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



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[Redacted]

FILE:

[Redacted]

Office: NEW YORK, NY

Date:

AUG 10 2009

IN RE:

[Redacted]

APPLICATION:

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:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The District Director, New York, New York, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and it 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, on January 20, 1994, was admitted to the United States as a conditional permanent resident based upon his marriage to a U.S. citizen, [REDACTED]. On May 3, 1995, the applicant pled guilty to and was convicted of conspiracy to possess unauthorized access devices in violation of 18 U.S.C. § 1029(b)(2). The applicant was sentenced to eight months in jail, deportation upon completion of jail sentence and three years of probation. On March 31, 1998, the applicant was placed into immigration proceedings as a conditional resident who had been convicted of a crime involving moral turpitude. On December 21, 1999, the immigration judge ordered the applicant removed from the United States *in absentia*. The applicant failed to depart the United States.

On August 4, 2006, the applicant married his current U.S. citizen spouse in New York City, New York. On November 10, 2008, the applicant filed the Form I-212 indicating that he continued to reside in the United States. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). The applicant requests permission to reapply for admission into 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 spouse and two U.S. citizen children.

The district director determined that the applicant did not warrant a favorable exercise of discretion and denied the Form I-212 accordingly. *See District Director's Decision* dated January 21, 2009.

On appeal, counsel contends that the applicant has sustained his burden of proving that the favorable factors in support of his case outweigh the unfavorable factors. *See Counsel's Brief*, dated February 11, 2009. In support of his contentions, counsel submits the referenced brief and copies of documentation previously provided. The entire record was reviewed in rendering a decision in this case.

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

(A) Certain aliens previously removed.-

- (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.
- (ii) Other aliens.- Any alien not described in clause (i) who-

- (I) has been ordered removed under section 240 or any other provision of law or
- (II) departed the United States while an order of removal was outstanding

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

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

Before the AAO can weigh the discretionary factors in this case, it must first determine whether the applicant is eligible to apply for the relief requested.

Section 212(a)(2)(A)(i) of the Act states in pertinent part:

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —
 - (i) In general. — Except as provided in clause (ii), any 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, that:

The Attorney General [now Secretary, Homeland Security, "Secretary"] may, in his discretion, waive the application of subparagraphs (A)(i)(I) . . . of subsection (a)(2) . . . if -

....

No waiver shall be provided 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 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States . . .
[emphasis added]

The record reflects that the applicant was charged with and convicted of "knowingly, willfully and unlawfully combining, conspiring, confederating and agreeing to possess a fifteen or more unauthorized access devices with the intent to defraud in a manner affecting interstate commerce" in violation of 18 U.S.C. § 1029(b)(2). The AAO finds that the applicant is inadmissible pursuant to section 212(a)(2)(A)(i)(I) of the Act for having been convicted of conspiracy to possess unauthorized access devices, a crime involving moral turpitude.

The Act makes it clear that a section 212(h) waiver is not available to an alien who had been admitted as a lawful permanent resident, if he or she had, since admission as a lawful permanent resident, not lawfully resided continuously in the United States for a period of at least seven years immediately preceding initiation of immigration proceedings. In this case, the applicant, after he had been admitted to the United States as a conditional resident, had only continuously resided in the United States in a lawful capacity for just over four years prior to initiation of immigration proceedings on March 31, 1998.¹ The applicant is, therefore, ineligible for waiver consideration.

Matter of Martinez-Torres, 10 I&N Dec. 776 (Reg. Comm. 1964) held that an application for permission to reapply for admission is denied, in the exercise of discretion, to an alien who is mandatorily inadmissible to the United States under another section of the Act, and no purpose would be served in granting the application.

The applicant is subject to the provisions of section 212(a)(2)(A)(i)(I) of the Act, which are very specific and applicable. No waiver is available to a lawful permanent resident who has not continuously and lawfully resided in the United States for a period of at least seven years prior to initiation of immigration proceedings. Therefore, no purpose would be served in the favorable exercise of discretion in adjudicating the application to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act. As the applicant is statutorily inadmissible to the United States, the appeal will be dismissed as a matter of discretion.

ORDER: The appeal is dismissed.

¹ A conditional permanent resident is an alien who has been lawfully admitted for permanent residence within the meaning of section 101(a)(20) of the Act. See 8 C.F.R. § 1216.1.