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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H4

FILE: [redacted] Office: NEW YORK, NY Date: AUG 16 2010

IN RE: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

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.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider or reopen. The motion to reopen or reconsider is dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Nigeria who, on January 20, 1994, was admitted to the United States as a conditional permanent resident based upon his marriage to a U.S. citizen, [redacted]. On May 3, 1995, the applicant pled guilty to and was convicted of conspiracy to possess unauthorized access devices in violation of 18 U.S.C. § 1029(b)(2). The applicant was sentenced to eight months in jail, deportation upon completion of jail sentence and three years of probation. On March 31, 1998, the applicant was placed into immigration proceedings as a conditional resident who had been convicted of a crime involving moral turpitude. On December 21, 1999, the immigration judge ordered the applicant removed from the United States *in absentia*. The applicant failed to depart the United States.

On August 4, 2006, the applicant married his current U.S. citizen spouse in New York City, New York. On November 10, 2008, the applicant filed the Form I-212 indicating that he continued to reside in the United States. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant requests permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii) in order to reside in the United States with his U.S. citizen spouse and two U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated January 21, 2009.

On appeal, counsel contended that the applicant had sustained his burden of proving that the favorable factors in support of his case outweigh the unfavorable factors. *See Counsel's Brief,* dated February 11, 2009. In support of his contentions, counsel submitted the referenced brief and copies of documentation previously provided.

On August 10, 2009, the AAO dismissed the applicant's appeal because the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of conspiracy to possess unauthorized access devices, a crime involving moral turpitude. The AAO found the applicant statutorily ineligible for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). The AAO found that no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. *Decision of AAO,* dated August 10, 2009.

In the motion to reconsider or reopen, counsel contends that the applicant has served his jail term and has completely turned a new leaf since his release from custody. Counsel contends that the applicant has not had any further problems with the law. Counsel contends that the absolute denial of the applicant's reentry and adjustment of status would constitute an untold hardship on his spouse and children who are U.S. citizens. *See Motion to Reopen or Reconsider and Form I-290B*, dated September 8, 2009. In support of his motion to reconsider or reopen, counsel submits the referenced

motion to reopen or reconsider, medical documentation, financial documentation and letters from the applicant's family members. The entire record was reviewed in rendering a decision in this case.

The regulation at 8 C.F.R. § 103.5(a) provides, in pertinent part:

> (2) *Requirements for motion to reopen.*
> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. A motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:
>
> a. The requested evidence was not material to the issue of eligibility;
> b. The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
> c. The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.
>
> (3) *Requirements for motion to reconsider.*
> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In support of the motion to reopen or reconsider, counsel contends that the applicant's spouse was diagnosed with multiple myeloma in March 2007 and has been under a doctor's care. Counsel contends that the applicant's spouse is a nursing student and the couple has three children. Counsel contends that the applicant has been caring for the children while the applicant's spouse has been undergoing chemotherapy due to her condition. In support of his contentions counsel submits medical documentation and letters from the applicant's children and spouse.

As discussed in the AAO's decision, the record clearly reflects that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of conspiracy to possess unauthorized access devices, a crime involving moral turpitude. The Act makes it clear that a section 212(h) waiver is not available to an alien who had been admitted as a lawful permanent resident, if he or she had, since admission as a lawful permanent resident, not lawfully resided continuously in the United States for a period of at least seven years immediately preceding initiation of immigration

proceedings. In this case, the applicant, after he had been admitted to the United States as a conditional resident, had only continuously resided in the United States in a lawful capacity for just over four years prior to initiation of immigration proceedings on March 31, 1998.[1] The applicant is, therefore, ***statutorily ineligible*** for waiver consideration. (Emphasis added.)

As such, there can be no basis for a motion to reopen or reconsider unless it is established that the applicant's conviction is overturned for a defect in the underlying proceedings.[2] There is no purpose in granting an applicant's Form I-212 if he or she in otherwise statutorily inadmissible.

After a careful review of the record, it is concluded that the applicant has failed to establish that the contentions submitted in the motion to reopen or reconsider meet the requirements of a motion to reopen or reconsider. Accordingly, the motion to reopen or reconsider is dismissed and the order dismissing the appeal is affirmed.

ORDER: The motion to reopen or reconsider is dismissed. The order dismissing the appeal will be affirmed.

[1] A conditional permanent resident is an alien who has been lawfully admitted for permanent residence within the meaning of section 101(a)(20) of the Act. *See* 8 C.F.R. § 216.1.

[2] Whether the applicant has served his sentence and has been rehabilitated does not have a bearing on his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act. Even if the applicant is granted a vacature/expungement/set aside of his conviction for any reason other than a defect in the underlying proceedings, the applicant will remain convicted for immigration purposes.