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20 Mass. Ave., NW, Rm. 3000
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U.S. Citizenship
and Immigration
Services

H3

[REDACTED]

FILE:

[REDACTED]

Office: MOSCOW, RUSSIA

Date: FEB 06 2009

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B)

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Moscow, Russia. 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 found to be inadmissible to the United States pursuant to section 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act (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 seeking readmission within ten years of his last departure from the United States. The applicant is married to a United States citizen. He seeks a waiver of inadmissibility in order to reside in the United States with his spouse and their United States citizen child.

The Field Office Director found that, based on the evidence in the record, the applicant had failed to establish extreme hardship to his qualifying relative. The application was denied accordingly. *Decision of the Field Office Director*, dated January 8, 2008.

On appeal, counsel asserts that United States Citizenship and Immigration Services (USCIS) erred as a matter of law in finding that the applicant failed to meet the burden of establishing extreme hardship to his qualifying relative if he were removed from the United States. *Form I-290B; Attorney's brief*.

In support of these assertions, counsel submits a brief. The record also includes, but is not limited to, medical letters for the applicant's spouse; a statement from the applicant's child's school; a speech and language evaluation for the applicant's child; a speech-language assessment summary for the applicant's child; a psychological evaluation for the applicant's child; statements from Congressional representatives; statements from the applicant's spouse; a statement from [REDACTED] Real Estate & Management Division II; a statement from Northland Group, Inc.; a telephone bill; published media and country conditions reports; published reports on health conditions; a Nigerian Certificate of Registration; Nigerian income tax assessments and receipts; a statement from the applicant's church; and a statement from the applicant. The entire record was reviewed and considered in rendering a decision on the appeal.

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

(B) Aliens Unlawfully Present.-

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

....

(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.

In the present application, the record indicates that the applicant was admitted to the United States on July 30, 1996 on a B-1 visa valid until August 30, 1996. *Form I-94, Alien Departure Record*. The applicant filed a Form I-589, Application for Asylum and for Withholding of Deportation on August 22, 1996. *Form I-589*. This application was subsequently denied by the immigration judge and the Board of Immigration Appeals. *Order of the Immigration Judge, Miami, Florida*, dated March 23, 1998; *Decision, Board of Immigration Appeals*, dated June 28, 2000. The applicant remained in the United States and married a U.S. citizen on April 16, 1999. *Marriage certificate*. On May 1, 2001 the applicant filed a Form I-485, Application to Register Permanent Residence or Adjust Status which was subsequently denied on February 5, 2003. *Form I-485*. On April 11, 2003, the applicant was removed from the United States. *Form I-205, Warrant of Removal/Deportation*. Although the proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as a period of stay for purposes of determining bars to admission under section 212(a)(9)(B)(i)(I) and (II) of the Act (*See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations*, dated June 12, 2002), the AAO notes that the applicant filed a Form I-485 application after his asylum and withholding of removal appeal was dismissed by the Board of Immigration Appeals and the applicant was ordered to depart the United States. As the Form I-485 application was not affirmatively filed, its filing does not stop the clock for the purpose of determining the amount of time accrued for unlawful presence. The applicant, therefore, accrued unlawful presence from June 28, 2000, the date of the Board of Immigration Appeal's decision on the applicant's appeal, until he was removed from the United States on April 11, 2003. In applying for an immigrant visa, the applicant is seeking admission within ten years of his April 11, 2003 departure from the United States. The applicant is, therefore, inadmissible to the United States under section 212(a)(9)(B)(i)(II) of the Act for being unlawfully present in the United States for a period of more than one year. The AAO also notes that the District Director, Chicago Illinois, has approved a Form I-212, Application for Permission to Reapply for Admission Into the United States After Deportation or Removal for the applicant. *Decision of the District Director*, dated March 9, 2005.

A section 212(a)(9)(B)(v) waiver of the bar to admission resulting from a violation of section 212(a)(9)(B)(i)(II) of the Act is dependent first upon a showing that the bar imposes an extreme

hardship to the citizen or lawfully resident spouse or parent of the applicant. The plain language of the statute indicates that hardship that the applicant or his child would experience upon removal is not directly relevant to the determination as to whether she is eligible for a waiver under section 212(a)(9)(B)(v). The only relevant hardship in the present case is hardship suffered by the applicant's spouse if the applicant is found to be inadmissible. If 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).

Matter of Cervantes-Gonzalez, 22 I&N Dec. 560 (BIA 1999) provides a list of factors the Board of Immigration Appeals deems relevant in determining whether an alien has established extreme hardship pursuant to section 212(i) of the Act. These factors include the presence of a lawful permanent resident or United States citizen family ties to 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 an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

The AAO notes that extreme hardship to the applicant's spouse must be established whether she resides in Nigeria or the United States, as she is not required to reside outside the United States based on the denial of the applicant's waiver request. The AAO will consider the relevant factors in adjudication of this case.

If the applicant's spouse travels with the applicant to Nigeria, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant was born in the United States. *Birth certificate*. She has no cultural ties to Nigeria and does not speak Yoruba. *Attorney's brief*. The applicant's mother is deceased and her father lives in the United States, as do many other family members. *Form G-325, Biographic Information sheet, for the applicant's spouse; Statement from the applicant's spouse*, dated August 1, 2006. The applicant's spouse has recently been diagnosed with a cancer of her bile ducts called cholangiocarcinoma. *Statement from [REDACTED] University of Illinois Medical Center at Chicago*, dated January 14, 2009. Untreated, life expectancy is approximately one year. *Id.* She has started to undergo a series of treatments including chemotherapy and radiation with the goal of a possible liver transplantation. *Id.* This is a very serious disease, and the treatment course is going to be involved and very long. *Id.* She will require a great deal of care and has already required hospitalization several times due to complications from this disease. *Id.* The AAO acknowledges the health issues of the applicant's spouse and notes that a move to Nigeria would interrupt her continuing medical treatment. When looking at the aforementioned factors, particularly the applicant's spouse's lack of familial and cultural ties to Nigeria, her lack of language abilities, and her health condition and medical treatment she is receiving in the United States as documented in the record, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in Nigeria.

If the applicant's spouse resides in the United States, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States and has many family members in the United States. *Birth certificate; Statement from the applicant's spouse*, dated August 1, 2006. As previously noted, the applicant's spouse suffers from cancer in her bile ducts and is receiving medical treatment in the United States. *Statement from [REDACTED] University of Illinois Medical Center at Chicago*, dated January 14, 2009. **The applicant's spouse** will definitely require continued medical intervention. *Statement from [REDACTED] Medical Group, S.C.*, dated December 4, 2008. She will not be available or feeling well enough to care for her son. *Id.* The applicant's son is autistic and presents challenges above and beyond those of an average 5 year old. *Statement from [REDACTED]* dated December 1, 2008. He has a 30% or more delay in one or more areas of development and it is recommended that intervention is needed in language, speech and communication development, and social-emotional development. *Statement from [REDACTED], CCC-SLP/L, Licensed Speech Language Pathologist*, dated September 2, 2005. While the applicant's child is not a qualifying relative for purposes of this case, the AAO acknowledges the child's health issues and how they may affect the applicant's spouse who is already suffering from her own health problems. The applicant's spouse notes that the applicant has been unable to find a job in Nigeria. *Statement from the applicant's spouse*, dated August 1, 2006. As previously noted, the cancer treatment course for the applicant's spouse is going to be involved and very long, and she has already started chemotherapy and radiation treatments. *Statement from [REDACTED] University of Illinois Medical Center at Chicago*, dated January 14, 2009. As such, the AAO recognizes that the applicant's spouse's capacity to work is diminished. The applicant's spouse also states that she has been unable to pay the bills due to the loss of the applicant's income. *Statement from the applicant's spouse*, dated August 1, 2006. In support of this assertion, the record includes a statement from Wilmette Real Estate & Management Division II noting that the applicant's spouse has been late with her rent payments 13 times. *Statement from [REDACTED], Accountant, [REDACTED] Real Estate Division II*, dated July 12, 2006; See also *payment obligation note, Northland Group Inc.*, dated July 11, 2006 showing outstanding balance. When looking at the aforementioned factors, particularly the health issues of the applicant's child and how they impact the applicant's spouse who has her own health problems, along with the financial difficulties she has encountered as documented in the record, the AAO finds that the applicant has demonstrated extreme hardship to his spouse if she were to reside in the United States.

The AAO additionally finds that the applicant merits a waiver of inadmissibility as a matter of discretion. In discretionary matters, the alien 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).

The adverse factors in the present case are the applicant's prior unlawful presence for which he now seeks a waiver. The favorable and mitigating factors are the extreme hardship to his spouse if he were refused admission, his supportive relationship with his spouse, and his lack of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant were serious and cannot be condoned, when taken together, the favorable factors in the present case outweigh the adverse factors, such that a favorable exercise of discretion is warranted. Accordingly, the appeal will be sustained.

ORDER: The appeal is sustained.