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



U.S. Citizenship
and Immigration
Services



Date: AUG 06 2015



IN RE:



APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)(1)(A).

ON BEHALF OF APPLICANT:



Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

Thank you,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the waiver application. The matter is 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 granted lawful permanent resident status in 1995. In [REDACTED] 2000, the applicant was convicted in the Criminal District Court [REDACTED] Texas, of Theft, a violation of Texas Penal Code Section 31.03, and Securing Execution of a Document by Deception, a violation of Texas Penal Code 32.46(b)(4). The applicant was sentenced to two years' confinement and probation for five years for each offense. In addition, the applicant was ordered to pay restitution. The applicant was charged with deportability under section 237(a)(2)(A)(iii) for having been convicted of an aggravated felony after admission and ordered removed on April 23, 2002. A subsequent appeal was dismissed by the Board of Immigration Appeals (BIA) on September 23, 2002. The applicant was removed in August 2003. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. citizen mother and children.

The director determined that the applicant was inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of crimes involving moral turpitude. The director further noted that the applicant was statutorily ineligible for a waiver of inadmissibility as a result of having been convicted of aggravated felonies as defined in sections 101(a)(43)(G) and (M) of the Act after admission to the United States as a lawful permanent resident. Finally, the director determined that the applicant did not merit a favorable exercise of discretion. The director denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal the applicant submits a brief. The entire record was reviewed and considered in rendering this decision.

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

(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:

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

(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 . . .; and

(2) the Attorney General [Secretary], in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than seven years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

In a May 12, 2015 decision, the Board of Immigration Appeals (BIA), citing “the overwhelming circuit court authority” and the importance of “uniformity in the application of the immigration laws,” determined that an alien who adjusted status in the United States, and who had not entered as a lawful permanent resident, is not barred from establishing eligibility for a waiver of inadmissibility under section 212(h) of the Act as a result of an aggravated felony conviction. *Matter of J-H-J-*, 26 I&N Dec. 563, 564-5 (BIA 2015) (citing *Matter of Small*, 23 I&N Dec. 448, 450 (BIA 2002)). The BIA held that section 212(h) of the Act only precludes aliens who entered the United States as

lawful permanent residents from establishing eligibility for a waiver on the basis of an aggravated felony conviction, withdrawing from its decisions in *Matter of Koljenovic*, 25 I&N Dec. 219 (BIA 2010), and *Matter of E.W. Rodriguez*, 25 I&N Dec. 784 (BIA 2012). The record establishes that the applicant adjusted status in 1995 rather than entering the United States as a lawful permanent resident. The applicant is thus eligible for a waiver of inadmissibility under section 212(h) of the Act.

Since the activities that are the basis for the applicant's criminal convictions occurred more than 15 years ago, he is eligible for a waiver under section 212(h)(1)(A) of the Act.¹ 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 been rehabilitated.

The applicant contends that numerous favorable factors warrant approval of his application. The applicant first outlines the close family ties he has in the United States, including the presence of his U.S. citizen mother and his two U.S. citizen children. Further, the applicant maintains that his convictions for Theft and Securing Execution of Document by Deception occurred more than fifteen years ago, which indicate rehabilitation. The applicant further outlines the hardships his U.S. citizen mother would experience were he unable to reside in the United States.²

In her own statement, the applicant's U.S. citizen mother contends that she would experience emotional and financial hardship were she to remain in the United States while the applicant continues to reside abroad due to his inadmissibility. The applicant's mother first explains that the applicant is her oldest child and since her youngest child resides in Germany and has his own financial and family obligations, she needs the applicant to return to the United States so that he may help her on a daily basis. She maintains that in 2010, she lost her husband unexpectedly and she had a car accident that left her with daily pain. In addition, the applicant's mother contends that she has dealt with depression for many years and has been treated with medications but the counseling she believes would help her is cost-prohibitive. She states that her husband used to assist with the finances of the household but since his death, her adjusted gross income of \$13,452 barely covers

¹ The record establishes that in March 2002, the applicant was convicted of a Class A Misdemeanor of Assault in violation of Texas Penal Code Section 22.01. The Director did not find that the applicant's assault conviction was a crime involving moral turpitude, and the record does not establish that the offense involves moral turpitude. As a general rule, simple assault or battery is not deemed to involve moral turpitude. *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996). However, assault or battery offenses involving some aggravating dimension, such as the use of a deadly weapon or serious bodily harm, have been found to be crimes involving moral turpitude. See, e.g., *Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967) (finding that second degree assault with a knife is a crime involving moral turpitude); *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon); *Matter of S-*, 5 I&N Dec. 668 (BIA 1954) (assault with a .38-caliber revolver); *Nguyen v. Reno*, 211 F.3d 692 (1st Cir. 2000) (intentional infliction of serious injury).

² Although extreme hardship to a qualifying relative is not required for purposes of a section 212(h)(1)(A) waiver of inadmissibility, we note that hardship is a relevant consideration for a discretionary determination under section 212(h)(2) of the Act.

her minimum expenses. Finally, the applicant's mother details that she suffers from numerous other medical conditions, including diabetes, high blood pressure, and hypertension, but since she is alone and aging, she may not be able to work much longer and will need the applicant's assistance.

In support, the applicant has submitted medical and mental health documentation pertaining to his mother, including evidence of depression, hypertension and diabetes. Documentation has also been provided establishing that the applicant's father died in 2010, and his brother resides abroad and has his own responsibilities. The applicant has also submitted financial documentation pertaining to his mother in support of her assertions regarding her annual income. Finally, letters have been provided from the applicant's relatives describing the hardships the applicant's mother is experiencing as a result of his inadmissibility.

In regard to relocating abroad to reside with the applicant, the record reflects that the applicant's U.S. citizen mother has been residing in the United State for over twenty years. She is in her early 60s. Were she to relocate to Nigeria to reside with the applicant, she would have to leave her employment, her home, her community, her friends, and affordable and effective medical treatment for her conditions. In addition, as referenced by the applicant, country conditions in Nigeria are problematic, including in the state of [REDACTED] where the applicant resides. We note that the U.S. Department of State issued a travel warning for Nigeria recommending against "all but essential travel to the following states due to the risk of kidnappings, robberies, and other armed attacks: Adamawa, Bauchi, Bayelsa, Borno, Delta, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Plateau, Rivers, Sokoto, Yobe, and Zamfara."³

The record does not indicate that the applicant's admission to the United States would be contrary to the national welfare, safety, or security of the United States. Furthermore, the applicant has shown by a preponderance of the evidence that he has been rehabilitated. As discussed above, there is no evidence that he has been convicted of a crime involving moral turpitude since 2000, and no evidence that he has engaged in any criminal activity since 2001, more than 14 years ago. The record shows that during the ensuing years, the applicant has not violated any immigration laws and has not been convicted of any crimes while residing in Nigeria. The record includes attestations to his good moral character and does not indicate that the applicant has a propensity to engage in further criminal activity. Accordingly, the applicant has shown that he meets the requirements of section 212(h)(1)(A) of the Act.

Demonstrating that his admission to the United States is not contrary to the national welfare, safety, or security of the United States and that he has been rehabilitated are requirements for eligibility, but once established are but one favorable discretionary factor to be considered in determining whether a grant of a waiver of inadmissibility is warranted in the exercise of discretion. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996). In discretionary matters, the alien bears the burden of

³ The report also states that the extremist group Boko Haram "has targeted churches, schools, mosques, government installations, educational institutions, and entertainment venues" in several states, including [REDACTED] where the applicant resides.

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). The BIA has further stated:

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

See Matter of Mendez-Morales, supra, at 301. This office must "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.

The favorable factors in this matter are the applicant's U.S. citizen mother and children; the emotional and financial hardships the applicant's U.S. citizen mother is experiencing as a result of her son's inadmissibility, as discussed in detail above; support letters attesting to the applicant's good character; the applicant's past gainful employment in the United States; the applicant's apparent lack of a criminal record since returning to Nigeria in 2003; the applicant's statement expressing remorse and regret for his criminal actions; and the passage of more than a decade since the applicant's last criminal conviction. The unfavorable factors in this matter are the applicant's criminal convictions after acquiring lawful permanent resident status; his removal from the United States; and periods of unlawful presence and employment while in the United States.

The crimes and immigration violations committed by the applicant were serious in nature. Nonetheless, we find that the applicant has established that the favorable factors outweigh the unfavorable factors. Therefore, a favorable exercise of the Secretary's discretion is warranted.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met.

ORDER: The appeal is sustained.