



U.S. Citizenship
and Immigration
Services

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DATE: OCT 29 2012 OFFICE: ACCRA, GHANA FILE: [REDACTED]

IN RE: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Sections 212(a)(9)(B)(v) and 212(h) of the Immigration and Nationality Act, 8 U.S.C. §§1182(a)(9)(B)(v) and 1182(h), and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)

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.

Thank you,

for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DICUSSION: The Form I-601, Application for Waiver of Grounds of Inadmissibility, was denied by the Field Office Director, Accra, Ghana, who also denied the Form I-212, Application for Permission to Reapply for Admission into the United States After Deportation or Removal. Both are 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 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 committed a crime involving moral turpitude; section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182 (a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year; and section 212(a)(9)(A)(ii) of the Act, 8 C.F.R. § 1182(a)(9)(A)(ii), for having been ordered removed and seeking admission within ten years of departure from the United States. He is the spouse and father of U.S. citizens, and seeks waivers under sections 212(a)(9)(B)(v) and 212(h) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(h), and an exception 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.

The Field Office Director determined that the applicant had established that the bars to his admissibility would result in extreme hardship for a qualifying relative, but denied the Form I-601 based on his determination that a favorable exercise of the Attorney General's (now Secretary of Homeland Security's) discretion was not warranted. Based on his denial of the Form I-601, the Field Office Director denied the Form I-212. *Decision of the Field Office Director*, dated January 31, 2011.

On appeal, counsel contends that the denial of the waiver application was arbitrary and capricious, and an abuse of discretion. *Notice of Appeal or Motion*, dated February 17, 2011. He submits additional evidence in support of the waiver application.

The evidence of record includes, but is not limited to: counsel's brief, a statement from the applicant's spouse; medical documentation relating to the applicant's older son; school records for the applicant's spouse and children; school notices relating to the applicant's older son; earnings statements for the applicant's spouse; country conditions information on Nigeria; letters of support for the applicant; and documentation relating to the applicant's conviction. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

Section 212(a)(9)(B) states in pertinent part:

(B) Aliens Unlawfully Present.-

(i) In general. - Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States . . . and again seeks admission

within 3 years of the date of such alien's departure or removal, or

- (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

....

(v) Waiver. – The Attorney General [now the Secretary of Homeland Security (Secretary)] has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or 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 such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien.

The record reflects that the applicant entered the United States on February 2, 1990, using a fraudulent passport and B-2 visa. He filed for asylum on February 25, 1994 and, thereafter, was placed in proceedings. On September 10, 1997, an immigration judge ordered the applicant removed in absentia and on October 16, 1997, denied the applicant's motion to reopen. The applicant filed an appeal with the Board of Immigration Appeals (BIA), which was dismissed on March 14, 2001. On August 1, 2007, the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status, based on an approved immigrant visa petition filed by his spouse. The Form I-485 was denied on June 11, 2008 and on October 7, 2008, the applicant was removed from the United States.

Based on this history, the AAO finds the record to establish that the applicant accrued unlawful presence in excess of one year, from March 15, 2001, the day after the BIA dismissed his appeal, until he filed the Form I-485 on August 1, 2007; and from June 12, 2008, the day after the Form I-485 was denied, until his October 7, 2008 removal from the United States. As the applicant is seeking admission to the United States within ten years of his 2008 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(2)(A)(i)(I) of the Act provides:

(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.

A waiver of a section 212(a)(2)(A)(i)(I) inadmissibility is provided by section 212(h) of the Act, which states, in pertinent part:

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

(1)(A) [I]t is established to the satisfaction of the Attorney General that-

(i) [T]he 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 bank/mail fraud in 1991 and that he was sentenced to 16 months in prison and 36 months of probation. As the applicant has not disputed his inadmissibility under section 212(a)(2)(A)(i)(I) of the Act on appeal, and the record does not show that determination to be in error, we will not disturb the finding of inadmissibility. Should the applicant establish eligibility for a waiver under section 212(a)(9)(B)(v) of the Act, he will also satisfy the waiver requirements imposed by section 212(h) of the Act.¹

Also, consistent with the field office director's statement in denying the application on discretion, the AAO also finds the applicant to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, which 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.

A waiver of a section 212(a)(6)(C)(i) inadmissibility is found in section 212(i) of the Act, which states:

¹ The applicant appears to be eligible for a waiver of his section 212(a)(2)(A)(i)(I) inadmissibility under section 212(h)(1)(A) of the Act since more than 15 years have passed since he committed the offense that potentially bars his admission to the United States. However, even if the AAO were to consider the applicant's eligibility under the more generous requirements of section 212(h)(1)(A), he applicant would still be required to satisfy the extreme hardship standard of section 212(a)(9)(B)(v), imposed by his unlawful presence in the United States.

- (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.

Although the Field Office Director did not formally find the applicant to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Act, we note that he indicated as part of his discretionary finding that the applicant was inadmissible to the United States for material misrepresentation based on 1) his use of a fraudulent passport and visa to enter the United States on February 2, 1990, and 2) his concealment of his conviction for bank fraud from a consular officer.

On appeal, counsel asserts that the applicant did not enter the United States with a fraudulent passport and visa on February 2, 1990, but arrived with a valid B-2 visa on December 31, 1989. In support of this claim, he submits a copy of two pages from the applicant's passport showing a multiple-entry B-2 visa, valid until January 19, 1990, and two admissions stamps that indicate the applicant entered the United States on November 1, 1989 and December 1, 1989. While the AAO acknowledges the applicant's lawful admissions in 1989, we do not find them to establish that the applicant did not also enter the United States with a fraudulent passport and visa on February 2, 1990, as stated by the Field Office Director in his decision. Moreover, the AAO notes that at the time of his 1996 asylum interview, the applicant testified under oath that he had entered the United States on February 2, 1990 with a fraudulent passport and visa.

Counsel also contends that the applicant did not conceal his bank fraud conviction from the consular officer who interviewed him in connection with the DS-230, Application for Immigrant Visa and Alien Registration, he filed in 2010 and that he did not mention any driving convictions. Counsel asserts that the applicant had no reason to lie at the interview since the U.S. Consulate in Lagos already had the applicant's court records. The AAO notes, however, that the June 28, 2010 consular worksheet found in the record states that the applicant did not indicate to the consular officer who interviewed him or on his DS-230 that he had previously been convicted of bank fraud. A copy of the applicant's DS-230 included in the record reflects that the applicant checked "No" to Question 40b, which asks visa applicants if they have previously been convicted of crimes involving moral turpitude. We also find the record to include a written report of an earlier consular interview, dated October 14, 2008, in which the applicant informed the interviewing officer that his only arrests in the United States, other than immigration violations, were for "driving violations."

Based on the record before us, the AAO finds that the applicant used a fraudulent passport and visa to enter the United States in 1990 and that in seeking admission to the United States in 2008 and 2010, he concealed his bank fraud conviction. The applicant's use of a fraudulent passport and visa to enter the United States is clearly a violation of section 212(a)(6)(C)(i) of the Act. Consequently, we need not determine whether the applicant's apparent concealment of this conviction is a material misrepresentation for the purposes of section 212(a)(6)(C)(i) of the Act. Accordingly, the applicant

is inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act for having sought a benefit under the Act through fraud or the willful misrepresentation of a material fact.

In that the record establishes that the applicant is inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act, the AAO now turns to a consideration of the record and the extent to which it establishes the applicant's eligibility for waivers under sections 212(a)(9)(B)(v), 212(h), and 212(i) of the Act, both of which are first dependent upon a showing that the bars would impose an extreme hardship on the citizen or lawfully resident spouse, parent or child of the applicant. Once 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).

In his January 31, 2011 decision, the Field Office Director found that the applicant had established that his spouse, the only qualifying relative for the purposes of this proceeding, would experience extreme hardship as a result of his inadmissibility. The AAO concurs with the Field Office Director's finding.

In reaching a determination that the applicant's spouse's hardship in Nigeria would exceed that normally created by relocation, we have taken note of her long-term residence in the United States; the conditions in Nigeria, as established by the submitted travel warning for Nigeria and other country conditions materials; and the difficulties she would face in relocating to Nigeria with a child suffering from serious physical and mental health problems, including paranoid schizophrenia, which are demonstrated by the medical documentation submitted with the Form I-601 and on appeal. We have also concluded that when the responsibilities of being a single parent for three children, the oldest of whom suffers from multiple medical and mental health conditions, are considered in the aggregate with the hardships normally created by the separation of families, the applicant's spouse would also experience extreme hardship if the waiver application is denied and she continues to reside in the United States. Accordingly, the applicant has established statutorily eligibility for a waiver under sections 212(a)(9)(B)(v), 212(h) and 212(i) of the Act, and the AAO turns to a consideration of whether or not he is eligible for a favorable exercise of discretion.

In discretionary matters, the applicant 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 . . . 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-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance 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 adverse factors in the applicant's case are his unlawful presence in the United States; his use of a fraudulent passport and visa to enter the United States in 1990; his conviction for bank fraud in 1991; his concealment of this conviction in seeking admission to the United States, most recently in 2010; his failure to comply with an order of removal; his subsequent removal from the United States; and his periods of unlawful employment while in the United States. The mitigating factors include the applicant's U.S. citizen spouse and children; the extreme hardship his spouse would experience if the waiver application is denied; the length of his and his spouse's marriage; his older son's medical and mental health problems; and the statements provided by [REDACTED]

[REDACTED] in Ibadan, Nigeria and [REDACTED] DCC, United States Zone. [REDACTED] states that he has known the applicant for approximately ten years and that he was ordained in 1999, becoming the Assembly Pastor in 2004. [REDACTED] also reports that the applicant has positively affected many lives through his generous and selfless service. In his statement, [REDACTED] reports that upon the applicant's return to Nigeria in 2008, the applicant was given an assignment as an [REDACTED] in charge of the English service and that he has demonstrated a high level of dedication and moral leadership in this position.

The AAO acknowledges the negative factors in this case, particularly the recent nature of the applicant's misrepresentation concerning his criminal conviction. However, we find that the record shows ample evidence of rehabilitation and significant other positive factors. When taken together, the mitigating factors in the present case outweigh the adverse factors such that a favorable exercise of discretion is warranted. Accordingly, the Form I-601 will be approved.

The AAO notes that in his January 31, 2011 decision, the Field Office Director denied the applicant's Form I-212 as a matter of discretion, based solely on the denial of the Form I-601. As the AAO has now found the applicant to be eligible for a waiver of inadmissibility under sections 212(a)(9)(B)(v) and 212(i) of the Act, we will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

Section 212(a)(9)(A) of the Act states:

Aliens previously removed.-

(A) Certain aliens previously removed.-

(i) Arriving aliens.-Any alien who has been ordered removed under section

235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.- Any alien not described in clause (i) who-

- (I) has been ordered removed under section 240 or any other provision of law, or
- (II) departed the United States while an order of removal was outstanding, and seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an aliens convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On September 10, 1997, an immigration judge ordered the applicant removed from the United States, resulting in the applicant's departure on October 7, 2008. As such, he is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO concludes that the applicant's Form I-212 should also be approved as a matter of discretion.

In proceedings for waivers of and exceptions to the grounds of inadmissibility, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. In discretionary matters, the applicant bears the full burden of proving his or her eligibility for discretionary relief. *See Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained. The Form I-601 and the Form I-212 are approved.