

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

H4

[REDACTED]

FILE:

[REDACTED]

Office: CHICAGO, IL

Date:

MAR 15 2010

RELATES)

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, as required by 8 C.F.R. 103.5(a)(1)(i).

Perry Khew
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, Chicago, Illinois, 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 The field office director's decision will be withdrawn and the application remanded for entry of a new decision.

The applicant is a native and citizen of Nigeria who, on January 10, 1986, was admitted to the United States as a nonimmigrant student. On February 14, 1986, the applicant was placed into immigration proceedings for violating his student status by engaging in unauthorized employment. On January 24, 1987, the applicant married [REDACTED], a U.S. citizen, in Louisiana. On August 25, 1987, the immigration judge granted the applicant voluntary departure until January 31, 1988. The applicant failed to surrender for removal or depart from the United States, thereby changing the grant of voluntary departure to a final order of removal. On May 1, 1988, the applicant was removed from the United States and returned to Nigeria.

On November 13, 1991, [REDACTED] filed a Petition for Alien Relative (Form I-130) on behalf of the applicant. On February 25, 1992, [REDACTED] filed a request to withdraw her support of the Form I-130 since she and the applicant were separated. On July 1, 1992, the Form I-130 was terminated per the request of [REDACTED]. [REDACTED] subsequently filed a request to rescind her prior withdrawal of the Form I-130 and the Form I-130 was approved on July 31, 1992. On the same day a Form I-212 was also approved.¹ On May 12, 1997, [REDACTED] and the applicant were divorced.

On August 30, 1997, the applicant married his current U.S. citizen spouse, [REDACTED] in Baton Rouge, Louisiana. On October 11, 1997, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485) based on a Form I-130 filed on his behalf by [REDACTED]. The Form I-485 indicates that the applicant reentered the United States without inspection in January 1994. On April 11, 2005, the Form I-485 was denied. On June 10, 2005, the applicant filed the Form I-212 indicating that he resided 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). 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 two U.S. citizen children.

The field office 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 field office 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 field office director denied the Form I-212 accordingly. *See Field Office Director's Decision*, dated October 16, 2007.

On appeal, counsel contends that the field office director erred in finding the applicant inadmissible under section 212(a)(9)(C) of the Act. Counsel contends that the applicant's Form I-212 should be granted in the interest of family reunification. *See Counsel's Letter*, dated December 13, 2007. In support of her contentions, counsel submits the referenced letter and copies of the applicant's passport pages. The entire record was reviewed in rendering a decision in this case.

¹ Since the applicant subsequently reentered the United States without inspection, the approval of the Form I-212 is void and the applicant requires the approval of a new Form I-212.

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.

....

(C) Aliens unlawfully present after previous immigration violations.-

- (i) In general.-Any alien who-
 - (I) has been unlawfully present in the United States for an aggregate period of more than 1 year, or
 - (II) has been ordered removed under section 235(b)(1), section 240, or any other provision of law, and who enters or attempts to reenter the United States without being admitted is inadmissible.

(ii) Exception.

Clause (i) shall not apply to an alien seeking admission more than 10 years after the date of the alien's last departure from the United States if, prior to the alien's reembarkation at a place outside the United States or attempt to be readmitted from a foreign contiguous territory, the Secretary of Homeland Security has consented to the alien's reapplying for admission.

(iii) Waiver

The Secretary of Homeland Security may waive the application of clause (i) in the case of an alien who is a VAWA self-petitioner if there is a connection between—

(I) the alien's battering or subjection to extreme cruelty; and

(II) the alien's removal, departure from the United States, reentry or reentries into the United States; or attempted reentry into the United States.

The record in this matter establishes that the applicant was removed from the United States on May 1, 1988 and the Form I-485 indicates that he last returned to the United States without being admitted in January 1994. In order to be found inadmissible pursuant to section 212(a)(9)(C) of the Act, an applicant, while he or she may have been ordered removed prior to April 1, 1997, must have either entered or attempted to reenter the United States without being admitted on or after April 1, 1997, the effective date of the Illegal Immigration and Immigrant Responsibility Act (IIRIRA). The evidence in the record does not establish that the applicant entered or attempted to reenter the United States without being admitted on or after April 1, 1997. Accordingly, the record does not establish that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C) of the Act; however, the applicant is clearly inadmissible under section 212(a)(9)(A)(ii) of the Act and must receive permission to reapply for admission.²

Since the applicant is *eligible* to apply for permission to reapply for admission to the United States, the AAO withdraws the decision of the field office director to deny the applicant's Form I-212 on the basis that the applicant is ineligible for relief under section 212(a)(9)(C) of the Act. The matter shall be remanded to the field office director for a full adjudication of the application on the merits.³

² The AAO notes, however, that U.S. Immigration and Customs Enforcement (USICE) may reinstate the applicant's prior removal order under section 241(a)(5) of the Act, even though he reentered prior to April 1, 1997, since section 241(a)(5) of the Act has been found to not be impermissibly retroactive. *See Labojewski v. Gonzalez*, 407 F. 3d 814 (7th Cir. 2005) (at 822).

³ The AAO notes that this decision has no bearing on whether the applicant does or does not warrant a favorable exercise of discretion. The AAO's decision merely withdraws the director's stated basis for the denial of the application and directs the director to review the applicant's Form I-212 and supporting documentation to determine whether the applicant warrants a favorable exercise of discretion.

ORDER: The field office director's decision is withdrawn. The application is remanded to the field office director for entry of a new decision that, if adverse to the applicant, shall be certified to the AAO for review.