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Office of Administrative Appeals MS 2090
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U.S. Citizenship
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FILE:

Office: ALBANY, NY

Date: OCT 06 2009

IN RE:

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

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.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge, Albany, New York. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider/reopen. The motion will be granted and the previous decisions of the officer-in-charge and the AAO will be withdrawn and the application remanded for approval.

The record reflects that the applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude (attempted criminal possession of stolen property and two forgery convictions).¹ The record indicates that the applicant has a U.S. citizen spouse and two U.S. citizen stepchildren. The applicant seeks a waiver of inadmissibility in order to reside with his family in the United States.

The officer-in-charge found that based on the evidence in the record, the applicant had failed to establish extreme hardship to a qualifying relative and the application was denied accordingly. *Officer-in-Charge's Decision*, at 3, dated July 11, 2005. The AAO also determined that the applicant had failed to establish extreme hardship to a qualifying relative and dismissed the appeal. *AAO Chief's Decision*, at 4-5, dated May 3, 2007.

On motion, counsel asserts that the evidence in the record establishes that the applicant's spouse would suffer extreme hardship if the application is denied and that the record establishes the remorse and rehabilitation of the applicant. *Form I-290B*, received May 30, 2007.

The record includes, but is not limited to, the applicant's spouse's statement, the applicant's statement, a medical letter for the applicant's spouse, a psychological evaluation of the applicant's spouse, photographs of the applicant and his family, a statement from the applicant's older daughter, school certificates for the applicant's daughters, a letter from the principal of the applicant's daughters' school, country conditions information on Nigeria, financial records and previously submitted documents.

Section 212(a)(2)(A) of the Act states in pertinent part, that:

- (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

¹ The AAO notes that the record is not clear as to whether the attempted criminal possession of stolen property conviction is a crime involving moral turpitude. However, the two forgery convictions are crimes involving moral turpitude.

Section 212(h) of the Act provides, in pertinent part, that:

(h) The Attorney General [now, Secretary, Homeland Security, “Secretary”] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if

. . . .

(1)(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien.

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member, in this case the spouse and daughters of the applicant. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560 (BIA 1999) the Board of Immigration Appeals (BIA) provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship. These factors included 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.

Therefore, an analysis under *Matter of Cervantes-Gonzalez* is appropriate in this case. The AAO notes that extreme hardship to the applicant’s spouse must be established whether she resides in Nigeria or in the United States, as she is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The first part of the analysis requires the applicant to establish extreme hardship to his spouse in the event that she resides in Nigeria. The applicant’s spouse states that she has a serious medical condition that causes painful and disabling blood clots in her leg, a high-risk pregnancy and asthma. *Applicant’s Spouse’s Statement*, at 1, dated June 21, 2007. The applicant’s spouse states that she does not believe that she could effectively control her asthma in Nigeria, it is unlikely that she or the applicant could find a job there, her medical care would be a big problem, she worries that her daughters would not receive adequate education and medical care in Nigeria, and she worries about unrest in the country. *Id.* at 2. The record reflects that the applicant’s spouse was being evaluated for a high-risk pregnancy, she is on medicine to control her increased tendency to develop blood

clots, she has not worked since October 2006 secondary to complications with her asthma, and she is being followed in an asthma clinic. *Letter from Women's Health Center, Albany Medical Center Hospital*, dated June 15, 2007. The record also reflects that the applicant's spouse is at risk for venous thromboembolic disease, she requires lifelong anticoagulation for hypercoagulability, her ability to stand or walk for any prolonged distance is limited by chronic venous insufficiency (with the likelihood of progressive disability), and she will be unable to work except in a limited environment. *Letter from [REDACTED]*, dated June 14, 2007. The record includes country conditions materials on Nigeria that establish the poor state of the country's health care system and report that the overall availability, accessibility and quality of health services has significantly decreased or stagnated over the past decade. *WHO Country Cooperation Strategy – Nigeria*. These materials also indicate that drug distribution in the public sector is *ad hoc*; that, in the private sector, poor quality medicines continue to circulate and that there is no accountability by manufacturers, importers or retailers on the disposal of medicines. *Essential Medicines, World Health Organization*. In light of the documented health conditions of the applicant's spouse and her long-term need for medical treatment, including the administration of anticoagulants, the AAO finds that the applicant's spouse would experience extreme hardship if she were to relocate to Nigeria.

The second part of the analysis requires the applicant to establish extreme hardship in the event that his spouse remains in the United States. Counsel states that the applicant's spouse is pregnant, is due to deliver in August 2007, suffers from chronic deep vein thrombosis and asthma, and has been elevated to high risk obstetrics. *Motion to Reopen*, at 2, June 21, 2007. Counsel states that the applicant makes sure his spouse takes her medications and complies with medical instructions to avoid overexerting herself, and that the applicant spouse would be unable to support herself and their three children. *Id.* at 2-3. The applicant's spouse states that the applicant injects her medication twice a day, he takes her to the doctor once or twice a week, her ability to perform chores is limited and the applicant has taken on a lot of those responsibilities, the applicant takes the children to school and attends their school programs, and the applicant helps reduce the stress that can induce an asthma attack. *Applicant's Spouse's Statement*, at 1-2. The applicant's spouse states that her mother died when she was three years old, she was raised in foster homes, she did not have good relationships with her daughters' fathers, her relationship with the applicant is the only stable and loving one that she has ever known, the applicant is the only father her daughters have ever known, the applicant supports her financially and emotionally, the applicant has been a loving husband and wonderful father, and she will not be able to support herself and the children due to her medical conditions. *Id.* at 2-3.

The record reflects that the applicant's spouse is receiving care for asthma and chronic deep vein thrombosis, her chronic DVT requires two daily injections which the applicant frequently participates in, her therapy is expected to be lifelong, and the applicant plays a critical role in her biannual evaluations for asthma therapy. *Letter from [REDACTED]* dated June 14, 2007. The record also indicates that the applicant's spouse has been unable to work since October 2006 due to asthma-related complications. *Letter from Women's Health Center, Albany Medical Center Hospital*. It further points to the applicant's spouse inability to stand or walk for any prolonged distance or to work except in limited circumstances because of her inability to stand. *Letter from [REDACTED]*, dated June 14, 2007. The record also reflects that the applicant's

spouse was evaluated by a psychologist who found her to be experiencing generalized anxiety and depression and that her anxiety and depression would be exacerbated by the loss of the applicant. *Psychological Evaluation*, at 6-7, dated June 20, 2007. Having considered the hardship factors in their totality, the AAO finds the record to include sufficient evidence to establish that the applicant's spouse would experience extreme hardship if she remained in the United States without the applicant.

As extreme hardship has been found for the applicant's spouse, the AAO will not address her children's hardship claims.

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).

In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then, "[B]alance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The main adverse factors in the present case are the applicant's convictions, which include a 2002 resisting arrest conviction, his failure to depart the United States when his 1997 visa expired and his subsequent unlawful residence in the United States.

The favorable factors include the presence of the applicant's two U.S. citizen daughters and spouse, the extreme hardship to the applicant's spouse if he is excluded from the United States, his stated

remorse for the actions that led to his convictions and his active involvement in the education of his children and their school's community.

The AAO finds that the applicant's past criminal acts are serious in nature and cannot be condoned. Nevertheless, the AAO concludes that, taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the previous decisions of the officer-in-charge and the AAO are withdrawn and the application remanded for approval.

ORDER: The previous decisions of the officer-in-charge and the AAO are withdrawn and the application remanded for approval.