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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: [Redacted]

[Redacted]

JUL 08 2010

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:

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 law was inappropriately applied by us 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. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

[Redacted Signature]

Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont Service Center denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212) and the Administrative Appeals Office (AAO) dismissed the subsequent appeal. The matter is now before the AAO on a motion to reconsider. The motion will be dismissed. The order dismissing the appeal will be affirmed.

The applicant is a native and citizen of Nigeria who, on March 1, 1999, appeared at the [REDACTED] applicant presented his brother's Nigerian passport containing a lawful permanent resident stamp bearing the name [REDACTED]. The applicant was placed into secondary inspection. The applicant admitted that he was not the true owner of the document and that he did not have valid documentation to enter the United States. The applicant indicated that he [REDACTED]. The applicant gave a false name and date of birth to immigration officers and failed to admit to his true identity. On March 18, 1999 the applicant was placed into immigration proceedings pursuant to credible fear procedures. On July 14, 1999, the immigration judge denied the applicant's applications for asylum, withholding of removal and convention against torture and ordered him removed from the United States. On July 27, 1999, the applicant was removed from the United States and returned to Nigeria under the name "John Olumide."

On January 26, 2000, the applicant was issued a U.S. nonimmigrant visa under his true identity.<sup>1</sup> On March 14, 2000, the applicant was admitted to the United States as a nonimmigrant visitor. On August 3, 2002, the applicant married his then lawful permanent resident spouse, [REDACTED]

[REDACTED] he applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Petition for Alien Relative (Form I-130) filed on his behalf by [REDACTED]. On September 29, 2006, the Form I-130 was approved. On the same day, the applicant's Form I-485 was denied. On November 8, 2006, the applicant filed the Form I-212, indicating that he continued to reside in the United States. The applicant is inadmissible under section 212(a)(9)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(i). He seeks 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 three U.S. citizen children.

The director determined that the applicant is inadmissible pursuant to section 212(a)(9)(C)(i) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i), for illegally reentering the United States after having been removed. The director determined that the applicant was not eligible to apply for permission to reapply for admission because he had not remained outside the United States for the required ten years. The director denied the Form I-212 accordingly. *See Director's Decision*, dated October 16, 2007. On June 4, 2009, the AAO dismissed the applicants appeal because the applicant did not warrant a favorable exercise of discretion. *See Decision of AAO*, dated June 4, 2009.

In her motion to reconsider, counsel contends that it is clear that the equities weigh in favor of the applicant and his application should be approved. *See Statement in Support of Motion to Reconsider* undated. In support of her contentions, counsel submits the referenced statement and copies of financial records and the birth certificate for the applicant's fourth U.S. citizen child. On March 5,

<sup>1</sup> The AAO notes that the applicant did not receive permission to reapply for admission prior to issuance of the nonimmigrant visa and concealed his prior removal from the United States at the time he applied for the visa.

2010, the AAO received a letter from the applicant's spouse; however, since the evidence was not directly filed with the motion to reconsider, it will not be considered.<sup>2</sup> The entire record was reviewed in rendering a decision in this case.

Section 212(a)(9) 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 [Secretary of Homeland Security] has consented to the alien's reapplying for admission.

8 C.F.R. § 103.5(a) provides, in pertinent part:

(3) *Requirements for motion to reconsider.*

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service

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<sup>2</sup> Although the regulation at 8 C.F.R. § 103.3(a)(2)(vii) states that a petitioner may be permitted additional time to submit a brief or additional evidence to the AAO in connection with an appeal, no such provision applies to a motion to reopen or reconsider. Additionally, new evidence may not be considered in rendering a decision on a motion to reconsider. See 8 C.F.R. § 103.5(a)(3).

policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

In her motion to reconsider, counsel submits copies of financial records and the birth certificate for the applicant's fourth U.S. citizen child. Pursuant to 8 C.F.R. § 103.5(a)(3), evidence of new facts or additional evidence that was not on record at the time of the initial decision may not be considered in rendering a decision on a motion to reopen. Counsel must establish that the AAO's decision was based on an incorrect application of law.

In her motion to reconsider, counsel contends that the applicant's appeal was dismissed because he failed to show the required "extreme hardship" to a U.S. citizen spouse. Counsel's contention is unpersuasive. The AAO notes that extreme hardship is not a requirement for permission to reapply for admission.<sup>3</sup> The AAO, in its decision, clearly evaluated and considered the hardship to the applicant and his family members if his application were denied.

In her motion to reconsider, counsel contends that the AAO based its dismissal of the applicant's appeal primarily upon the existence of immigration violations in the applicant's history and the fact that the applicant's favorable factors were "after-acquired." Counsel contends that the AAO decided to divide the applicant's single offense, namely attempting to enter the United States by utilizing another's passport, into many separate steps and discrete actions to make it appear that the applicant has committed multiple immigration violations.<sup>4</sup> Counsel contends that the AAO unfairly decided to consider the applicant's deportation and reentry as particularly egregious crimes that warrant no sympathetic second look regardless of its impact upon the applicant's U.S. family. Counsel's contentions are unpersuasive. The AAO finds that the immigration violations it found to be negative factors in the applicant's case were each separate and distinct violations to be properly considered in weighing whether an applicant warrants a favorable exercise of discretion. The AAO finds that it did not consider the applicant's removal itself to be a factor in weighing whether the applicant warranted a favorable exercise of discretion. The AAO finds that the applicant's fraudulent reentry after having been removed is an appropriate factor to be considered in weighing whether an applicant warrants a favorable exercise of discretion. The AAO finds that the applicant's inadmissibility under section 212(a)(6)(C)(i) of the Act is an appropriate factor to be considered in weighing whether an applicant warrants favorable exercise of discretion. The AAO finds that the applicant's favorable factors were correctly accorded diminished weight as "after-acquired" equities in accordance with applicable case

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<sup>3</sup> The AAO notes that counsel incorrectly cites to requirements for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). Section 212(h) of the Act relates to a waiver of a crime involving moral turpitude or a crime related to a controlled substance. Counsel goes on to discuss case law relating to extreme hardship. The record does not reflect that the applicant had been convicted of a crime which requires a waiver under section 212(h) of the Act. Moreover, the record reflects that the application before the AAO is for permission to reapply for admission, which requires an applicant to establish that he or she warrants a favorable exercise of discretion.

<sup>4</sup> The AAO notes that counsel incorrectly cites to case law relating to a waiver under section 212(a)(19) of the Act, holding that the violation an applicant sought to be forgiven was not to be considered an adverse factor.; however, the applicant seeks a waiver of his prior removal order and not the fraud committed in his attempt to enter the United States, which requires a separate waiver under section 212(i) of the Act. An applicant may obtain a waiver under section 212(i) of the Act by filing an Application for Waiver of Grounds of Inadmissibility (Form I-601).

law and policy. Moreover, counsel fails to cite any relevant case law which establishes the AAO incorrectly applied the law in this case.

In her motion to reconsider, counsel contends that the applicant and his spouse were not so knowledgeable on the subject of the applicant's immigration status. Counsel contends that the applicant undoubtedly remembered that he had committed an immigration offense in the past for which he was deported, but, by obtaining a U.S. visa at a later date, he had believed that he was forgiven, at least in part, for what he had done. Counsel contends that the applicant was unaware that, by returning to the United States, he had reopened his immigration proceedings.<sup>5</sup> Counsel contends that the applicant's spouse was even less aware of the applicant's immigration situation. Counsel contends that, if the couple had been fully apprised of the applicant's immigration situation he would not have filed for adjustment of status. Counsel contends that the applicant and his spouse were not informed of the problems the applicant's prior immigration history would cause. Counsel contends that it is unfair to discount the extreme hardships the applicant's spouse will suffer because she was unaware of the consequences of the applicant's prior immigration history. Counsel's contentions are unpersuasive. Any appeal or motion based upon a claim of ineffective assistance of counsel requires: (1) that the claim be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard, (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond, and (3) that the appeal or motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. [REDACTED] 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). Counsel has failed to submit any evidence to establish the requirements of *Lozada*. Moreover, the applicant purposefully concealed his prior immigration violations in obtaining a U.S. visa in order to reenter the United States. Furthermore, the written warnings provided to the applicant clearly inform him that he requires permission to reapply for admission and will face additional consequences if he returns to the United States without such permission. Additionally, counsel fails to provide any case law or evidence to establish that the AAO incorrectly found the applicant's spouse to be an "after-acquired" equity due diminished weight.

While counsel contends that there was an incorrect application of law, as discussed above, counsel's contentions are unpersuasive and are contrary to relevant case law. Accordingly, the AAO finds that counsel failed to state reasons for reconsideration, supported by pertinent precedent decisions establishing that the AAO's decision was based on an incorrect application of law.

The petitioner's motion does not meet applicable requirements. The regulation at 8 C.F.R. § 103.3(a)(3) states that a motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law. Accordingly, the motion must be dismissed for failing to meet applicable requirements.

**ORDER:** The motion is dismissed. The order dismissing the appeal will be affirmed.

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<sup>5</sup> The AAO notes that counsel is incorrect in stating that the applicant's immigration proceedings were reopened.