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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
and Immigration
Services**



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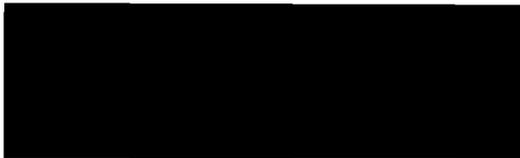
DATE: **JUN 13 2011** OFFICE: VIENNA, AUSTRIA

FILE: 

IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:



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,

A handwritten signature in black ink that reads "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The applicant is a native and a citizen of Poland who was found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(B)(i)(II) for having been unlawfully present in the United States for more than one year and seeking admission within ten years of her last departure. The applicant is the spouse and mother of U.S. citizens. She seeks a waiver under section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States.

The Field Office Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative and denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Field Office Director's Decision*, dated March 30, 2010.

On appeal, counsel asserts that the Field Office Director erred as a matter of fact and law. He contends that the Field Office Director did not properly consider all of the relevant hardships in the aggregate and that the decision misstates the facts of the applicant's case. *Form I-290B, Notice of Appeal or Motion*, received April 28, 2010.¹

The record of proceeding includes, but is not limited to, the following evidence: counsel's briefs; statements from the applicant, her spouse, her father-in-law, her aunt, cousins, friends and her former pastor; statements of support from friends and Chicago community organizations; psychological evaluations of the applicant, her spouse and her son; medical documentation relating to the applicant, her spouse and her father-in-law; articles on health care spending and employment income in Poland; and a certificate awarded to the applicant. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states 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

¹ On March 27, 2011, counsel requested that the Field Office Director consider the appeal as a motion to reconsider. The AAO notes that the Field Office Director did not take the action requested by counsel and has forwarded the Form I-290B to the AAO as an appeal.

admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

The record reflects that the applicant entered the United States on March 5, 1989 with a B-2 nonimmigrant visa, valid until September 4, 1989. When her visa expired, the applicant remained unlawfully in the United States. On April 13, 1995, an immigration judge granted the applicant voluntary departure until October 13, 1995, with an alternate order of removal. The applicant did not depart the United States in compliance with the grant of voluntary departure, thereby converting it into an order of removal. As a result of motions filed by the applicant, the Board of Immigration Appeals (BIA) twice, on May 6, 2002 and June 9, 2004, vacated the applicant's order of removal. On May 16, 2005, an immigration judge again ordered the applicant removed, resulting in the applicant's departure from the United States on June 8, 2007.

Based on the applicant's history, the AAO finds that she accrued unlawful presence beginning April 1, 1997, the effective date of the unlawful presence provisions under the Act, until June 8, 2007, the date of her removal from the United States. Therefore, she accrued unlawful presence in excess of one year. As the applicant is seeking admission within ten years of her 2007 departure, she is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act and must seek a section 212(a)(9)(B)(v) waiver.²

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 her children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and United States Citizenship and Immigration Services (USCIS) then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

² The applicant also filed a Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal, in connection with her inadmissibility under section 212(a)(9)(A)(i) of the Act. Although the Form I-212 was initially denied by the Field Office Director on March 30, 2010, the record indicates that it was reopened and approved as of April 13, 2011.

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 BIA 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 BIA 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 BIA 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 BIA 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*, 138 F.3d at 1293 (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 AAO now turns to the question of whether the applicant in the present case has established that a qualifying relative would experience extreme hardship as a result of her inadmissibility.

On appeal, counsel contends that if the applicant's spouse returned to Poland, he would find it difficult to find employment after so many years in the United States and that having to leave behind all that he has worked so hard for would be psychologically, emotionally and financially devastating for the applicant's spouse.

In statements, dated October 31, 2009 and March 25, 2011, the applicant's spouse asserts that his lawful permanent resident father is suffering from prostate cancer and is undergoing chemotherapy. The applicant's spouse contends that his father needs his emotional, physical and financial support so that he can focus on the aggressive cancer facing him. If he relocates, the applicant's spouse states, his father will suffer, which will result in his own suffering. The applicant's spouse also contends that it will be difficult for him to obtain suitable employment in Poland as he does not have any formal education beyond high school and is over 40 years of age. He further states that his ten-year-old son, who is living with the applicant in Poland, needs to attend school in the United States, that he will not receive the same quality of education in Poland and that he is already forgetting his English.

In support of the above claims, the record contains a September 8, 2009 evaluation of the applicant's spouse's mental health by licensed professional counselor [REDACTED], who states that she interviewed the applicant's spouse at the request of his psychiatrist, [REDACTED] who has been treating him for depression and anxiety. In her report, [REDACTED] observes that the applicant's spouse's stress and anxiety are, in part, the result of his belief that he will not be able to survive and provide for his family if he relocates to Poland. She notes that on a visit to Poland in June 2009, the applicant's spouse experienced his first panic attack, brought on by the possibility of moving back to Poland. [REDACTED] also indicates that the applicant's spouse's concern that he would be unable to assist his father financially from Poland contributes to his anxiety and depression. In a separate August 8, 2009 statement, [REDACTED] observes that the idea of moving to Poland "would expose [the applicant's spouse] to further deterioration." He reports that the applicant's spouse's mental state appears resistant to medication and psychotherapy and that he is now treating him with Transcranial Magnetic Stimulation, which is available only in a few locations in the United States.

Documenting the health of the applicant's spouse's father are April 21, 2009 and August 8, 2009 statements from [REDACTED] who reports that he has been treating the applicant's spouse's father since August 12, 2008 and that he suffers from high blood pressure, peptic ulcer disease, thrombophlebitis of the lower extremities, pulmonary emboli and metastatic prostate cancer.

states that the applicant's spouse's father does not have the financial resources to cover the costs of the treatment for his cancer and that he relies almost totally on the applicant's spouse for financial help.

Also included in the record is a statement, dated May 20, 2008, written by Polish psychologist that reports both the applicant's spouse and son are experiencing emotional disturbances in Poland. In particular, the psychologist notes that the applicant's son has found it difficult to assimilate to conditions in Poland and that he has felt ostracized by Polish society, a feeling that is counterproductive to his development. The opinion states that continuing the applicant's son's stay in Poland will have a negative effect on his emotional and social development.

To establish conditions in Poland, the applicant has submitted a 2007 report on health spending in Poland from the Organization for Economic Cooperation and Development (OECD), which indicates that Poland ranks below the OECD average in terms of health spending per capita, and that only Mexico and Turkey had lower per capita spending. Also provided as evidence of country conditions in Poland is an online report on world salaries from worldsalaries.org indicates that the average income in Poland for 2003 was \$8,280.

Having reviewed the preceding evidence, the AAO finds it to establish that the applicant's spouse would experience extreme hardship if he relocated to Poland. In reaching this conclusion, we have noted that the applicant's spouse would lose his U.S. business upon relocation and that he has expressed concerns about his ability to obtain new employment in Poland. Although the record does not contain sufficient evidence to demonstrate that the applicant and her spouse would be unable to obtain acceptable employment in Poland, it does demonstrate the impact that the applicant's spouse's concerns about his ability to support his family in Poland and his father in the United States have had on his emotional/mental health. We further note the statement made by concerning the deterioration in the applicant's spouse's mental health that would result from relocation to Poland and that the treatment he is currently using to address the applicant's spouse's resistant depression is not available outside the United States.

The AAO has also considered the report from the Polish psychologist that indicates the applicant's spouse's son is not doing well emotionally or developmentally in Poland and the impact that such problems would present for his father upon relocation. We further acknowledge the applicant's spouse's desire to remain near a father who has been diagnosed with metastatic prostate cancer and the emotional suffering that would be created by separation. Although the record does not indicate whether other family members are available to assist the applicant's spouse's father in dealing with his health problems, it does demonstrate that he is financially dependent on the applicant's spouse to meet the costs of his cancer treatment. Having considered the specific hardships documented in the record and the disruptions and difficulties that normally result from relocation in the aggregate, we find the record to demonstrate that the applicant's spouse would suffer extreme hardship if he joined the applicant in Poland.

The AAO also finds the record to establish that the applicant's spouse would experience extreme hardship if the waiver application is denied and he remains in the United States. On appeal, counsel states that the applicant's spouse has suffered emotionally and financially as a result of his separation from the applicant and his son. Counsel asserts that the applicant's spouse is suffering from depression and cardiac problems, and that he is caring for his father who has been diagnosed with cancer.

On appeal, the applicant submits a March 25, 2011 affidavit from her spouse in which he states that the years following her 2007 removal have been a nightmare for him and that his health has deteriorated. He asserts that he has battled depression and has had thoughts of suicide. He also asserts that he has suffered a stroke and has developed ulcers, and has trouble sleeping. In addition, the applicant's spouse reports that, on Thanksgiving 2010, he was forced to sell his house in a "short sale" and that having to sell his home at a loss was one of the worst days of his life. The applicant's spouse also states that in the applicant's absence his cleaning business has suffered greatly as he is not as skillful at handling the business' paperwork.

To demonstrate the emotional hardship experienced by the applicant's spouse's as a result of his separation from the applicant, the record offers numerous statements from the physicians and mental health professionals who have treated him or who are treating him. In an August 3, 2009 statement, [REDACTED] reports that the applicant's spouse is suffering from depression and severe anxiety as a result of his personal problems. [REDACTED] states that in addition to the applicant's spouse's psychological problems, he has multiple physical medical problems for which he is being treated.

The September 8, 2009 evaluation of the applicant's spouse undertaken by licensed professional counselor Katarzyna Fergemann at the request of [REDACTED] states that since his separation from the applicant, the applicant's spouse has been consistently depressed and stressed, his attention span has been compromised and he has developed numerous physical ailments. [REDACTED] states that while a strong sedative has slightly improved his ability to sleep, he remains extremely nervous, impulsive and preoccupied with bringing the applicant and his son back to the United States. [REDACTED] indicates that she administered the Holmes-Rahe Social Adjustment Rating Scale to the applicant's spouse whose score indicated that he had an 80 percent chance of developing a medical or mental illness during the following two-year period. She further notes that the applicant's spouse's mental health treatment includes psychotropic medications prescribed by [REDACTED] as well as the use of Transcranial Magnetic Stimulation for his medically-resistant depression. [REDACTED] Fergemann states that she believes the applicant's spouse would benefit from intensive psychotherapy.

Further documentation of the applicant's spouse's mental health is found in June 2, 2008, April 2, 2009 and August 28, 2009 medical statements from [REDACTED], a licensed clinical social worker. [REDACTED] states that the applicant's spouse has been seeing her regarding the impact that the applicant's departure has had on him. She indicates that, since the applicant's and his son's departure, the applicant's spouse has been consumed with symptoms of depression, and that he

experiences difficulty sleeping and eating, which has resulted in substantial weight loss and that his level of functioning has been significantly impaired. [REDACTED] also reports that the applicant's spouse is on medication for physical problems that are directly related to his separation from the applicant.

Three statements from psychiatrist [REDACTED] dated May 20, 2008, May 4, 2009 and August 8, 2009, indicate that he has been treating the applicant's spouse for depression and anxiety since May 2007. [REDACTED] reports that with the removal of the applicant on June 8, 2007, the applicant's spouse's mental health problems escalated, which included increasing anxiety attacks, and depressive symptoms like lack of energy and appetite, feelings of hopelessness and helplessness, decreased interest in any activity, impaired concentration and low stress tolerance, and neglect of his work and daily chores. [REDACTED] indicates that while sedatives have improved the applicant's spouse's sleep, he does not appear to be returning to a normal level of functioning as a result of medication and psychotherapy. [REDACTED] reports that the applicant's spouse is now being treated with Transcranial Magnetic Stimulation that is available only in a few centers in the United States, including the Mayo Clinic, The Johns Hopkins Medical Center, Harvard University Hospital, The University of Michigan Medical Center and in several private psychiatric practices, including his own.

Statements from friends and associates of the applicant's spouse also attest to the applicant's spouse's emotional hardship in the absence of the applicant and his son. A June 9, 2009 statement from [REDACTED] states that he and other Coalition members have come to know the applicant's spouse through his involvement in Coalition activities and that they have witnessed his "agony" as a result of the applicant's removal and that his ordeal is having grave consequences for his health, well-being and his continued involvement in the community. A May 23, 2008 statement from [REDACTED] the applicant's spouse's pastor, states that the applicant's spouse's "character and essence" are diminishing as a result of his separation from the applicant and his son, and that he is "suffering greatly."

More recent statements in the record continue to report on the applicant's spouse's emotional hardship, as well as his declining financial situation. A February 22, 2011 statement from [REDACTED] states that she has come to know the applicant's spouse through his efforts on behalf of her organization and that the toll of separation on the applicant's spouse over the past four years has been detrimental to his health and well-being. She states that the applicant's spouse has accumulated over \$90,000 in legal fees and travel expenses to bring the applicant back to the United States, while at the same time he has lost 60 percent of his business as a result of the economic downturn. She notes that the applicant's spouse has lost his home as a result of the expenses resulting from the applicant's immigration problems. She also notes that the emotional distress of worrying about his son and the frustration of separation has resulted in the applicant's spouse suffering a minor heart attack, and that he also suffers from depression and an ulcer. Representatives of other Chicago organizations with which the applicant's spouse is active also report these same observation, including [REDACTED]

While the record does not contain any documentation that establishes the applicant's spouse's financial situation at the time the appeal was filed, the AAO finds that it contains sufficient evidence to establish that the applicant's spouse is experiencing extreme hardship as a result of his separation from the applicant. The numerous statements from the medical professionals treating the applicant's spouse offer proof that his mental and/or emotional health has been seriously compromised by his separation from his wife and son, and that there has been no improvement since he initially began receiving treatment in 2007. We have also taken note of the statements from the individuals who have worked with or known the applicant's spouse during this period and who have observed the changes in him as a result the applicant's removal. As result, when the applicant's current mental health problems and the emotional hardship resulting from the cancer diagnosis given the applicant's spouse's father are added to the difficulties and disruptions normally created by the removal or exclusion of a family member, the AAO concludes that the applicant's spouse would experience extreme hardship if he continues to reside in the United States without the applicant.

In that the applicant has established that the bar to her admission would result in extreme hardship to a qualifying relative, the AAO now turns to a consideration of whether the applicant merits a waiver of inadmissibility as a matter 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).

See Matter of Mendez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance 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).

The adverse factors in the present case are the applicant’s unlawful presence in the United States for which she now seeks a waiver; her failure to comply with the order of voluntary departure granted her on April 13, 1995 or subsequent removal orders; and her periods of unauthorized employment in the United States. The mitigating factors include the applicant’s U.S. citizen spouse and child; the extreme hardship to her spouse if the waiver application is denied; her father-in-law’s health; the absence of a criminal record; her payment of taxes; and the numerous statements of support from family, friends and members of the Chicago community testifying to the positive role she has played in their lives and in support of community and church activities.

The AAO finds the immigration violation committed by the applicant to be serious in nature and does not condone it. Nevertheless, we conclude that taken together, the mitigating 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)(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. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal will be sustained.