



U.S. Department of Justice

Immigration and Naturalization Service

AI

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



PUBLIC COPY

JAN 31 2007

File:  Office: NEWARK, N.J. Date:

IN RE: Applicant: FRANK TOM

Application: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Immigration and Nationality Act, 8 U.S.C. 1182(i)

IN BEHALF OF APPLICANT:



Identification data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

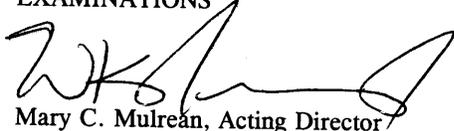
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The application was denied by the District Director, Newark, New Jersey, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected.

The applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States under § 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having sought to procure a benefit by fraud or willful misrepresentation when applying for asylum in 1994. The applicant married a United States citizen in August 1997 and a petition for alien relative was filed in his behalf in August 1999. The applicant seeks the above waiver in order to remain in the United States and reside with his spouse.

The district director denied the application for failure of the applicant to show that exceptional hardship would be imposed on a qualifying relative and because the applicant's historic disregard for the truth did not warrant a favorable exercise of discretion to grant his request.

On appeal, counsel argues that the district director used the wrong standard of proof in reviewing the case for "exceptional" rather than "extreme" hardship and failed to properly weigh all of the positive factors in denying a favorable exercise of discretion. Counsel also states that the district director's finding that the applicant's spouse would suffer "the usual" hardship is against the weight of the evidence submitted.

Section 212(a) CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

(C) MISREPRESENTATION.-

(i) IN GENERAL.-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(i) ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

A review of the record reflects that the applicant was ordered excluded and deported from the United States by an immigration judge on March 6, 2000.

Section 212(a)(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under § 235(b)(1) [1225] or at the end of proceedings under § 240 [1229a] initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible...

(iii) EXCEPTION.-Clause (i)...shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

The Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was recodified as § 212(a)(9)(A)(i) and (ii). According to the reasoning in Matter of Soriano, 21 I&N Dec. 516 (BIA 1996, A.G. 1997), the provisions of any legislation modifying the Act must normally be applied to waiver applications adjudicated on or after the enactment date of that legislation, unless other instructions are provided. IIRIRA became effective on September 30, 1996.

Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

The present record does not contain evidence that the applicant has remained outside the United States for five consecutive years since the date of deportation or removal as required by 8 C.F.R. 212.2(a), or that he was granted permission to reapply for admission to the United States.

Therefore, since there is no evidence that the Form I-212 application has been adjudicated first and approved in this instance, the appeal of the district director's decision denying the Form I-601 application will be rejected, and the record remanded so that the district director may adjudicate the Form I-212 application first, or provide evidence for the record that a decision has already been made on the Form I-212.

If the district director approves the Form I-212 application or provides evidence that such application has been approved, she shall certify the record of proceeding to the Associate Commissioner for review and consideration of the appeal regarding the Form I-601 application. However, if she denies the Form I-212 application or provides evidence that such application has been denied, she shall certify that decision to the Associate Commissioner for review, reject the Form I-601 application, and refund the fee.

ORDER: The appeal is rejected. The district director's decision is withdrawn and the matter is remanded for further action consistent with the foregoing discussion.