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U.S. Citizenship
and Immigration
Services

H3

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: **NOV 29 2005**

IN RE:

APPLICATION:

Application for Waiver of of the Foreign Residence Requirement under Section 212(e)
of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a citizen of Kenya who is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant was admitted to the United States as a J1 nonimmigrant exchange visitor on May 14, 2001. The applicant married a U.S. citizen on March 13, 2004 and has a U.S. citizen child. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse and child.

The director determined that the applicant failed to establish her spouse and child would suffer exceptional hardship if she fulfilled her two-year foreign residence requirement in Kenya. The application was denied accordingly. *Decision of the Director*, dated August 11, 2005.

On appeal, counsel asserts that the applicant's spouse and child will endure exceptional hardship if the waiver is not granted. *See Brief in Support of Appeal*, dated September 7, 2005.

The record includes, but is not limited to, medical records for the applicant's spouse, loan documents for the applicant's spouse and a statement from the applicant. The entire record was considered in rendering this decision.

Section 212(e) of the Act states in pertinent part that:

- (e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission
 - (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,
 - (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or
 - (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [now, Citizenship and Immigration Services, CIS] after he has determined that

departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Homeland Security, "Secretary"] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General [Secretary] to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General [Secretary] may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

Counsel asserts that the government of Kenya has not expressed any objections to the applicant remaining in the United States. *Brief in Support of Appeal*, at 3. However, the record does not contain a "no objection" letter from the Kenyan government. The record contains letters from the YMCA and the JUJA preparatory school, neither of which represents the Kenyan government.

In *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad." (Quotations and citations omitted).

The first step required to obtain a waiver is to show that the applicant's spouse or child would suffer exceptional hardship if they moved to Kenya for two years. Counsel states that the applicant's spouse has high blood pressure and heart problems that require regular medical monitoring with sophisticated medical equipment. *Brief in Support of Appeal*, at 2. Counsel asserts that this equipment is readily available in the United States, but not in Kenya. *Id.* Therefore, counsel states that the applicant's spouse will have to sacrifice his medical needs by moving to Kenya. *Id.* The record indicates that the applicant's spouse is taking medication for hypertension and has been subject to various medical procedures including x-rays, an EKG and a CBC. *Medical Records of Applicant's Spouse*, dated August 13, 2004. The record indicates that he is making routine medical follow-ups and is scheduled for an MRI of the renal arteries. *Medical Records of Applicant's Spouse*, dated January 26, 2005. Therefore it is clear that the applicant's spouse requires access to sophisticated medical equipment, however, there is no evidence that this is not available in Kenya.

Counsel has only made assertions on the lack of suitable care and equipment in Kenya. However, the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Counsel also asserts that the applicant's spouse has student loans in excess of \$23,000 and he will default and face financial ruin due to the inability to generate sufficient income in Kenya to pay these loans. *Brief in Support of Appeal*, at 2. Documentation is provided to verify the loans, however, no evidence is provided to support counsel's assertion of the applicant's spouse's inability to earn sufficient income in Kenya. In regard to the applicant's child, counsel states that he needs both parents. *Id.* at 2. The applicant states that her child needs emotional support from both parents and will be deprived of this as her spouse will remain in the United States. *See Applicant's Declaration*, undated. No other contentions are made regarding exceptional hardship to the applicant's child. Therefore, based on the evidence contained in the record, the AAO finds that the applicant has failed to establish that her spouse or child would suffer exceptional hardship if they moved with her to Kenya.

The second step required to obtain a waiver is to show that the applicant's spouse or child would suffer exceptional hardship if they remained in the United States during the two-year period. Counsel's only assertion is that the family will be separated if the applicant's spouse or child remain in the United States and this is against public policy. *Id.* The applicant states that separation will damage their relationship. *Applicant's Declaration*. In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "[t]emporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e)." Therefore, based on the record, the AAO finds that the applicant has also failed to establish her spouse or child would suffer emotional or financial hardship beyond the anxiety and loneliness ordinarily anticipated from a two-year separation, if they remained in the U.S. while the applicant returned temporarily to Kenya.

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that in the present case, the applicant has not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.