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FILE:



Office: PHILADELPHIA, PA

Date: JUL 27 2009

IN RE:



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:



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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained.

The applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States 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 attempted to procure admission into the United States by fraud or willful misrepresentation. The applicant is married to a naturalized United States citizen and has a United States citizen child. She seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), in order to reside in the United States with her spouse and their child.

The District Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Excludability (Form I-601) accordingly. *Decision of the District Director*, dated July 7, 2005.

On appeal, counsel asserts that the medical condition of the applicant's child should be considered in determining extreme hardship to the applicant's spouse. *Form I-290B, Notice of Appeal to the Administrative Appeals Office and attached attorney's brief*.

In support of the waiver, counsel submits a brief and a statement. The record also includes, but is not limited to, medical statements and evaluations regarding the applicant's child; a statement from the applicant's child's school; a property deed; tax returns for the applicant and her spouse; W-2 Forms for the applicant and her spouse; a statement from the County of Delaware Department of Human Services; employment letters for the applicant and her spouse; statements from the applicant's spouse; a statement from the applicant; medical records for the applicant; health insurance cards; earnings statements for the applicant's spouse; a mortgage interest statement; a car title; homeowner's insurance statement; car insurance statement; credit union statements; water bills; and energy bills. The entire record was reviewed and considered in rendering this decision.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) 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) of the Act provides that:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], 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 [Secretary] 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.

The record reflects that the applicant was admitted to the United States on November 10, 1993 using false documents. *Form I-485, Application to Register Permanent Residence or Adjust Status; Form I-601, Application for Waiver of Ground of Excludability; Form I-94, Departure Card*. Based on her presentation of a fraudulent document at the port of entry, the applicant is inadmissible under Section 212(a)(6)(C)(i) of the Immigration and Nationality Act.

A section 212(i) waiver of the bar to admission resulting from violation of section 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or her child would experience if the applicant's waiver request is denied is not directly relevant to the determination as to whether the applicant is eligible for a waiver under section 212(i). The only relevant hardship in the present case is the hardship suffered by the applicant's spouse if the applicant is removed. If extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560, 565-566 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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.

The AAO notes that extreme hardship to the applicant's spouse must be established whether he resides in Nigeria or the United States, as he is not required to reside outside of the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse returns with the applicant to Nigeria, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of Nigeria. *Naturalization certificate*. Although the record does not address how long the applicant's spouse has resided in the United States, the AAO notes that he naturalized on April 17, 2002. *Id.* The parents of the applicant's spouse reside in Nigeria. The applicant and her spouse have a U.S. citizen child born in 1995 who, in 1997, was diagnosed with Autism Spectrum Disorder. *Statement from [REDACTED], Developmental/Behavioral Pediatrician, Crozer-Keystone Center for Family Health*, dated September 16, 1997. Early intervention services were recommended as well as placing the child in a developmental autistic support program with services delivered from 25-40 hours a week (to include home-based as well as in class time), provided 5-7 days a week throughout

the year and by professionals experienced in utilizing multiple integrated therapeutic modalities. *Id.* In 2003, the applicant's child was again evaluated and found to be a child with a disability and subclinical features of an autism spectrum disorder. *Delaware County Intermediate Unit, Evaluation Report*, dated December 8, 2003. He has received and continues to receive speech, language and occupational therapies. *Statement from [REDACTED] CAGS, PA Certified School Psychologist, Delaware County Intermediate Unit, Francis Harvey Green School*, dated October 25, 2005. According to the Office of Mental Retardation of the County of Delaware Department of Human Services, the applicant's child has been diagnosed with severe mental retardation and limited speech. *Statement from [REDACTED] Supports Coordinator, Delaware County Department of Human Services Office of Mental Retardation*, dated October 6, 2005. He requires total care for all personal hygiene, he must be in direct line of sight for safety, and he is prone to frequent colds and episodes of Otitis Media (inflammation of the middle ear). *Id.* Special education support using specially designed instruction will be necessary to give the applicant's child the appropriate instruction needed to continue to progress in the areas of academics, language, fine motor and social skills. *Statement from [REDACTED] CAGS, PA Certified School Psychologist, Delaware County Intermediate Unit, Francis Harvey Green School*, dated October 25, 2005. Specially designed instruction for the applicant's child must include a lower than average teacher to student ratio environment, high daily structure and predictability, a slower than average pace of instruction adapted to his learning style, with frequent guidance and feedback and a strong emphasis on visual/multisensory instructional strategies. *Id.* According to [REDACTED], a medical doctor specializing in pediatric medicine, there are no provisions by the government or any institution in Nigeria for the treatment of special needs children in the area of psychological development. *Statement by [REDACTED]*, dated November 2, 2005. **Nigeria does not have specific guidelines or curriculum in place when it comes to educating and caring for children with cognitive disabilities.** *Id.*

While the applicant's child is not a qualifying relative for purposes of this case, hardship to the applicant's child will be assessed as it affects the applicant's spouse, the only qualifying relative. The AAO acknowledges [REDACTED] statements regarding the lack of services for special needs children in Nigeria, but does not find the record to establish [REDACTED] as an authority on this issue. Simply going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The AAO notes, however, that the applicant's minor child currently requires and receives significant support from special education programs and an educational psychologist to deal with his learning disabilities. If the applicant's spouse relocates to Nigeria, he must remove his child from an educational environment in which he has made significant gains and transplant him to a country where a new educational support system must be developed. When combined with the normal disruptions and difficulties of readjusting to living in Nigeria, the AAO finds that the additional burden created by a child with persistent, long-term developmental problems would constitute extreme hardship for the applicant's spouse. When looking at the aforementioned factors, particularly the health condition of the applicant's child and its impact upon the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside in Nigeria.

If the applicant's spouse resides in the United States, the applicant needs to establish that her spouse will suffer extreme hardship. The applicant's spouse is a native of Nigeria and naturalized on April 17, 2002. *Naturalization certificate*. As previously noted, the applicant's child suffers from a disability. He requires total care for all personal hygiene, he must be in direct line of sight for safety, and he is prone to frequent colds and episodes of Otitis Media (inflammation of the middle ear). *Statement from [REDACTED] Supports Coordinator, Delaware County Department of Human Services Office of Mental Retardation*, dated October 6, 2005. The applicant's child receives all of his care from his mother with no outside support. *Id.* The applicant transports him to his numerous monthly doctor appointments. *Id.* The applicant's spouse notes that he is scheduled for a 40 hour work week from 8:00am to 4:00pm, Monday through Friday and often has the opportunity to work overtime either later in the day or possibly on the weekends. *Statement from the applicant's spouse*, dated January 30, 2004. He notes that in order to provide for his family, he will normally accept these assignments. *Id.* The AAO notes that the record includes a statement from the employer of the applicant's spouse noting that his salary is \$14.50 to \$15.00 an hour. *Statement from [REDACTED] Human Resource Manager, Northeast Treatment Centers*, dated January 21, 2004; *Statement from [REDACTED] Director of Behavioral Health*, dated June 7, 2005. Because of the numerous hours that the applicant's spouse works, the burden of taking care of their child has fallen primarily on the applicant. *Statement from the applicant's spouse*, dated January 30, 2004. When special care is needed and their child has to go to either the medical facility or for testing, the applicant can usually rearrange her part-time work schedule so that she does not lose time from work. *Id.* The applicant's spouse states that even if he could get time off from his job, he may not be able to make up the lost time. *Id.* He further notes that he would not have the help he needs in taking care of their son. *Id.* He states that their child is very attached to the applicant and if they were separated, he can only imagine that his condition would worsen. *Id.*

While the applicant's child is not a qualifying relative for purposes of this case, hardship to the applicant's child will be assessed as it affects the applicant's spouse, the only qualifying relative in this case. The AAO notes the partnership that exists between the applicant and her spouse in taking care of a child with special needs and the disruption of that partnership should the applicant be removed. While being separated from one's spouse does not necessarily amount to extreme hardship but rather represents the type of inconvenience and hardship experienced by the families of most aliens being deported (*See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991)), the AAO finds that, in this particular situation, the applicant's spouse would face an added hardship of taking care of a child with special needs, whose day-to-day requirements have been primarily met by the applicant. When looking at the aforementioned factors, particularly the health condition of the applicant's child and its impact upon the applicant's spouse, the AAO finds that the applicant has demonstrated extreme hardship to her spouse if he were to reside 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 prior misrepresentation for which she now seeks a waiver, and her periods of extended unlawful residence in the United States, along with unauthorized employment.

The favorable and mitigating factors are the applicant's naturalized United States citizen spouse and United States citizen child, the extreme hardship to her spouse, her payment of taxes, and the absence of a criminal record.

The AAO finds that, although the immigration violation committed by the applicant are 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. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.