

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY



H2

FILE: [REDACTED] Office: PHILADELPHIA, PA Date: **SEP 24 2010**

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:



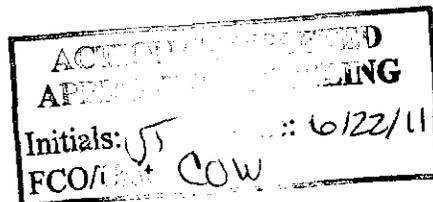
INSTRUCTIONS:

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Argum Sikka
for

Perry Rhew
Chief, Administrative Appeals Office



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

The applicant is a native and citizen of Nigeria. She was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of Crimes Involving Moral Turpitude (CIMTs). The applicant is married to a U.S. citizen and has five U.S. citizen children. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to remain in the United States.

The District Director concluded that the applicant had failed to establish that the bar to her admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) on March 27, 2007.

On appeal, counsel for the applicant asserts that the director's decision was in error and that the applicant has established extreme hardship to a qualifying relative.

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

(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.

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

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

(1) (A) in the case of any immigrant it is established to the satisfaction of the Attorney General [Secretary] that –

(i) . . . the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(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 record reflects that the applicant was convicted of Fraud, Obtaining Food Stamps, 62 Pennsylvania Statutes (Pa. Stat.) § 481, in Harrisburg, Pennsylvania, on November 14, 1996. The applicant has also been convicted of Retail Theft, 18 Pa. Stat. § 3939, in Harrisburg, Pennsylvania, on January 6, 1994. Any crime involving fraud is a CIMT. *Burr v. INS*, 350 F.2d 87, 91 (9th Cir. 1965), cert. denied, 383 U.S. 915 (1966); *See also Jordan v. De George*, 341 U.S. 223, 227, (U.S. 1951) (noting that, without exception, a crime in which fraud is an ingredient involves moral turpitude.) Theft has long been held to be a CIMT. *Matter of Garcia*, 11 I. & N. Dec. 521 (BIA 1966). The Board of Immigration Appeals (BIA) has held that, in order to constitute a CIMT, a conviction for theft must involve a permanent taking. *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). In *Matter of Jurado*, 24 I&N Dec. 29, 33-34 (BIA 2006), the BIA found that a violation of a retail theft statute reasonably allowed for the presumption that the conduct involved an intent to permanently deprive the owner of their property. Therefore the applicant's conviction for retail theft also constitutes a CIMT. The applicant does not contest this finding.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

Section 212(a)(6)(C) Misrepresentation, states in pertinent part:

- (i) In general. 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(a)(6)(C)(iii) authorizes a waiver, in the discretion of the Attorney General, as proscribed by Section 212(i):

- (1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) of this section in the case of an immigrant 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 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

Beyond the decision of the director, the record indicates that the applicant failed to reveal her two convictions when she was interviewed on April 2, 2001 in connection with her Application to Register Permanent Residence or Adjust Status (Form I-485). As such, she misrepresented material facts in an attempt to adjust her status to that of a permanent resident, and is inadmissible pursuant to section 212(a)(6)(C) of the Act.

The AAO notes that the applicant's claim of extreme hardship is based on her U.S. citizen spouse and children. While children are not qualifying relatives under section 212(i), the applicant's eligibility for a waiver under this section of the Act would also serve to waive any inadmissibility under section 212(h).

A waiver of inadmissibility under section 212(i) is dependent upon a showing that the bar to admission imposes an extreme hardship on a qualifying relative, in this case the U.S. citizen spouse of the applicant. If extreme hardship to a qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. Section 212(i) of the Act; *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996).

The concept of extreme hardship to a qualifying relative "is not . . . fixed and inflexible," and whether extreme hardship has been established is determined based on an examination of the facts of each individual case. *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999). In *Matter of Cervantes-Gonzalez*, the Board of Immigration Appeals set forth a list of non-exclusive factors relevant to determining whether an applicant has established extreme hardship to a qualifying relative pursuant to section 212(i) of the Act. These factors include, with respect to the qualifying relative, the presence of family ties to U.S. citizens or lawful permanent residents in the United States, family ties outside the United States, country conditions where the qualifying relative would relocate and family ties in that country, the financial impact of departure, and significant health conditions, particularly where there is diminished availability of medical care in the country to which the qualifying relative would relocate. *Id.* at 566.

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.

Matter of O-J-O-, 21 I&N Dec. 381, 383 (BIA 1996) (citations omitted).

The AAO notes that extreme hardship to a qualifying relative must be established whether he or she relocates with the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The record of proceeding contains, but is not limited to, a brief from counsel; statements from the applicant's family; a medical document stating the applicant's spouse has diabetes, and requires several doctor's visits monthly; tax records and other financial documents for 2003, 2004 and 2005; copies of the birth certificates for the applicant's children; court records pertaining to the applicant's convictions;

The entire record was reviewed and all relevant evidence considered in rendering this decision.

Counsel asserts that the applicant's children would experience extreme hardship if they were to relocate to Nigeria with the applicant. Specifically, he asserts that her children are at a crucial age of

development, and that none of them have ever been to Nigeria and do not have any family ties there. Counsel also asserts that the children would be exposed to dangerous health risks, and cites to a travel warning by the U.S. Department of State warning that violent crime is prevalent in the country.

While children are not qualifying relatives for the purpose of a 212(i) proceeding, hardships to them are nonetheless indirectly relevant due to any impacts their hardships would have on a qualifying relative, in this case the applicant's spouse. The record contains sufficient evidence that the applicant's youngest children would experience significant hardships upon relocating with the applicant to Nigeria, and that this would result in indirect hardships on her spouse which rise above those normally associated with relocation. The AAO also notes that the record indicates the applicant's spouse has a diabetes and hyperlipidemia, and the Department of State and Centers for Disease Control reports indicate that violence is still prevalent in the country, and there are rampant diseases and other health risks with a strained medical infrastructure. The evidence in the record of the impact and degree of hardship the applicant's spouse's medical condition causes him is weak, nonetheless, when considered in light of other factors such as his age, his length of residence in the United States, the indirect impacts arising from having to support and provide for his U.S. citizen children in Nigeria, having to relocate with a medical condition represents a significant impact, and in the aggregate these impacts would rise above those normally experienced by the relatives of inadmissible aliens relocating with their family members. Therefore, the record indicates that a qualifying relative would experience impacts which cumulatively rise above those commonly experienced by the relatives of inadmissible aliens when relocating, and as such constitute extreme hardship.

With regard to hardship upon separation, if the applicant was removed to Nigeria and her qualifying relative remained in the United States, counsel has asserted that the applicant's children and spouse would suffer emotional and financial hardship. Specifically counsel asserts that the applicant's spouse has diabetes and will be unable to fill the financial void caused by the applicant's absence, and that her children will suffer due to the separation from their mother.

The record contains tax statements, statements by the applicant's family and a hand-written prescription note from the applicant's doctor. As of the date of the applicant's appeal, the applicant and her spouse were the guardians of two high school age children. The applicant's other three children are now adults. The tax records do indicate that the applicant provides a significant portion of the household income from her employment, however, the record does not contain sufficient evidence to establish that the applicant's spouse will experience extreme hardship living on his income alone, which is roughly \$30,000, annually

In addition, the hand-written prescription note from Colonial Park Family Practice is not sufficient to establish that the degree of impact the applicant's spouse is currently suffering or would suffer is severe. The note makes a simple statement, barely legible, which states that he needs quarterly doctor's visits. Thus, while the AAO recognizes medical hardship as a factor in this case, there is insufficient evidence to establish that the applicant's spouse will experience significant hardship as a result of his medical condition if he is separated from the applicant.

The AAO acknowledges that the applicant's spouse will experience some emotional hardship if he remains in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, even when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship articulated in this case, based on the evidence in this record, does not rise above the common result of removal or inadmissibility and thus does not constitute extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

The AAO therefore finds that the applicant failed to establish extreme hardship to her spouse as required under sections 212(i) and 212(h) of the Act. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility the burden of proving eligibility rests with the applicant. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.