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

U.S. Citizenship and Immigration Services

PUBLIC COPY

#5

[redacted]

Date: JUN 11 2012 Office: ACCRA, GHANA [redacted]

IN RE: [redacted]

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

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,

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 record reflects that the applicant is a native and citizen of Nigeria who was found to be inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for obtaining an immigration benefit through fraud or the willful misrepresentation of a material fact; and section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for more than one year and seeking readmission within ten years of her last departure from the United States. The record indicates that the applicant is married to a U.S. citizen and is the mother of a lawful permanent resident child and two U.S. citizen stepchildren. She is the beneficiary of an approved Petition for Alien Relative (Form I-130). The applicant seeks a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), and section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v), in order to reside in the United States with her spouse and child.

The Field Office Director found that the applicant had failed to establish that extreme hardship would be imposed on the applicant's qualifying relative, that she did not warrant a favorable discretionary finding, and he denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the Field Office Director*, dated November 20, 2009.[1]

On appeal, the applicant's husband asserts that United States Citizenship and Immigration Services (USCIS) erred in denying the waiver application based on discretion and in not finding that he would suffer extreme hardship. *Form I-290B*, filed December 21, 2009. The applicant and her husband submit new evidence of hardship on appeal.

The record includes, but is not limited to, an appeal brief, statements from the applicant and her husband, letters of support, medical documentation for the applicant's husband, photos, financial documents, household and utility bills, employment documents, school documents for the applicant's husband, foreclosure documents, marriage and divorce documents for the applicant and her husband, documents pertaining to the applicant's removal proceeding, and country-conditions documents for Nigeria. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

> (i) In general.-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.
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> . . . .

[1] The AAO notes that the Field Office Director also denied the applicant's Application for Permission to Reapply for Admission into the United States After Deportation or Removal (Form I-212) in the same decision, though no Notice of Appeal or Motion (Form I-290B) was filed for that application.

(iii) Waiver authorized.-For provision authorizing waiver of clause (i), see subsection (i).

Section 212 of the Act provides, in pertinent part, that:

(i) (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant 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 [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) 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.

. . . .

(v) Waiver.-The [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 [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.

In the present case, the record reflects that the applicant entered the United States as a nonimmigrant in 1989. On June 14, 1995, the applicant filed an Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved family petition. On or about May 15, 2002, the applicant's Form I-485 was denied, because her second husband withdrew his petition. On March 1, 2007, the applicant filed another Application to Register Permanent Residence or Adjust Status (Form I-485), based on an approved family petition her current husband filed on her behalf. On June 7, 2007, the applicant's Form I-485 was denied. On October 23, 2007, the applicant was removed from the United States.

In her appeal brief dated January 10, 2010, the applicant "denies the alleged documentary discrepancies upon which USCIS denied her application for waiver." She claims that the various names used in her

immigration documents are from her numerous marriages, and she did not enter the United States under a fake identity. Additionally, she claims that the different date of birth used in a document is based on the "way dates are typically written in Nigeria," where the day is written before the month. The AAO notes that when a misrepresentation is committed it must be material. A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759 (1988); *see also Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (BIA 1962; AG 1964); *Matter of S- and B-C-*, 9 I&N Dec. 436 (BIA 1950; AG 1961). According to the Department of State's Foreign Affairs Manual and the Board of Immigration Appeals (Board), a misrepresentation is material if either: (1) The alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry that is relevant to the alien's eligibility and that might well have resulted in a proper determination that he be excluded. *9 FAM 40.63 N61*; *see also Matter of S- and B-C-, supra*. The record establishes that the applicant has been married four times and has used four different last names corresponding to her husbands' names. It also establishes that the date of birth at issue here transposes the month and day of her actual date of birth. In this case, the discrepancies are not material; she would not have been excludable based on the different last names used while married. Additionally, her different last names and date of birth would not shut off a line of inquiry that is relevant to her eligibility. Therefore, the AAO finds the applicant's use of her married names and the variation on her date of birth are not material misrepresentations, and she is not inadmissible to the United States under section 212(a)(6)(C)(i) of the Act.

However, the applicant accrued unlawful presence from May 16, 2002, the day after the applicant's Form I-485 was denied, until March 1, 2007, the day she filed her second Form I-485. The applicant is attempting to seek admission into the United States within ten years of her October 23, 2007 removal. 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 and seeking admission within 10 years of her departure from the United States. The applicant does not contest her inadmissibility under this section of the Act.

A waiver of inadmissibility under section 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, her child, or stepchildren 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).

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. *Supra* at 565. 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 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. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *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.*

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., Matter of 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). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. *See Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); *but see Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record contains references to hardship the applicant's child and stepchildren would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(a)(9)(B)(v) of the Act, and hardship to the

applicant's child and stepchildren will not be separately considered, except as it may affect the applicant's spouse.

The applicant states all of her husband's immediate family resides in the United States, including his elderly mother and children, and he will suffer emotionally by being separated from them. Her husband has two children from his previous marriage, and if he joins her in Nigeria, he could not fulfill his parental obligations, help them with college expenses, and they "would be denied his role as their father." The mother of her husband's children would not allow them to travel to Nigeria to visit their father. The applicant also claims that her husband and his siblings contribute "towards the living expenses of his elderly mother." The applicant states her husband's "advanced IT skills are U.S. specific," his skills "would not be fully utilized in Nigeria," and he has no "known contacts" to help him enter the information-technology job market there. In a statement dated July 1, 2009, the applicant's husband states he has student-loan and credit-card debt, and in Nigeria, he "will never have a kind of job that will allow [him] the opportunity to repay" his debts. Additionally, in a statement dated October 3, 2007, the applicant's husband, a native of Nigeria who became a U.S. citizen in 1994, states he is "fully integrated into the American society."

The applicant states her husband suffers from diabetes, sleep apnea, and high blood pressure, and he is receiving treatment for his medical conditions. In a statement dated December 28, 2009, [redacted] states he is treating the applicant's husband for diabetes, hypertension, and sleep apnea, and he had an abnormal EKG. Medical documentation in the record establishes that the applicant was scheduled for a heart catheterization procedure on August 24, 2010. [redacted] reports that the applicant's husband's diabetes is not under control, and he requires as much "assistance as possible." The applicant's husband states "Nigeria is not medically equipped to deal with the health related complications associated with [his] diabetes." In an undated statement, [redacted] states the applicant's husband is being treated for severe obstructive sleep apnea with a heated humidifier. [redacted] reports that the applicant's husband "is at risk of multiple medical complications including high blood pressure, pulmonary hypertension, stroke, and early death with lack of monitoring and treatment of the sleep apnea." The applicant's husband states every night he goes "to sleep scared that [he] may not wake up alive the next morning." The applicant states her husband's CPAP machine requires constant electricity, and in Nigeria, the power supply is constantly interrupted, so his "health would be endangered" in Nigeria.

The applicant's husband states he is concerned about the increase in kidnapping incidents in Nigeria. The AAO notes that on February 29, 2012, the Department of State issued a travel warning to U.S. citizens about the security situation in Nigeria. The warning "recommend[s] that U.S. citizens avoid all but essential travel to . . . the Southeastern states of Abia, Edo, Imo . . . because of the risks of kidnapping, robbery, and other armed attacks in these areas. Violent crime committed by individuals and gangs, as well as by persons wearing police and military uniforms, remains a problem throughout the country." The record establishes that the applicant lives in the state of Imo. Additionally, the warning states "[t]he risk of additional attacks against Western targets in Nigeria remains high.... U.S. citizen visitors and residents have experienced armed muggings, assaults, burglary, carjacking, rape, kidnappings, and extortion - often involving violence."

Based on his safety concerns in Nigeria; his minimal ties to Nigeria; his separation from his family in the United States, including his elderly mother and children; his medical issues and possible disruption of his treatment; his financial obligations in the United States; and his employment issues; the AAO finds that the applicant's husband would suffer extreme hardship if he were to join the applicant in Nigeria.

Regarding the hardship the applicant's husband would experience if he were to remain in the United States, the applicant states her husband "constantly lives in agony because of the insecurity in Nigeria." The applicant's husband states he fears that the applicant and her daughter will be "subjects of kidnappers." As noted above, the Department of State issued a travel warning regarding the security situation in Nigeria. The applicant states that she and her husband adopted a girl in Nigeria. Documentation in the record shows that the applicant and her husband adopted a girl in Nigeria, who was born on August 4, 2008. The applicant states that her husband is suffering hardship by being separated from her and their adopted daughter.

The applicant claims that if she cannot return to the United States, her husband will "be withdrawn or dismissed from his doctoral program" and he will lose "all his investments in the program ($65,000)." The applicant's husband states he is "seriously in debt" with high student loans and unsecured credit debt. Documentation in the record establishes that the applicant's husband has approximately $153,159 in student loans. Additionally, the applicant states her husband is now "solely responsible for all the mortgage payments," and because she cannot find a job, her husband also supports her in Nigeria. The applicant's husband claims that he is suffering financial hardship by having to maintain two homes, one in the United States and one in Nigeria. Additionally, he states phone calls and travel to Nigeria are "too expensive." The record contains mortgage statements, utility and household bills, and medical bills.

In a statement dated September 5, 2010, the applicant's husband claims that he is "facing an immediate near death adverse action" in that their home is being foreclosed, he filed for bankruptcy, and he is "struggling" with his medical conditions. As noted above, the applicant's husband suffers from diabetes, sleep apnea, and high blood pressure. Documentation in the record establishes that the applicant's home was being foreclosed upon, with a sale date of September 7, 2010, and the applicant's husband filed a declaration for electronic filing of bankruptcy on September 4, 2010. The applicant's husband also states that he was scheduled for a heart procedure in August 2010, and medical documentation corroborates his statement.

The AAO finds that, considering the applicant's spouse's hardships in the aggregate, specifically his emotional, financial and medical circumstances, the record establishes that the applicant's husband would face extreme hardship if he remained in the United States in her absence. Accordingly, the applicant has established extreme hardship to a qualifying relative under section 212(a)(9)(B)(v) of the Act.

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).

> In evaluating whether section 212(h)(1)(B) relief is warranted in the exercise of discretion, the factors adverse to the alien include the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature and seriousness, and the presence of other evidence indicative of the alien's bad character or undesirability as a permanent resident of this country. The favorable considerations include family ties in the United States, residence of long duration in this country (particularly where alien began residency at a young age), evidence of hardship to the alien and his family if he is excluded and deported, service in this country's Armed Forces, a history of stable employment, the existence of property or business ties, evidence of value or service in the community, evidence of genuine rehabilitation if a criminal record exists, and other evidence attesting to the alien's good character (e.g., affidavits from family, friends and responsible community representatives).

See Matter of Mendez-Moralez, 21 I&N Dec. 296, 301 (BIA 1996). The AAO must then "balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented on the alien's behalf to determine whether the grant of relief in the exercise of discretion appears to be in the best interests of the country." *Id.* at 300. (Citations omitted).

The adverse factors in the present case include the applicant's failing to abide by an immigration judge's order, unlawful presence, and unauthorized employment. The favorable and mitigating factors are the applicant's U.S. citizen husband and lawful permanent resident daughter; the extreme hardship to her husband if she were refused admission; and the absence 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. Accordingly, the appeal will be sustained.

In proceedings for application for waiver of grounds of inadmissibility under section 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.

ORDER: The appeal is sustained. The waiver application is approved.