

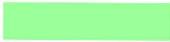
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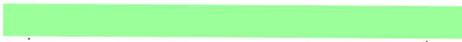


U.S. Citizenship
and Immigration
Services



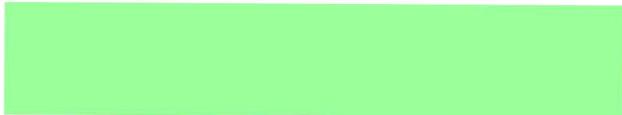
DATE: **MAR 25 2013** OFFICE: ROME, ITALY

FILE: 

IN RE: 

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

ON BEHALF OF APPLICANT:



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 its 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-290B, 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 any 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,


for Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Field Office Director, Rome, Italy and 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 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 crimes involving moral turpitude; section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having obtained a benefit under the Act through fraud or the willful misrepresentation of a material fact; and 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. He is the spouse and father of U.S. citizens, and seeks waivers under section 212(a)(9)(B)(v), section 212(h), and section 212(i) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), § 1182(h), and § 1182(i), in order to reside in the United States.

The Acting Field Office Director found that the applicant had established that his inadmissibility would result in extreme hardship for a qualifying relative, but denied the Form I-601 based on her determination that a favorable exercise of the Attorney General's (now Secretary of Homeland Security's) discretion was not warranted. *Decision of the Acting Field Office Director*, dated August 25, 2011.

On appeal, the applicant contends that United States Citizenship and Immigration Services (USCIS) did not consider all of the positive factors in the applicant's case in reaching its discretionary denial. *Notice of Appeal or Motion*, dated August 25, 2011; *Counsel's brief*, dated October 25, 2011. He submits additional evidence in support of the waiver application.

The evidence of record includes, but is not limited to: counsel's briefs, statements from the applicant, his spouse, his daughter, his mother-in-law, his sister-in-law and one of his spouse's cousins; medical documentation relating to the applicant's spouse and mother-in-law; psychological reports on the applicant's spouse and daughter; school records for the applicant's daughter; a statement from a teacher working with the applicant's daughter; documentation of the applicant's spouse's financial obligations; a Social Security Administration statement issued to the applicant's spouse; country conditions information on Nigeria; letters of support for the applicant; an educational certificate issued to the applicant; and records documenting the applicant's convictions. The entire record was reviewed and all relevant evidence considered in reaching a decision on the appeal.

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, on September 23, 2002, the applicant pled guilty to Forgery in the First Degree, Georgia Code Annotated (GCA), § 16-9-1; Forgery in the Second Degree, GCA § 16-9-2; and Giving False Name to Officers, GCA § 16-10-25. The applicant was prosecuted as a First Offender. He was sentenced to three years of probation for each of his forgery convictions and 12 months of probation for his violation of GCA § 16-10-25, which were to be served concurrently. The applicant was also fined \$1,000.

The record further includes an Irish Police Certificate, dated February 10, 2010, that reports the applicant was convicted on February 8, 2005, of Using a False Instrument, a violation of section 26 of the Theft Act of 2001, and Custody of a False Instrument, section 29 of the Theft Act of 2001. It also records that he was again convicted of Using a False Instrument and Custody of a False Instrument on October 17, 2005. On December 3, the applicant was convicted for a third time of Using a False Instrument. On December 13, 2005, he was convicted of Custody of a False Instrument; Refuse Name and Address, section 24 of the Criminal Justice (Public Order) Act, 1994; and Threatening/Abusive/Insulting Behaviour in a Public Place, section 6 of the Criminal Justice (Public Order) Act, 1994. On April 26, 2006, the Cloverhill District Court sentenced the applicant to three months in prison for Using a False Instrument, section 26 of the Theft Act of 2001, and to six months in prison for Custody of a False Instrument, section 29 of the Theft Act of 2001, with his other convictions taken into consideration.

The applicant has not disputed his inadmissibility on appeal and the record does not show that the Acting Field Office Director erred in determining that his forgery offenses are crimes involving moral turpitude. Accordingly, the AAO will not disturb the Acting Field Office Director's finding that the applicant is inadmissible under section 212(a)(2)(A)(i)(II) of the Act.

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 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.

The record reflects that the applicant used a British passport that was not his own to enter the United States under the Visa Waiver Pilot Program on April 21, 2000, September 5, 2000 and June 9, 2001. He is, therefore, inadmissible pursuant to section 212(a)(6)(C)(i) of the Act for having obtained admission to the United States through fraud or the willful misrepresentation of a material fact.

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 following his June 9, 2001 admission, the applicant remained in the United States in violation of the requirements of the Visa Waiver Pilot Program. On July 22, 2002, he filed a Form I-485, Application to Register Permanent Residence or Adjust Status, in conjunction with the Form I-130, Petition for Alien Relative, filed by his U.S. citizen spouse. On February 2, 2004, USCIS denied the Form I-485 and on February 27, 2004, the applicant was removed from the United States.

Based on this history, the applicant accrued unlawful presence beginning on September 8, 2001, the day after his authorized stay under the Visa Waiver Program expired, until July 22, 2002, when he filed the Form I-485, a period of 317 days. On February 3, 2004, the day after USCIS denied the Form I-485, the applicant again began to accrue unlawful presence, which ended with his February 27, 2004 removal, a period of 24 days. Therefore, the applicant accrued 341 days of unlawful presence and is subject to section 212(a)(9)(B)(i)(I) of the Act, which bars admission to the United States for three years from the date of last departure.

The applicant was removed from the United States on February 27, 2004 and has remained outside the United States since that time. As more than three years have passed since the applicant's last departure from the United States, he is no longer inadmissible under section 212(a)(9)(B)(i)(I) of the Act and the Acting Field Officer's finding to that effect is withdrawn.

As the record establishes that the applicant is inadmissible to the United States pursuant to sections 212(a)(2)(A)(i)(I) and 212(a)(6)(C)(i) 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(h) and (i) of the Act, which are first dependent upon a showing that the bar would impose an extreme hardship on a qualifying relative. 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).

Although section 212(h) of the Act defines an applicant's qualifying relatives as his or her U.S. citizen or lawful permanent resident parents, spouse or children, the more restrictive requirements of section 212(i) of the Act limit qualifying relatives to an applicant's spouse and parents. Therefore, as the applicant is seeking a waiver under section 212(i) of the Act, his only qualifying relative for the purposes of this proceeding is his U.S. citizen spouse.

In her August 25, 2011 decision, the Acting Field Office Director found that the applicant had established that his spouse would experience extreme hardship as a result of his inadmissibility and was statutorily eligible for waivers pursuant to sections 212(h) and (i) of the Act. The AAO concurs with this finding.

In reaching a determination that relocation to Nigeria would result in extreme hardship for the applicant's spouse, we have taken note of her birth and life-long residence in the United States; the conditions in the Delta region of Nigeria, as documented by the record and as corroborated by the Department of State's travel warning of December 21, 2012; the impact on the applicant's spouse of leaving her ailing mother and other family members in the United States; and the documented deterioration in the applicant's spouse's mental health. We have also concluded that the applicant's spouse would suffer extreme hardship if she continues to be separated from the applicant, finding the combination of her responsibilities as a single parent for three children, one of whom is experiencing behavioral problems, and her impaired mental health to establish that she would experience hardship beyond that normally created by the separation of a family if she continues to be separated from the applicant.

In that the applicant has established statutory eligibility for a waiver under section 212(i) of the Act, we now turn 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-Morales, 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).

As established by the record, the mitigating factors in the applicant's case include his U.S. citizen spouse and children; the extreme hardship his spouse would experience if the waiver application is denied; his spouse's mental health and the behavioral problems of his oldest child; his mother-in-law's medical problems; the certificate issued to the applicant by [REDACTED] for his completion of a ten-week course on Family Communication; and the letters of support from Father [REDACTED]; [REDACTED], President of the [REDACTED]; the applicant's doctor, Dr. [REDACTED]; and [REDACTED] Father [REDACTED], the director of a [REDACTED] providing pastoral care to Africans in Ireland, indicates that the applicant has been using their services since his arrival in Cork and that he is not aware of any illegal behavior on the part of the applicant. In his statement, [REDACTED] states that the applicant has been a tremendous asset to the [REDACTED], organizing and unifying their affiliates. Dr. [REDACTED] describes the applicant as "a pleasure to look after." The applicant's friend, [REDACTED] states that he has known the applicant for five years and that he has no reason to believe that the applicant has acted against the law during this period.

The adverse factors in this matter are the applicant's repeated use of a passport that was not his to enter the United States; his 2002 and 2005 convictions; his unlawful presence; his 2004 removal from the United States; and a July 9, 2010 consular memorandum that raises concerns regarding the applicant's identity and his relationship with his spouse, and which indicates that he continues to seek admission to the United States through misrepresentation.

In the memorandum, the consular officer who interviewed the applicant on November 10, 2009, indicates that he asked the applicant to supplement the 2006 identity certificate and passport he submitted at the interview with documentation that would establish his identity prior to 2006, and to provide proof of an ongoing relationship with his U.S. citizen spouse. He reports that the applicant has not provided this information. The consular officer also notes that, at his interview, the applicant refused to acknowledge his U.S. convictions until he was confronted with the results of his fingerprint check.

The AAO recognizes that there are the strong mitigating factors in the record, particularly the concerns raised by the applicant's spouse's psychiatrist with regard to her mental health. Nevertheless, we do not find the present case to warrant a favorable exercise of discretion. When added to the negative factors of his convictions, his multiple entries to the United States under a false identity, his unlawful presence and his removal from the United States, the applicant's concealment of his U.S. criminal record at the time of his 2009 visa interview precludes a favorable exercise of discretion. Proof that the applicant's misrepresentation of his criminal history during his visa interview was not inadvertent is provided by the Form DS-230 Application for Immigrant Visa and Alien Registration, signed by the applicant on November 3, 2009, in which he answered "No" to Question 31, which states "Have you ever been charged, arrested or convicted of any offense or crime?" In light of the applicant's continuing disregard for U.S. immigration law, the AAO does not find that there has been genuine rehabilitation or that the mitigating factors in the present case outweigh the negative. Accordingly, the appeal will be dismissed as a matter of discretion.

In proceedings for waivers 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

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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 not met that burden.

ORDER: The appeal is dismissed.