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U.S. Department of Homeland Security  
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U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: ST. PAUL, MN

Date: FEB 05 2009

IN RE: Applicant:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief  
Administrative Appeals Office

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

The applicant, [REDACTED], is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking admission into the United States by fraud or willful misrepresentation. The applicant sought a waiver of inadmissibility under section 212(i) of the Act, 8 U.S.C. § 1182(i), which the director denied, finding the applicant failed to establish extreme hardship to a qualifying relative. *Decision of the District Director, dated June 20, 2006.*

With regard to the district director's finding of fraud, 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.

The record conveys that the applicant admitted to using his brother's passport and lawful permanent resident card in November 1995 to gain entry into the United States at the JFK International Airport in New York. Consequently, the district director's finding of inadmissibility under section 212(a)(6)(C) of the Act is correct.

A waiver for inadmissibility under section 212(a)(6)(C) of the Act is found under section 212(i) of the Act, which 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.

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. Hardship to an applicant and to his or her child is not a consideration under section 212(i) of the Act, and unlike section 212(h) of the Act where a child is included as a qualifying relative, children are not included under section 212(i) of the Act, and will be considered only to the extent that it results in hardship to a qualifying relative, who in this case is the applicant's U.S. citizen spouse. Once extreme hardship is established, it is one of the

favorable factors to be considered in determining whether the Secretary should exercise discretion. See *Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

The record before the AAO contains the applicant's affidavits, his wife's affidavits, a letter concerning the applicant's health, photographs, a country report on Nigeria, birth certificates, a letter indicating the applicant is an independently contracted driver, and other materials.

The affidavits in the record by the applicant's wife dated July 16, 2006 and June 16, 2005 state that she "sunk into a deep depression" after her husband was diagnosed with the human immunodeficiency virus (HIV) in early 2003, and that she separated from him on account of exposing the virus to herself and to her children, and later withdrew the I-130 petition, and divorced the applicant in 2004. She states that after she became more emotionally stable, she learned about HIV and eventually renewed her relationship with the applicant, re-marrying him in May 2005, but continuing to live apart to work on their marriage and to slowly introduce her children into their relationship. The applicant's wife states that she has been with the applicant for more than 10 years, and "survived some very rough times caused by his HIV infection" and has "struggled together to deal with this medical condition and attendant psychological trauma, and have spent the last year re-integrating our children into our marriage." She expresses concern about her husband returning to Nigeria and not having access to the same health facilities in the United States. She states that her husband is her strongest supporter and that separation from him, if he were to return to Nigeria without her, would impact their marriage, causing her stress and anxiety. She states that all of her relatives are in the United States and her children have lived here their entire lives. The applicant's wife states that Nigeria's culture is different from the United States, its employment prospects poor and its political conditions unstable, and its medical facilities and educational opportunities inferior to the United States. She indicates that she may not take all of her children to live in Nigeria.

The June 20, 2005 affidavit by the applicant conveys, in part, that he and his wife "are now living separately because we are still trying to integrate her children into our new marriage. The HIV-virus has very negative connotations and we do not think the children are quite ready to accept me back into their life."

The letter in the record by [REDACTED], dated May 25, 2006, states that the applicant is seen every three to four months by [REDACTED] and that the applicant "has essentially no risk to develop AIDS over the next 3 years without the need for antiretroviral therapy."

The record contains a country report on Nigeria by the U.S. Department of State, which shows that more than 70 percent of Nigeria's citizens live on less than one dollar per day.

"Extreme hardship" is not a definable term of "fixed and inflexible meaning"; establishing extreme hardship is "dependent upon the facts and circumstances of each case." *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). *Matter of Cervantes-Gonzalez* lists the factors considered relevant in determining whether an applicant has established extreme hardship pursuant to section 212(i) of the Act. The factors, which relate to the applicant's qualifying relative, 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.* at 565-566.

The factors to consider in determining whether extreme hardship exists "provide a framework for analysis," and the "[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). The trier of fact considers the entire range of hardship factors in their totality and then determines "whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." (citing *Matter of Ige*, 20 I&N Dec. 880, 882 (BIA 1994).

The AAO acknowledges that it has been held that "the family and relationship between family members is of paramount importance" and that "separation of family members from one another is a serious matter requiring close and careful scrutiny. *Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9<sup>th</sup> Cir. 1987), citing *Bastidas v. INS*, 609 F.2d 101 (3<sup>rd</sup> Cir. 1979).

An analysis of the factors in *Matter of Cervantes-Gonzalez*, which counsel asserts the district director did not correctly apply, is appropriate here. Extreme hardship to the applicant's spouse must be established in the event that she joins the applicant, and alternatively, if she remains in the United States without him. A qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

In rendering this decision, the AAO will carefully consider and give proper weight to the evidence in the record.

Given the evidence of hardship, considered in the aggregate and in light of the *Cervantes-Gonzalez* factors cited above, the AAO finds that the hardship to the applicant's wife, particularly in view of her husband's health condition and how it may impact his employability in the near future, as indicated in the letter by [REDACTED]; and the adverse effect of moving from this country on the applicant's wife and on her youngest U.S. citizen child, who is 15 years old, rises to the level of "extreme" hardship if she joins the applicant in Nigeria.

The applicant's wife states that she has had a 10-year relationship with her husband, that he gives her strength when she feels like giving up, and that separation from him, if he were to return to Nigeria without her, would impact their marriage, which has given her stability and security. She indicates that her priority is to keep her family together and to have a good husband and father for her three children. The applicant's wife expresses concern about her husband suffering alone in Nigeria and not having access to the same health facilities as in the United States. *Affidavit by applicant's wife dated July 16, 2006*. In light of the emotional hardship that would be experienced by the applicant's wife if she were to be separated from her husband, the AAO finds that the totality of the record is sufficient to establish that she would suffer extreme emotional hardship if she were to remain in the United States without her husband.

The grant or denial of the above waiver does depend only on the issue of the meaning of "extreme hardship." Once extreme hardship is established, the Secretary then determines whether an exercise of discretion is warranted.

The unfavorable factors in this matter are the applicant's entry into the United States by claiming to be his brother, his unauthorized employment, his unauthorized presence, and his two drinking while intoxicated convictions. The favorable factors in this matter are the extreme hardship to the applicant's spouse, the passage of approximately 13 years since the applicant's immigration violation, the applicant's completion of an alcohol treatment program with West Metro Recovery Services and the letter written on his behalf by that organization, his participation in Sub-Saharan African Youth & Family Services in Minnesota (SAYFSM) for three years and the letter written on his behalf by SAYFSM's executive director, and the applicant's employment as an independently contracted driver.

While the AAO cannot emphasize enough the seriousness with which it regards the applicant's breach of the immigration laws of the United States, the severity of the applicant's misrepresentation is at least partially diminished by the fact that 13 years have elapsed since the applicant's immigration violation. The AAO finds that the hardship imposed on the applicant's spouse as a result of his inadmissibility outweighs the unfavorable factors in the application. Therefore, a favorable exercise of the Secretary's discretion is warranted in this matter.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i), the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The applicant has met that burden. Accordingly, the appeal will be sustained.

**ORDER:** The appeal is sustained. The waiver application is approved.