thank you,

Perry Rhew

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and citizen of Poland who was found to be inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and child.

The Officer-in-Charge found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Officer-in-Charge*, dated September 29, 2008.

On appeal, counsel for the applicant asserts that the applicant has shown that his qualifying relative would experience extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, medical documentation for the applicant's child and spouse; employment letters for the applicant; tax statements; W-2 Forms for the applicant's spouse; a psychological evaluation for the applicant's spouse; statements from the applicant's spouse; a statement from a pastor; welfare statements; and a student loan statement. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(9)(B) of the Act provides, in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

....

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. - The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or

of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General [Secretary] that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

In the present case, the record indicates that the applicant entered the United States without inspection in November 2002. *Form I-213, Record of Deportable/Inadmissible Alien*. On January 10, 2007 immigration authorities encountered the applicant at the Port of Entry, Champlain, New York after having been denied admission into Canada. *Id.* The applicant was placed into proceedings and on May 2, 2007 an immigration judge granted voluntary departure to the applicant until August 30, 2007. *Order of the Immigration Judge*, dated May 2, 2007. On August 30, 2007 the applicant personally appeared at the United States Embassy in Warsaw, Poland and presented a boarding pass indicating he left the United States on August 28, 2007. *Form G-146*. The applicant, therefore, accrued unlawful presence from November 2002 until he departed the United States on August 28, 2007. In applying for an immigrant visa, the applicant is seeking admission within ten years of his August 28, 2007 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) (“[redacted] 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 spouse joins the applicant in Poland, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant’s spouse was born in the United States. *United States*

passport. Her parents reside in the United States and all of her siblings were born in the United States. *Form G-325A, Biographic Information sheet, for the applicant's spouse; Attorney's brief*. She is very close to her family and they are in regular contact. *Attorney's brief*. The applicant's spouse states she has spent her entire life in the United States, can hardly speak Polish, and cannot read or write in Polish. *Statement from the applicant's spouse*, dated November 10, 2008. She notes that her child was born with clubbed feet. *Id.*; *Medical records for the applicant's child*. A medical letter included in the record notes that the applicant's child has been under the same physician's care since March 2007. *Statement from [REDACTED] M.D.*, dated October 20, 2008. The applicant's child is being treated for bilateral club feet and internal tibia torsion, and she receives follow-up visits with her physician every two months. *Id.* While the AAO notes that the applicant's child is not a qualifying relative for the purposes of this case, it acknowledges the medical conditions of his child as documented by a licensed healthcare professional and notes the added difficulties placed upon the applicant's spouse in caring for a child with health problems in a foreign country, particularly when this child has been receiving consistent medical care in the United States and is in need of follow-up care. The applicant's spouse is under treatment for cervical intraepithelial neoplasia and is currently receiving the Gardasil vaccine. *Statement from [REDACTED] M.D.*, dated November 8, 2008. Her physician notes that it would not be in her best interest to leave the United States for follow-up care and treatment. *Id.* When looking at the aforementioned factors, particularly the applicant's spouse's lack of familial and cultural ties to Poland, her lack of language skills and its impact upon her adjustment to Poland, her documented medical conditions and need for follow-up care, as well as her child's documented medical conditions and their effect upon the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Poland.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. As previously noted, the applicant's spouse was born in the United States. *United States passport*. Her parents reside in the United States and all of her siblings were born in the United States. *Form G-325A, Biographic Information sheet, for the applicant's spouse; Attorney's brief*. The applicant's spouse notes that she is barely making it financially, noting she has student loans to pay off as well as medical bills. *Statement from the applicant's spouse*, dated November 10, 2008. Documentation included in the record show that the applicant's spouse has student loans in forbearance that were approved for temporary hardship. *Student loan statement*, dated October 5, 2010. Documentation in the record from licensed healthcare professionals also confirm that both the applicant's spouse and her child have been diagnosed with medical conditions and are in need of follow-up care. *Medical records for the applicant's spouse and child*. W-2 Forms for the applicant's spouse show her earnings to be \$1,723.75 in 2004 and \$2,110.99 in 2005. *W-2 Forms*. While there is nothing in the record to show that the applicant is unable to financially assist his spouse from Poland, the AAO acknowledges the documented financial obligations of the applicant's spouse and the added responsibilities of caring for a child with documented health conditions. The applicant's spouse notes that she is struggling being unemployed, and that she is unable to buy groceries, food, clothes or pay the rent. *Statement from the applicant's spouse*, dated October 28, 2010. The AAO notes that the record includes documentation showing that the applicant's spouse's application for food stamps has been approved. *Statement from Bergen County Board of Social Services*, dated September 30, 2010. Additionally, the applicant's spouse is pregnant with her second child due on January 15, 2011. *Statement from the applicant's spouse*, dated October 28, 2010; *Statement from [REDACTED] RN, [REDACTED] Action*

[REDACTED], dated October 28, 2010. The applicant's spouse states that being separated from the applicant is very hard for herself and her family, that she is not the same without the applicant, and that it is not fair for their child. *Statement from the applicant's spouse*, dated February 28, 2008. A psychological evaluation included in the record diagnoses the applicant's spouse as having Adjustment Disorder with Depressed Mood. *Psychological Evaluation from [REDACTED] Ph.D.*, dated March 5, 2008. Psychological testing results indicate clinically significant levels of depression and emotional reactivity, consistent with clinical presentation. *Id.* Based on the results of the psychological evaluation, the applicant's spouse has mild-moderate symptoms of depression reactive to current stressors, including the removal of the applicant from the United States, her daughter's medical needs and financial strain. *Id.* When looking at the aforementioned factors, particularly the documented financial difficulties of the applicant's spouse, the difficulties of being a single-parent of a child with documented health conditions while pregnant with a second child, as well as the emotional difficulties of being separated from the applicant and the documented psychological health conditions of the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to remain in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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).

The adverse factors in the present case are the applicant's November 2002 entry without inspection, his prior unlawful presence for which he now seeks a waiver, and his periods of unauthorized employment. The favorable and mitigating factors are his United States citizen spouse and child, the extreme hardship to his spouse if he were refused admission and his lack of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

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

ORDER: The appeal is sustained.