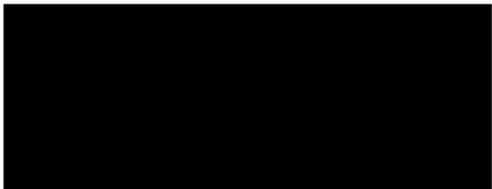


U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

H6



DATE: Office: VIENNA, AUSTRIA File: [REDACTED]

IN RE: **DEC 13 2012** Applicant: [REDACTED]

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

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.

Thank you,

A large, stylized handwritten signature in black ink, appearing to be "Ron Rosenberg".

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, 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. She was found to be inadmissible to the United States pursuant to 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 one year or more and seeking admission within 10 years of her last departure. She is married to a United States citizen. She seeks a waiver of inadmissibility pursuant to section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v).

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, her U.S. citizen spouse, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on November 8, 2011.

On appeal, the applicant's spouse states that additional evidence being submitted will establish that he suffers medical and emotional problems. *Form I-290B*, received on December 13, 2011.

The record includes, but is not limited to, a psychological evaluation of the applicant's spouse by the Twardon Group, dated December 2, 2011; two statements of medical conditions by [REDACTED] concerning the applicant's spouse, dated May 18, 2010, and November 30, 2011; copies of medical records pertaining to an angiogram and other procedures the applicant's spouse has undergone; a psychological evaluation of the applicant's spouse by [REDACTED] undated; and statements of moral character by friends and associates of the applicant and her spouse. The entire record was reviewed and all relevant evidence considered in rendering this decision.

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

(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 indicates that the applicant entered the United States with as a B-2 visitor for pleasure in March 2003, remaining beyond her authorized period of stay until November 2005. As such, the applicant was unlawfully present in the United States for over one year from the date her status expired in 2002, until November 2005, and is now seeking admission within 10 years of her last

departure from the United States. Accordingly, the applicant is inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act. The applicant does not contest this finding.

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 an applicant or any 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-Morales*, 21 I&N Dec. 296, 301 (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 removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec.

880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that “[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists.” *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator “must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 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 applicant’s spouse has submitted a statement asserting he would be unable to relocate to Poland because of the physical hardships it would impose on him. *Statement of the Applicant’s Spouse* dated May 26, 2011. He explains that he suffers from several medical conditions, including diabetes, spinal stenosis, coronary artery disease and depression, and that his body is no longer able to handle the nine-hour trips it takes to get back to Poland. He further states that he would not have medical insurance in Poland. He explains that he has recently endured a heart surgery, and that he and the applicant are both at retirement age and need each other for physical support.

An examination of the record reveals substantial evidence corroborating the applicant’s spouse’s assertions of having serious medical conditions. In a statement dated November 30, 2011, [REDACTED] states that the applicant’s spouse suffers from diabetes, coronary artery disease, spinal stenosis, hypertension and osteoporosis, and explains that he currently takes Testim, Toprol-XL, Plavix, Benicar, Tylenol, Mobic, Xanax, Lipitor and Lexapro to control his conditions. Based on this evidence the AAO can determine that the applicant’s spouse is suffering from numerous serious medical conditions. Disrupting his continuity of care with the American doctors and specialists who are familiar with his history would constitute uncommon and significant hardship on

the applicant's spouse. In addition, due to the number of medications the applicant's spouse takes, the AAO finds that it would constitute an uncommon financial burden to relocate to Poland where he would possibly not have medical insurance and would have to find a means to obtain his medications.

When all hardships are considered in the aggregate, they are sufficient to establish that the applicant's spouse would experience extreme hardship upon relocation.

With regard to hardship upon separation, the applicant's spouse has noted that he suffers from anxiety and depression, and that he needs the applicant in the United States to assist him physically. *Statement of the Applicant's Spouse*, May 26, 2011.

As discussed above, the applicant's spouse suffers from several serious medical conditions. Based on the evidence in the record, the AAO can discern that not having a family member present to assist him would result in uncommon physical hardship.

The record contains two psychological examinations of the applicant's spouse. In a statement dated December 2, 2011, [REDACTED] discusses the applicant's spouse's personal background and concludes that he suffers from Major Depressive Disorder, Generalized Anxiety Disorder, Panic Disorder with Agoraphobia and Dependent Personality Disorder. Based on this report, and a previous psychological assessment of the applicant's spouse, the AAO finds that he is experiencing significant emotional consequences due to separation from the applicant.

When the AAO considers these impacts in the aggregate with the common impacts of separation it finds that, together, they rise above the common impacts to a degree of extreme hardship. As the AAO has found that a qualifying relative will experience extreme hardship upon relocation and separation, it may now determine whether the applicant warrants a waiver 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).

In evaluating whether section 212(h)(1)(B) 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-Morales, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300 (Citations omitted).

The AAO finds that the unfavorable factors in this case include the applicant's unlawful presence. The favorable factors in this case include the presence of the applicant's spouse, the extreme hardship her spouse would experience due to her inadmissibility and the lack of any criminal record during her residence in the United States. Although the applicant's unlawful presence is a serious matter, the favorable factors in this case outweigh the negative factors, therefore favorable discretion will be exercised. The director's decision will be withdrawn and the appeal will be sustained.

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 rests 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.