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U.S. Citizenship and Immigration Services

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APR 28 2005

[redacted]

FILE: [redacted] Office: BALTIMORE, MD Date:

IN RE: Applicant: [redacted]

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

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. The applicant appealed the district director's decision to the Administrative Appeals Office (AAO). The matter was subsequently remanded to the district director for information relating to the rescission of the applicant's lawful permanent resident status. The matter is again before the AAO. The appeal will be dismissed and the application declared moot because the applicant is presently a U.S. lawful permanent resident.

The record reflects that the applicant is a native and citizen of Nigeria who was found to be inadmissible under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation. The applicant is married to a U.S. citizen and he seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to remain in the United States and to adjust his immigration status to that of a lawful permanent resident.

In order to overcome an Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, CIS) finding that his Nigerian divorce decree was fraudulent and that his marriage to a U.S. citizen was void, the applicant obtained a new divorce from his first wife (Florence Akinsipe) on November 26, 1997, pursuant to a valid U.S. court proceeding. The applicant then remarried his wife, Donna Akinsipe in the U.S. on January 14, 1998. The record reflects that in March 1998, the applicant filed a second Form I-485, Application to Register Permanent Resident or Adjust Status (I-485 application) in order to adjust his status to that of a lawful permanent resident. The applicant was notified of the Service's intent to deny the second I-485 application due to inadmissibility under section 212(a)(6)(c)(i) of the Act, for willful misrepresentation of a material fact relating to his first marriage and divorce, and the applicant filed a Form I-601, Application for Waiver of Grounds of Excludability (I-601 application) in July 1999. The district director determined that the applicant had failed to establish his wife would suffer extreme hardship if the applicant were removed from the United States, and the I-601 application was denied on October 14, 1999. The applicant appealed the district director's decision to the AAO on November 1, 1999.

On appeal, the applicant asserts his wife will suffer emotional, financial, and psychological hardship in the United States, or in the alternative in Nigeria, if he is removed from the United States. The applicant asserts further that he did not misrepresent any material facts to the Immigration and Naturalization Service (Service, now Citizenship and Immigration Services) and that he was unaware that his original Nigerian divorce decree was fraudulent.

The record reflects that the applicant was admitted into the U.S. as a non-immigrant visitor on December 20, 1986. He married a U.S. citizen, [redacted] on November 10, 1988. The applicant filed an I-485 application on September 13, 1989, and his immigration status was adjusted to that of a conditional lawful permanent resident on October 31, 1990. The condition was subsequently removed and the applicant became a lawful permanent resident on September 8, 1992. However, pursuant to a December 1992, investigation in Nigeria, the Service determined that the applicant's marriage to [redacted] was void because the Nigerian divorce decree for the applicant's prior marriage to [redacted] was determined to be fraudulent. The Service subsequently issued a Notice of Intent to Rescind the applicant's lawful permanent resident status on December 18, 1992.

In a letter dated June 23, 1993, the Service acknowledged the applicant's January 19, 1993 response to the Notice of Intent to Rescind his lawful permanent resident status. The Service additionally wrote that the applicant's case had been forwarded to the immigration court for implementation of rescission proceedings,

and the Service wrote that the applicant would be notified once an immigration court hearing date was scheduled. The record contains no evidence to establish that immigration court rescission proceedings were commenced or carried out against the applicant. The AAO additionally notes that Executive Office of Immigration Review (EOIR) and centralized Immigration Service database records contain no evidence to indicate that the applicant was placed into immigration court rescission proceedings or that his lawful permanent resident status was rescinded.

Section 246(a) of the Act, 8 U.S.C. § 1256(a) states:

> (a) If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or section 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General [now Secretary, Homeland Security, Secretary] that the person was not in fact eligible for such adjustment of status, the Attorney General [Secretary] shall rescind the action taken granting an adjustment of status to such person and canceling removal in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. Nothing in this subsection shall require the Attorney General [Secretary] to rescind the alien's status prior to commencement of procedures to remove the alien under section 240, and an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status.

8 C.F.R. § 246 states in pertinent part:

> (1) Notice. If it appears to a district director that a person residing in his or her district was not in fact eligible for the adjustment of status made in his or her case . . . a proceeding shall be commenced by the personal service upon such person of a notice of intent to rescind, which shall inform him or her of the allegations upon which it is intended to rescind the adjustment of his or her status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he or she may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he or she may, within such period, request a hearing before an immigration judge in support of, or in lieu of, his or her written answer. The respondent shall further be informed that he or she may have the assistance of or be represented by counsel or representative of his or her choice qualified under part 292 of this chapter, at no expense to the Government, in the preparation of his or her answer or in connection with his or her hearing, and that he or she may present such evidence in his or her behalf as may be relevant to the rescission.
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> (2) Allegations admitted; no answer filed; no hearing requested. If the answer admits the allegations in the notice, or if no answer is filed within the thirty-day period, or if no hearing is requested within such period, the district director . . . shall rescind the adjustment of status previously granted, and no appeal shall lie from his decision.

> (3) Allegations contested or denied; hearing requested. If, within the prescribed time following service of the notice pursuant to § 246.1, the respondent has filed an answer which contests or denies any allegation in the notice, or a hearing is requested, a hearing pursuant to § 246.5 shall be conducted by an immigration judge, and the requirements contained in §§ 240.3, 240.4, 240.5, 240.6, 240.7, and 240.9 of this chapter shall be followed.
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> (4) Immigration judge's authority; withdrawal and substitution. In any proceeding conducted under this part, the immigration judge shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence, to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case.

The AAO finds that the provisions contained in 8 C.F.R. § 246(2) allowing the district director to rescind previously granted adjustment of status without an immigration court hearing, do not apply to the present case. The record establishes that the applicant responded in a timely manner, as set forth in 8 C.F.R. § 246(3), to the Service's December 18, 1992, Notice of Intent to Rescind his lawful permanent residence status. The evidence reflects further that on June 23, 1993, the Service acknowledged the applicant's timely request for an immigration court hearing in the matter. The record additionally reflects that pursuant to 8 C.F.R. § 246(3) and (4), the applicant's case was to be forwarded to the Immigration Court for commencement of rescission proceedings in June 1993. The applicant is therefore entitled to an immigration court hearing to establish whether his lawful permanent resident status will be rescinded.

The AAO found no evidence in the present record, nor in the EOIR or centralized Immigration Service computer databases, to establish that immigration court rescission proceedings were commenced against the applicant or that the lawful permanent resident status granted to the applicant in 1992, was rescinded in accordance with section 246 of the Act. Accordingly, the AAO finds that the applicant's lawful permanent resident status (granted in 1992) was not rescinded. The AAO finds further that, because the applicant is already a lawful permanent resident, his I-601 Waiver of Inadmissibility application (relating to a second, March 1998, I-485, Adjustment of Status application filed by the applicant) is moot.

ORDER: The appeal is dismissed and the application declared moot.