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



U.S. Citizenship
and Immigration
Services

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DATE: **MAY 20 2011** Office: PHILADELPHIA, PA

FILE: [Redacted]

IN RE: [Redacted]

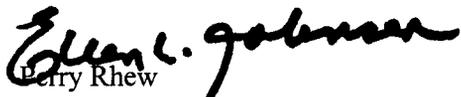
APPLICATION: Application for Waiver of Grounds of Inadmissibility under sections 212(a)(9)(B)(v), 212(a)(9)(C)(ii) and 212(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(9)(B)(v), 1182(a)(9)(C)(ii) and 1182(i)

ON BEHALF OF PETITIONER:
[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.

Thank you,


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Philadelphia, Pennsylvania and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Field Office Director for action consistent with this decision.

The applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) for having sought to procure an immigration benefit by fraud or willful misrepresentation; section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having accrued more than one year of unlawful presence in the United States and seeking admission within ten years of his last departure; and section 212(a)(9)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(9)(C)(i)(I), for having been unlawfully present in the United States for more than one year and entering the United States without being admitted. The applicant is married to a U.S. citizen and is the father of two U.S. citizens. He seeks waivers of inadmissibility pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, 8 U.S.C. §§ 1182(a)(9)(B)(v) and 1182(i), and an exception under section 212(a)(9)(C)(ii), 8 U.S.C. § 1182(C)(ii), in order to remain in the United States.

The Field Office Director concluded that the applicant had failed to establish extreme hardship to a qualifying relative pursuant to sections 212(a)(9)(B)(v) and 212(i) of the Act, and was not eligible for an exception under section 212(a)(9)(C)(ii). She denied the Form I-601, Application for Waiver of Grounds of Inadmissibility, accordingly. *Decision of the Field Office Director* dated January 7, 2009.

On appeal, counsel asserts that the record demonstrates that the applicant's spouse will suffer extreme hardship as a result of his inadmissibility and that United States Citizenship and Immigration Services (USCIS) has misapplied section 212(a)(9)(C)(i)(I) to the applicant. *Form I-290B, Notice of Appeal or Motion, and Counsel's brief*, dated January 29, 2009.

The record contains, but is not limited to, the following evidence: counsel's brief; statements from the applicant's spouse, his father-in-law and his mother-in-law; country conditions materials on Nigeria; medical documentation relating to the applicant's daughter and his father-in-law; printed materials on sickle cell anemia; a psychological evaluation of the applicant's spouse; documentation relating to the applicant's and his spouse's financial obligations; tax returns; documentation relating to the applicant's business; and evidence submitted in support of previously filed immigrant visa petitions. The entire record was reviewed and all relevant evidence considering in reaching a decision on the appeal.

The AAO first turns to the Field Office Director's determination that the applicant is inadmissible to the United States pursuant to section 212(a)(9)(C)(i)(I) of the Act, which states in pertinent part:

(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

. . . .

(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.

On appeal, counsel correctly states that the applicant is not subject to section 212(a)(9)(C)(i)(I) of the Act as it applies only to individuals who, subsequent to accruing more than one year of unlawful presence in the United States, enter or attempt to enter the United States without being admitted. In that the record indicates that, since his initial nonimmigrant admission, the applicant has departed and returned to the United States under grants of advance parole, he has not returned to the United States unlawfully and, therefore, is not inadmissible under section 212(a)(9)(C)(i)(I) of the Act.

The Field Office Director additionally determined that the applicant is inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act.

Section 212(a)(6)(C) of the Act provides, in pertinent part, that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

A waiver of a section 212(a)(6)(C)(i) inadmissibility is available under section 212(i) of the Act, which states:

- (1) The Attorney General [now the Secretary of Homeland Security (Secretary)] may, in the discretion of the Attorney General [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, 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 the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

Section 212(a)(9)(B) provides:

- (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.

A section 212(a)(9)(B)(i)(II) inadmissibility may be waived if an applicant satisfies section 212(a)(9)(B)(v) of the Act, which states:

(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.

The AAO will not, however, consider whether the applicant is eligible for waivers under sections 212(a)(9)(B)(v) and 212(i) of the Act as we find the record before us to reflect that a prior Form I-130, Petition for Alien Relative, benefitting the applicant was revoked under section 204(c) of the Act, which provides:

[N]o petition shall be approved if (1) the alien has previously . . . sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States . . . by reason of a marriage determined by the Attorney General [now Secretary of Homeland Security] to have been entered into for the purpose of evading the immigration laws, or (2) the Attorney General [Secretary] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

8 U.S.C. § 1154(c).

The corresponding regulation states:

Fraudulent marriage prohibition. Section 204(c) of the Act prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. The director will deny a petition for immigrant visa classification filed on behalf of any alien for whom there is substantial and probative evidence of such an attempt or conspiracy, regardless of whether that alien received a benefit through the attempt or conspiracy.

Although it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy, the evidence of the attempt or conspiracy must be contained in the alien's file.

8 C.F.R. § 204.2(a)(ii).

The record contains an April 22, 1996 decision issued by the District Director, Baltimore, Maryland denying a visa petition filed on behalf of the applicant by his second wife, [REDACTED]. The District Director indicated that his denial was based on the petitioner's failure to demonstrate that her marriage to the applicant was not entered into solely to circumvent the immigration laws of the United States. On May 8, 2003, the Field Office Director, Philadelphia, Pennsylvania revoked an approved Form I-130 filed by the applicant's current spouse, [REDACTED], citing section 204(c) of the Act. While the record indicates that the applicant's prior counsel appealed this decision, the record does not reflect the outcome of the appeal.¹ Therefore, although the AAO acknowledges that the applicant's spouse filed a new Form I-130 that was approved by USCIS on January 7, 2009, we do not find the record to establish that this approval was consistent with law and regulation given USCIS' prior 204(c) finding.

In that the applicant may be permanently barred from obtaining a U.S. immigrant visa, the AAO finds no purpose would be served in addressing the issue of admissibility at this time. The AAO will, therefore, remand the matter for further processing. Should the current approved Form I-130 petition underlying the applicant's Form I-601 waiver application be revoked, the Field Office Director shall issue a new decision dismissing the applicant's Form I-601 as moot. In the alternative, should it be determined that the applicant is not subject to section 204(c) of the Act and that the Form I-130 should not be revoked, the Field Office Director shall return the applicant's Form I-601 waiver application to the AAO for consideration on its merits.

ORDER: The matter is remanded to the Field Office Director for further processing consistent with this decision.

¹ Prior counsel in a March 12, 2006 letter states that the 2003 appeal was filed with the AAO. We note, however, that the Board of Immigration Appeals has jurisdiction over the appeal of the denial of a Form I-130, Petition for Alien Relative. The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).