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



U.S. Citizenship
and Immigration
Services

Date: **APR 15 2013**

Office: ACCRA

FILE: [REDACTED]

IN RE:

Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(h), 212(a)(9)(B)(v), and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(h), (a)(9)(B)(v) and (i) respectively, and 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:

SELF-REPRESENTED

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 AAO inappropriately applied the law 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 with the field office or service center that originally decided your case by filing a Form I-190B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application and application for permission to reapply were denied by the Field Office Director, Accra, Ghana, and are now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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 a crime involving moral turpitude. The applicant was found to be inadmissible pursuant to section 212(a)(9)(B)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(B)(ii), for having been unlawfully present in the United States for more than one year and again seeking readmission within 10 years of his last departure from the United States. In addition, the record also shows that the applicant was found to be inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having attempted to procure admission to the United States through fraud or willful misrepresentation of a material fact. The applicant was further found to be inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii), for having been ordered removed under any provision of law and seeking admission within 10 years of the date of his departure or removal. The applicant seeks a waiver of inadmissibility pursuant to sections 212(h), 212(i), and 212(a)(9)(B)(v) of the Act, 8 U.S.C. §§ 1182(h), (i), and (a)(9)(B)(v), and permission to reapply for admission to 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 wife and three U.S. citizen children.

In a decision dated December 15, 2010, the field office director denied the Form I-601 application for a waiver, finding that the applicant failed to establish that his U.S. citizen wife and children would experience extreme hardship as a consequence of his inadmissibility. Further, the field office director found the applicant failed to demonstrate his rehabilitation, also denying the waiver in the exercise of discretion. The field office director denied the applicant's Form I-212 in the same decision.

On appeal, the applicant contends he is not inadmissible. The applicant asserts that the field office director erred in finding him inadmissible for using a false name, as he avers that the evidence submitted demonstrates he entered the United States using his valid passport with his legal name. The applicant further asserts that the evidence in the record demonstrates he has not accrued unlawful presence. The applicant contends that should the AAO find him inadmissible, the field office director also erred in finding that the applicant has not established extreme hardship to his qualifying relatives.

The record contains, but is not limited to: the applicant's appeal statement; statements from some of the applicant's family members and friends, including his U.S. citizen wife and children; a psychological evaluation of the applicant's U.S. citizen wife; copies of tax returns and utility bills; a self-made income and expenses report; documentation regarding the applicant's 1986 deportation proceeding; documentation regarding the applicant's 1994 proceeding; and documentation regarding the applicant's criminal history.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The entire record has been reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act provides, 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

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record shows that on August 28, 1995, the applicant was convicted in the Superior Court. of theft by deception in the third degree in violation of section 2C:20-4 of the Statutes. In a crime of the third degree is punishable by a term of imprisonment between three and five years. *See* Stat. Ann. § 2C:43-6. On October 2, 1995, the applicant was sentenced to probation for a period of four years.

At the time of the applicant's conviction, section 2C:20-4 of the Statutes provided that:

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

- a. Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
- b. Prevents another from acquiring information which would affect his judgment of a transaction; or

c. Fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship.

The term "deceive" does not, however, include falsity as to matters having no pecuniary significance, or puffing or exaggeration by statements unlikely to deceive ordinary persons in the group addressed.

We note that in *Nugent v. Ashcroft*, the Third Circuit held that theft by deception under section 3922 of the Pennsylvania Statutes constituted a crime involving moral turpitude. 367 F.3d 162, 165 (3rd Cir. 2004). The Third Circuit noted that theft by deception under the Pennsylvania Statutes "is taken word for word from § 223.3 of the Model Penal Code ("Code") promulgated by the American Law Institute ("ALI") in 1962." 367 F.3d 162, 168. Theft by deception under the New Jersey Statutes is an analogous offense in that it is similarly "taken word for word" from section 223.3 of the Model Penal Code. The AAO finds that section 2C:20-4 of the [REDACTED] Statutes is categorically a crime involving moral turpitude. The applicant does not contest this on appeal, but asserts that he is not inadmissible for this conviction due to the petty offense exception, as he was sentenced to only four months probation. However, he does not qualify for the exception to this ground of inadmissibility under section 212(a)(2)(A)(ii) of because the maximum penalty possible for the crime exceeded one year. Accordingly, the applicant is inadmissible under section 212(a)(2)(A)(i)(I) of the Act for having committed a crime involving moral turpitude.

Section 212(a)(9)(B) of the Act, provides, in pertinent part, that:

(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 (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, 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.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

Section 212(a)(9)(B)(ii) of the Act defines "unlawful presence" for purposes of sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act to mean that an alien is deemed to be unlawfully present in the United States, if the alien is present after the expiration of the period of stay authorized

by the Secretary of Homeland Security or present without being admitted or paroled. When nonimmigrants are admitted to the United States, the period of stay authorized is generally noted on the Arrival Departure Record (Form I-94). The initiation of removal proceeding has no effect, neither to the alien's benefit nor to the alien's detriment, on the accrual of unlawful presence. See 8 C.F.R. § 239.3.

The record reflects that the applicant entered the United States on May 19, 1980, as a B-2 visitor using the false name [REDACTED]. The applicant remained in the United States beyond the period of authorized stay and, as a result, was placed in deportation proceedings on June 12, 1986. On June 19, 1986, the Immigration Judge granted the applicant the privilege of voluntary departure on or before June 26, 1986. The applicant failed to voluntarily depart the United States when required; thus, an order of deportation was issued against the applicant on July 2, 1986. On July 22, 1986, the applicant was deported from the United States to Nigeria.

The record is replete with admissions from the applicant indicating that following his deportation to Nigeria in July 1986, he applied for a visa in Nigeria to travel to Canada under the name [REDACTED]. In October 1986, the applicant reentered the United States by crossing the border from Canada to New York. A review of the record of proceedings revealed no documentary evidence of the applicant having applied for a visa or being granted permission to reenter the United States following his deportation. In fact, the record evidence shows that on January 24, 1995, the applicant was convicted in the United States District Court for the District of Rhode Island of "unlawful re-entry after deportation," in violation of 8 U.S.C. § 1326. The record of conviction reveals that the criminal charge was based on the applicant reentering the United States in October 1986 without authorization from immigration authorities. Moreover, the Presentence Investigation Report indicates that "fingerprints taken on May 11, 1994, showed the [applicant] to be [REDACTED], the same person who was deported on July 22, 1986." The record of conviction further reflects that the applicant signed a sworn statement in preparation of the Presentence Investigation Report, in which he indicates that: "I was charged with and admit guilt to illegally re-entering the United States of America without first obtaining permission from the United States Attorney General. I am in fact guilty of committing such a crime."

As a result of the arrest and subsequent conviction for "unlawful re-entry after deportation," the applicant was once again placed in administrative deportation proceedings on July 14, 1994, by issuance of an Order to Show Cause (OSC). During deportation proceedings, the applicant requested relief from deportation by applying for adjustment of status. The applicant's deportation proceeding lasted some 10 years and resulted in an order of deportation, which was upheld by the Board of Immigration Appeals (Board) on August 25, 2005. On August 2, 2006, the applicant was removed from the United States to Nigeria. Therefore, the applicant accrued unlawful presence in the United States from April 1, 1997, the effective date of the unlawful presence provisions, until his departure in August 2006. The applicant contends that he did not accrue unlawful presence in excess of one year because he filed an adjustment of status application with the immigration court as relief from removal. However, the regulation at 8 C.F.R. § 239.3 indicates that the filing with the immigration court of a charging document placing an alien in immigration court proceedings has no effect in determining periods of unlawful presence under section 212(a)(9)(B) of the Act. Additionally, the United States Citizenship and Immigration Service (USCIS) Adjudicator's Field

Manual (AFM) indicates that the exception to the accrual of unlawful presence applies in the case of an alien who: (1) files an affirmative adjustment of status application with USCIS; (2) the application is denied by the agency; and (3) the same application is later renewed by the alien in immigration court proceedings. See AFM 40.9(b)(3)(A).

Here, because the applicant's adjustment of status application was not the "renewal" of an affirmative application previously denied by USCIS, filing the application with the immigration court did not stop the accrual of unlawful presence. See AFM 40.9(b)(5)(A). The record reflects therefore that the applicant entered the United States without inspection or authorization from an immigration officer and remained from April 1, 1997 until his deportation in August 2006. Accordingly, he accrued unlawful presence in the United States of more than one year. Because the applicant is seeking admission within 10 years of his 2006 departure, he is inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Act.

C. Willful Misrepresentation of a Material Fact

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 shows that on May 19, 1980, the applicant entered the United States as a B-2 nonimmigrant visitor by falsely claiming to be one [REDACTED]. The applicant contends on appeal that the field office director's determination regarding material misrepresentation is incorrect. The applicant asserts on appeal that he entered the United States on September 26, 1981, under the name [REDACTED]. The applicant further asserts that a passport copy he submitted on appeal corroborates his assertion. However, the AAO notes that the passport copy presented, which contains what appears to be a stamp in the passport, is illegible as to the date of entry and the authorizing country. Moreover, the passport copy is incomplete, as part of the passport page is missing and does not include the "admitted until" date. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The evidence in the record is inconsistent with the applicant's assertions. For instance, in a sworn statement submitted to the immigration court, dated April 10, 2002, the applicant admits that he was deported from the United States to Nigeria on July 22, 1986, under the name [REDACTED]. The applicant further stated that [REDACTED] were among the aliases he used while in the United States. Moreover, the alien number the applicant used in his 2002 sworn statement to the immigration court is the same alien number that appears on the 1986 immigration charging document against [REDACTED]. The charging document alleged that he entered the United States as a nonimmigrant visitor on May 19, 1980, and the voluntary departure and subsequent removal order were predicated upon this factual allegation. Lastly, the Presentence Investigation Report indicates that when the applicant was arrested on May 11, 1994, for "unlawful

re-entry after deportation," his fingerprints showed that the applicant was the same person [REDACTED] who was deported on July 22, 1986. As such, the applicant's misrepresentation of his identity on his nonimmigrant visa application constitutes a material misrepresentation under the Act. By stating that he was [REDACTED], the applicant cut off a line of inquiry that was relevant to his request for a nonimmigrant visa. Specifically, the applicant cut off a line of inquiry which might have resulted in a denial of his nonimmigrant visa under section 214(b) of the Act, 8 U.S.C. § 1184(b). Accordingly, the applicant obtained an immigration benefit through the willful misrepresentation of a material fact and is barred from admission to the United States under section 212(a)(6)(C)(i) of the Act.

II. Waivers of Inadmissibility

A. Waiver of Inadmissibility Under Section 212(h)(1)(A) of the Act for a Crime Involving Moral Turpitude

The waiver for inadmissibility under section 212(a)(2)(A)(i)(I) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part, that:

(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) 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 rehabilitated.

The AAO notes that the applicant's most recent conviction for a crime involving moral turpitude occurred on or about August 28, 1995. As the conduct underlying the conviction took place over 15 years ago, he meets the requirement of section 212(h)(1)(A)(i) of the Act, and the AAO will assess his eligibility for a waiver under the additional requirements of section 212(h)(1)(A) of the Act. An application for admission or adjustment is a "continuing" application, and inadmissibility is adjudicated on the basis of the law and facts in effect at the time of admission. *Matter of Alarcon*, 20 I&N Dec. 557, 562 (BIA 1992). Section 212(h)(1)(A) of the Act requires that the applicant's admission to the United States not be contrary to the national welfare, safety, or security of the United States, and that he has rehabilitated.

Section 212(h)(1)(A)(iii) of the Act requires that the applicant establish his rehabilitation. Evidence in the record to establish the applicant's eligibility under section 212(h)(1)(A)(iii) of the Act consists

of letters commending his character. In a letter dated January 28, 2011, [REDACTED] indicates that the applicant participates in "many of the church programs." [REDACTED] further indicates that the applicant comports himself diligently and is an honest, hardworking person. The applicant's sister, [REDACTED] conveys in her letter dated January 31, 2011, that the applicant is a nice, honest, respectful, and disciplined man. She further states that the applicant is a good husband and a good father. The record also includes a letter dated January 25, 2011, from [REDACTED], who conveys that the applicant is a truthful and matured man. The record includes additional letters from the applicant's neighbors and friends, attesting to his character and positive influence on his family.

To further support his claim that he has rehabilitated, the applicant submitted a letter dated June 8, 2010, in which he states that he is sorry for his past criminal acts. The applicant expresses remorse for his participation in both crimes, and apologizes to his family, the U.S. government, and others he offended by his past actions. He states that he has changed tremendously since committing the crime of theft by deception, and asserts that he advises young men within the community through his church's Men's League Program.

The applicant does not address his numerous misrepresentations in his letter dated June 8, 2010. In fact, in his statement on appeal, the applicant asserts on page two that he did not enter the United States under the false identity of [REDACTED]. The applicant also asserts that the field office director incorrectly found that he had misrepresented a material fact and that he has not misrepresented facts relating to his identity. However, the AAO notes that the record is inconsistent with the applicant's statements regarding his assertion that he did not procure immigration benefits under the name [REDACTED]. Here, the record evidence is replete with statements from the applicant in which he admits that he was physically present in the United States from 1980 until his deportation in July 1986. For instance, the record of proceedings includes the transcript of an immigration court individual calendar hearing convened on July 27, 2001, in which the applicant testified under oath to misrepresenting to immigration officers that his name was A [REDACTED]. The record also includes a sworn statement dated April 10, 2002, in which the applicant declares under oath that he used the alias [REDACTED] and that he was deported to Nigeria under this name on July 22, 1986. Moreover, the applicant admitted before an Immigration Judge in 1994 the allegation from Legacy Immigration and Naturalization Service concerning his July 22, 1986 deportation under the alias [REDACTED]. Furthermore, evidence in the record from the U.S. Department of State and U.S. Immigration and Customs Enforcement show that the applicant entered the United States in 1980 as a B-2 visitor under the name [REDACTED].

Additionally, the record contains evidence indicating that the applicant has not been straightforward about his criminal convictions for illegal reentry and theft by deception to his family in Nigeria, as the applicant's sister states in her sworn statement dated January 31, 2011 that the applicant is a "law abiding citizen who does not have any criminal record." Further, in her decision dated April 6, 2004, the Immigration Judge recounts the several instances in which the applicant provided false information to government authorities, including providing a false name to Rhode Island police officers and Secret Service officials, and providing a false address to [REDACTED] police officers. The documentary evidence in the record, including police affidavits, narratives, records of conviction, criminal complaints, and a presentence investigation report, corroborate the conclusions rendered by the Immigration Judge regarding the applicant's mendacity. As such, the applicant's

assertions are directly contradicted by the applicant's judicial record of conviction, the statements he volunteered to the immigration court during his two deportation proceedings, the letter from the applicant's sister dated January 31, 2011, and other evidence in the record.

Here, the record does not contain a declaration from the applicant indicating that he is remorseful about his prior misrepresentations, or that he has been truthful in his statements to the immigration authorities. This lack of evidence, coupled with the above-noted inconsistencies as well as his repeated misrepresentations about his personal information, leads the AAO to find that the applicant has not shown that he has been rehabilitated. The AAO acknowledges that the applicant has not been convicted of a crime since 1995; however, the applicant's history of misrepresentations, his crime involving deception, and the absence of evidence from the applicant demonstrating his remorse and efforts towards rehabilitation do not show that he has rehabilitated. Additionally, based on the aforementioned, the AAO also finds that the applicant has not demonstrated that his admission would not be contrary to the national safety and welfare of the United States. Rather, the record demonstrates that the applicant has a tendency and a propensity to be untruthful when dealing with immigration authorities. His admission would therefore be contrary to the national safety and welfare of the United States.

Section 212(a)(9)(B)(v) of the Act provides that:

Waiver.-The Attorney General [Secretary of Homeland Security] 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 of Homeland Security] 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. No court shall have jurisdiction to review a decision or action by the Attorney General [Secretary of Homeland Security] regarding a waiver under this clause.

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

(1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) 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 [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 ...

The AAO begins its analysis by noting that a section 212(a)(9)(B)(v) and a section 212(i) waiver of inadmissibility are both dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawful permanent resident spouse or parent of the applicant. Hardship to the applicant or other family members can be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. See *Matter of Mendez-Morales*, 21 I&N Dec. 296, 301 (BIA 1996). Here, the record reflects that the applicant is the spouse of a U.S. citizen who has an

approved Form I-130, Petition for Alien Relative, which was filed on the applicant's behalf. The applicant's U.S. citizen wife therefore meets the definition of a qualifying relative.

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors 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 the unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage; loss of current employment; inability to maintain one's present standard of living; inability to pursue a chosen profession; separation from family members; severing community ties; cultural readjustment after living in the United States for many years; cultural adjustment of qualifying relatives who have never lived outside the United States; inferior economic and educational opportunities in the foreign country; or inferior medical facilities in the foreign country. See generally *Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[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) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "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." *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-*

Buenfil v. INS, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant is not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The AAO now turns to the issue of whether the applicant has established that a qualifying relative would experience extreme hardship as a result of his inadmissibility.

The asserted hardship factors in this case are the psychological, financial, and emotional impact to the applicant's wife if she remains in the United States without him. On appeal, the applicant's spouse asserts that she feels alone, isolated, and that she needs her husband to offer her some stability, as he is a source of emotional and psychological support to her. The applicant's wife further asserts that she's endured four years of physical and emotional exhaustion and that she needs the applicant in the United States to provide their family the emotional support they need.

The record includes a psychological report prepared by [REDACTED] a Licensed Marriage and Family Therapist. In her report, the family therapist indicates that she treated the applicant's wife from October 2, 2009, until May 14, 2010. The applicant's wife was referred to the office by an Employee Assistance Program for a behavioral evaluation due to recent issues with her work performance. The family therapist further indicates that the applicant's wife experienced symptoms of irritability, anger, frequent crying, and problems with short-term memory, focus, and concentration. The applicant's wife believes she has no source of support and indicated to the family therapist that she began experiencing the above-referenced symptoms around the time the applicant was deported to Nigeria. The medical report reflects that after conducting the required psychological evaluations, the applicant's wife was diagnosed with Major Depressive Disorder, Recurrent. The family therapist concludes that the applicant's wife's symptoms have worsened over time and that the lack of family support is a contributing factor to her depression. The record, therefore, contains sufficient medical evidence of the applicant's wife's psychological state to establish that she has been diagnosed with a major depressive disorder.

With regards to financial hardship, the applicant's wife states the family's financial stability has decreased as a consequence of separation and the added expenses of their children's student loans and college tuition. She states that though she earned a higher salary than him at the time he lived in the United States, the applicant also financially contributed to the household. The applicant's spouse asserts that she is unable to cover all of her monthly obligations with just her income, as she must function as a single mother of three, two of whom are in college. Consequently, she has reduced all extra spending and is currently utilizing her income solely to meet their monthly obligations. The applicant's wife asserts that on occasion, she cannot pay for food, clothes, or the family's daily expenses. The applicant also states that recent emergency reparations to their house have further constrained her family's finances and living standards.

The applicant's wife indicates that her current financial situation worries her, resulting in lack of concentration during work and in sleep disorders. From the financial documentation submitted on appeal by the applicant's wife, it is noted that her average bi-weekly salary is \$2,359. The record evidence further indicates that the applicant pays monthly mortgage payments of \$994.72 and pays

an average of \$1,046 each month on utility bills. Additionally, the applicant's wife has personal loan expenses and is currently assisting her children with the repayment of student loans, which when combined total around \$549 a month. Taken together, the record indicates that the applicant's wife has fixed monthly obligations totaling around \$2,589. The applicant's wife also covers the family's daily expenses and home emergency expenses. From the documents provided, the AAO acknowledges that the applicant's wife currently faces economic difficulties, as she is the sole provider for her household.

In letters and statements from the applicant's wife, their children, and friends of the family, it is asserted that the applicant's wife has a good, stable relationship with the applicant and that she depends upon him for emotional and financial support. The applicant's wife stated that the applicant was involved in her daily care and that she needs the applicant in the United States to help her with their oldest daughter, who is currently experiencing some behavioral problems. The AAO acknowledges that the applicant's wife is experiencing emotional and financial difficulties by remaining in the United States without the applicant.

Accordingly, when looking at the aforementioned factors in the aggregate, particularly the documented financial difficulties of the applicant's wife, the applicant's wife's major depressive disorder and the observed difficulties at work she experiences due to the separation, as well as the emotional difficulties due to separation, the AAO finds that the applicant has demonstrated extreme hardship to his wife if she were to remain in the United States without him.

In regard to joining the applicant to live in Nigeria, the applicant states that she cannot relocate because she would not be able to find a similar job there. She further states that their health insurance would not be transferable to Nigeria. Neither the applicant nor his wife has asserted any other unfavorable reasons why the family cannot rejoin the applicant in Nigeria. Here, the current documentation submitted is insufficient to establish that the applicant's wife will experience extreme hardship in Nigeria. The record fails to establish that the applicant's wife is receiving medical treatment, or that health insurance in Nigeria would be insufficient to treat the applicant's wife's medical conditions, if any. Moreover, the record does not establish that the applicant's wife must see a doctor on a regular basis, or that adequate health insurance in Nigeria is unavailable.

The additional documentation submitted and the lack of certain documentation in the record does not support the asserted claims of hardships in regards to relocation. For instance, the record does not include specific information supporting the applicant's wife's claims made pertaining to country conditions in Nigeria, such as problems with the standards of medical care in the country and economic problems. Also, the record does not support the applicant's wife's assertion that she would be unable to find employment in Nigeria.

Here, the applicant has demonstrated that his qualifying relative would experience extreme hardship if separated from him. However, the AAO can find extreme hardship warranting a waiver of inadmissibility only where an applicant has demonstrated extreme hardship to a qualifying relative in the scenario of separation *and* the scenario of relocation. The AAO has long interpreted the waiver provisions of the Act to require a showing of extreme hardship in both possible scenarios, as a claim that a qualifying relative will remain in the United States and thereby suffer extreme hardship as a consequence of separation can easily be made for purposes of the waiver even where

there is no intention to separate in reality. *See Matter of Ige*, 20 I&N Dec. 880, 886 (BIA 1994). Furthermore, to separate and suffer extreme hardship, where relocating abroad with the applicant would not result in extreme hardship, is a matter of choice and not the result of inadmissibility. *Id.*, *see also Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996). As the applicant has not demonstrated extreme hardship to his wife resulting from relocation, the AAO cannot find that refusal of admission would result in extreme hardship to a qualifying relative. Consequently, the AAO finds that the documentation in the record fails to establish the existence of extreme hardship to the applicant's wife caused by the applicant's inadmissibility to the United States.

The AAO also finds that the applicant does not merit 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, 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 negative factors in this case are: the applicant's long period of unlawful presence in the United States, for which he now seeks a waiver, as well as his unlawful residence in the United States prior to April 1, 1997; the applicant's conviction for theft by deception in [REDACTED] the applicant's conviction for unlawful reentry after deportation; the applicant's continuous and repeated misrepresentations to immigration officers and law enforcement officials; his failure to comply with the terms of the nonimmigrant visa with which he initially entered the United States in 1980; and his failure to comply with the grant of voluntary departure issued by an immigration judge in 1986.

The positive factors in this case are: the applicant's family ties in the United States, including his U.S. citizen wife and three U.S. citizen children; and the existence of extreme hardship to his qualifying relative in the event of separation.

The applicant's criminal convictions are at least 17 years in his past and his arrests for robbery, credit card fraud, and violating a domestic protection order, neither of which resulted in formal charges, occurred more than 18 years ago. The same, however, cannot be said of the applicant's violations of immigration law. The applicant entered the United States for the first time in 1980 by falsely claiming to be one [REDACTED] and misrepresenting his purpose in entering the United States to immigration inspectors. Further, the applicant failed to abide by the terms of his nonimmigrant visa. When placed in deportation proceedings, the applicant once again misrepresented his identity to the immigration court and failed to disclose his true name and personal information. In addition, when granted voluntary departure by an immigration judge in 1986, he did not comply, remaining unlawfully in the United States until he was deported by immigration officials. Since his deportation in 1986, the applicant has continued to violate U.S. immigration law, reentering the United States through New York without permission to reapply for admission or a valid visa. The applicant was convicted in federal district court for this violation.

Additionally, the applicant contends on appeal that he has not misrepresented material facts to immigration officials; yet statements from the applicant at various stages of his immigration proceedings admitting his misrepresentations abound in the record. Thus, the AAO finds the applicant's repeated misrepresentations regarding his identity and other personal information, added to his years of unlawful residence in the United States and the applicant's criminal convictions, reflect a long-term and continuing disregard for U.S. immigration law. The applicant's misrepresentations, which are entirely corroborated by the record of proceedings, denote a continuous propensity to lie to immigration authorities and other law enforcement officials. His lack of acceptance of responsibility for the misrepresentations on appeal, particularly in light of the fact that he admitted to the same during his testimony before the immigration court and in various sworn statements, further denotes his continuing disregard for U.S. immigration laws. The record does not reflect genuine rehabilitation. Accordingly, the AAO does not find the favorable factors in the present matter to outweigh the negative and will not favorably exercise the Secretary's discretion.

The documentation in the record fails to establish the existence of rehabilitation, extreme hardship to the applicant's wife caused by the applicant's inadmissibility to the United States, or that the applicant merits a favorable exercise of discretion. In proceedings for an application for waiver of grounds of inadmissibility under sections 212(h), 212(a)(9)(B)(v), and 212(i) of the Act, the burden of proving eligibility rests with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

The AAO further notes that in *Matter of Martinez-Torres*, 10 I&N Dec. 776 (Reg. Comm. 1964), it was held that an application for permission to reapply for admission will be denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act. Thus, no purpose would be served in further review of the applicant's Form I-212 application. Consequently, the appeal of the field office director's denial of the Form I-212 will be dismissed as a matter of discretion.

(b)(6)

ORDER: The appeal is dismissed.