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

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PUBLIC COPY

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: ACCRA, GHANA Date: DEC 13 2010

IN RE: Applicant: [redacted]

APPLICATION: Immigrant Application for Waiver of Grounds of Inadmissibility pursuant to section 212(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(i) and 212(a)(9)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(B) and Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A).

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.

Thank you,

Tariq Syed
for
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Field Office Director, Accra, Ghana and 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 is inadmissible to the United States pursuant to sections 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i) and 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having attempted to procure admission into the United States by fraud or willful misrepresentation and 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 U.S. citizen spouse and children.

The Field Office Director concluded that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated January 28, 2008.

On appeal, counsel asserts that the applicant's qualifying relative would suffer extreme hardship should the waiver application be denied. *Form I-290B, Notice of Appeal or Motion*; *Attorney's brief*.

In support of the waiver, counsel submits a brief. The record also includes, but is not limited to, statements from the applicant's spouse; a psychological evaluation for the applicant's spouse; statements from the applicant's church; mortgage statements; business foreclosure documents; a tax statement; a statement from a family member; an employment letter for the applicant; and a statement from the applicant. The entire record was reviewed and considered in rendering this decision.

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.

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.

The record reflects that the applicant gained admission to the United States on January 12, 1978 with a J-1 visa valid until January 22, 1982. *Form I-213, Record of Deportable Alien: Applicant's passport and visa.* On September 8, 1988 the applicant appeared before immigration authorities for an interview on his application to adjust status to lawful permanent resident based on his marriage at the time to a United States citizen. *Form I-213, Record of Deportable Alien.* During his interview, the interviewing examiner noticed the non-immigrant visa classification on the applicant's passport to have been changed from J-1 to F-1. *Id.* On his Form I-485 application to adjust status to lawful permanent resident, the applicant had reversed his middle and first name. *Id.* When a check was run on his true name, immigration authorities learned that the applicant was subject to the two year foreign residency requirements for J-1 visa holders. *Id.* The applicant's passport was forwarded to an Immigration and Naturalization Service Forensic Document Laboratory which found the classification and validity date on the visa to have been altered. *Memorandum, Forensic Document Laboratory, Immigration and Naturalization Service*, dated August 18, 1989. While the AAO acknowledges counsel's assertion that the applicant is not inadmissible under section 212(a)(6)(C)(i) of the Act, it notes that counsel fails to offer any argument rebutting the findings of visa alteration. As such, the AAO finds that the applicant is inadmissible under section 212(a)(6)(C)(i) of the Act for attempting to procure admission by adjustment of status through fraud or willful misrepresentation. On May 23, 1991 the applicant was ordered deported by an immigration judge. *Decision of the Immigration Judge*, dated May 23, 1991. The applicant appealed which was dismissed by the Board of Immigration Appeals (BIA) on January 14, 1994. *Decision of the Board of Immigration Appeals*, dated January 14, 1994. The applicant filed a Motion to Reopen which was ultimately dismissed by the BIA on December 3, 2001. *Decision of the Board of Immigration Appeals*, dated December 3, 2001. On August 31, 2005, after being apprehended for a traffic violation, the applicant was removed from the United States. *Attorney's brief.* The applicant, therefore, accrued unlawful presence from April 1, 1997, the effective date of the unlawful presence provisions under the Act, until he departed the United States on August 31, 2005. In applying for an immigrant visa, the applicant is seeking admission within ten years of his August 31, 2005 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.

Section 212(i) of the Act provides, in pertinent part:

> (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)(v) of the Act provides for a waiver of section 212(a)(9)(B)(i) inadmissibility as follows:

> The Attorney General [now Secretary of Homeland Security] 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 . . . 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.

A waiver of inadmissibility under sections 212(i) and 212(a)(9)(B)(v) of the Act is dependent on a showing that the bar to admission imposes extreme hardship on a qualifying relative, which includes the U.S. citizen or lawfully resident spouse or parent of the applicant. Hardship to the applicant or children can be considered only insofar as it results in hardship to a qualifying relative. The applicant's spouse is the only qualifying relative in this case. If extreme hardship to a qualifying relative is established, the applicant is statutorily eligible for a waiver, and USCIS then assesses whether a favorable exercise of discretion is warranted. *See Matter of Mendez-Moralez*, 21 I&N Dec. 296, 301 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios exist should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action that will be taken is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board of Immigration Appeals stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996)

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. 22 I&N Dec. 560, 565 (BIA 1999). The factors include the presence of a lawful

permanent resident or United States citizen spouse or parent in 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. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Family separation, for instance, has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the nature of family relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. [redacted] was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the

respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and establish a life together such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of family relationship involved, the hardship resulting from family separation is determined based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

If the applicant's spouse joins the applicant in Nigeria, the applicant needs to establish that his spouse will suffer extreme hardship. The applicant's spouse was born in the United States. *Approved Form I-130, Petition for Alien Relative*. The applicant's spouse has substantial family ties to the United States, including her three children and grandchildren. *Attorney's brief*. She has no ties outside of the United States. *Id.* The applicant's spouse notes that she helps care for her grandchildren in the United States and that her children would struggle in finding adequate child care if she relocated to Nigeria. *Statement from the applicant's spouse*, undated. She states that while she is in fairly stable health, she has some medical conditions that require close monitoring. *Id.* She asserts that she has a heart murmur, takes medication for high blood pressure, and needs follow-up colonoscopies for pre-cancerous cells in her colon that were removed. *Id.* While the AAO acknowledges the statements of the applicant's spouse, it notes that the record fails to include documentation from a licensed healthcare professional regarding the asserted medical conditions of the applicant's spouse. Going on record without supporting documentary evidence will not meet the burden of proof of this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Furthermore, the record fails to include published country conditions documentation regarding the availability and adequacy of health care in Nigeria. The applicant's spouse asserts that she fears the crime in Nigeria. *Statement from the applicant's spouse*, undated. She states that every time she has traveled to Nigeria, she is always stressed because of the constant harassment. *Id.* She further asserts there are reports of highway robbery almost every week and that she and her family know a couple of families who were robbed when traveling by these armed highways. *Id.* The AAO notes

that the United States Department of State has issued a Travel Warning for Nigeria warning United States citizens of the risks of traveling to Nigeria. *Travel Warning, Nigeria, United States Department of State*, dated October 19, 2010. When looking at the aforementioned factors, particularly the applicant's spouse's lack of familial and cultural ties to Nigeria, her family ties in the United States, and the risks for United States citizens traveling to Nigeria as demonstrated by the Travel Warning, 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. As previously noted, the applicant's spouse was born in the United States. *Approved Form I-130, Petition for Alien Relative*. The applicant's spouse has substantial family ties to the United States, including her three children and grandchildren. *Attorney's brief*. She has no ties outside of the United States. *Id.* The AAO observes that the record includes a psychological evaluation for the applicant's spouse that notes the applicant's spouse sought help for her depression and had previous suicidal thoughts. *Statement from* dated April 9, 2008. Her counselor asserts that being separated from the applicant has taken an incredible emotional toll upon the applicant's spouse. *Id.* The applicant's spouse asserts that she fears the crime in Nigeria. *Statement from the applicant's spouse*, undated. The AAO notes that the United States Department of State has issued a Travel Warning for Nigeria warning United States citizens of the risks of traveling to Nigeria. *Travel Warning, Nigeria, United States Department of State*, dated October 19, 2010. As such, the AAO recognizes the difficulties the applicant's spouse would have in visiting the applicant in Nigeria. The applicant's spouse notes that she and the applicant are in serious financial trouble with foreclosures and attorney's fees. *Statement from the applicant's spouse*, undated. The record includes documentation regarding the foreclosure of the properties owned by the applicant's business. *Business foreclosure documents; Mortgage statements*. The record also includes a tax statement from 2006 showing a loss of income for the applicant and his spouse of -$118,865.00. *Tax statement*, dated 2006. As such, the AAO acknowledges the financial difficulties of the applicant's spouse. When looking at the aforementioned factors, particularly the documented psychological condition of the applicant's spouse, her inability to visit the applicant in Nigeria as noted by the Travel Warning issued by the United States Department of State, and the documented financial difficulties of the applicant's spouse and the normal results of separation, 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 misrepresentation for which he now seeks a waiver, his prior unlawful presence for which he now seeks a waiver, failure to depart when ordered deported, and periods of unauthorized employment. The favorable and mitigating factors are his United States citizen spouse and children, the extreme hardship to his spouse if he were refused admission, and his lack of a criminal record.

The AAO finds that, although the immigration violations committed by the applicant are 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.
In proceedings for application for waiver of grounds of inadmissibility under sections 212(a)(6)(C)(i) and 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has met that burden. Accordingly, the appeal will be sustained.

The AAO notes that the Field Office Director denied the applicant's Form I-212 Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision. The Form I-212 was denied solely based on the denial of the Form I-601. As the AAO has now found the applicant eligible for a waiver of inadmissibility under sections 212(a)(6)(C) and 212(a)(9)(B)(i)(II) of the Act, it will withdraw the Field Office Director's decision on the Form I-212 and render a new decision.

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

Aliens previously removed.-

(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 5 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 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 aliens 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 aliens' reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General [now, Secretary, Department of Homeland Security] has consented to the aliens' reapplying for admission.

On May 23, 1991 the applicant was ordered deported from the United States. As such, he is inadmissible under section 212(a)(9)(A) of the Act and must request permission to reapply for admission.

A grant of permission to reapply for admission is a discretionary decision based on the weighing of negative and positive factors. The AAO has found that the applicant warrants a favorable exercise of discretion related to the adjudication of the Form I-601. For the reasons stated in that finding, the AAO finds that the applicant's Form I-212 should also be granted as a matter of discretion.

ORDER: The appeal is sustained.