

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

PUBLIC COPY



**U.S. Citizenship
and Immigration
Services**

H3

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 24 2008

IN RE: [REDACTED]

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, Chief
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 applicant, a native and citizen of Yemen, was admitted to the United States in J-1 nonimmigrant status in January 1990 to participate in a program sponsored by the Agency for International Development. He is thus 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) based on government financing. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse and children, born in 1998, 2002 and 2004, would suffer exceptional hardship if they moved to Yemen temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Yemen.

The director determined that the applicant failed to establish that his U.S. citizen spouse and/or children would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Yemen. *Director's Decision*, dated March 26, 2008. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated May 21, 2008, and referenced exhibits. The entire record was reviewed and considered in rendering this decision.

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

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.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "Therefore, it must first be determined whether or not such hardship would occur as the consequence of her accompanying him abroad, which would be the normal course of action to avoid separation. The mere election by the spouse to remain in the United States, absent such determination, is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed. Further, even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary 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), supra."

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 establish that the applicant's U.S. citizen spouse and/or children would experience exceptional hardship if they resided in Yemen for two years with the applicant. To support this contention, counsel for the applicant states the following:

The Applicant in this case has three (3) U.S. citizen children ages nine (9), five (5), and three (3) years old. All three were born in the U.S. and have lived here their entire lives. Obviously, moving to Yemen would be a significant disruption to their lives....

If the Applicant's U.S. citizen children are forced to move to Yemen with the Applicant, their educational situation would certainly be greatly affected. All were born in the U.S. and have resided here their entire lives. As such, having to transition to whatever forms of schooling may be available to them in Yemen, given the vast cultural and linguistic differences, would be severely disruptive.

Yemen is a country greatly effected by poverty and political volatility at this time....

Brief in Support of Appeal, dated May 21, 2008.

No corroborating documentation has been provided by counsel that explains and details what exact hardships the applicant's spouse, a native of Yemen, and/or the children, would face were they to reside in Yemen. Moreover, no objective documentation has been provided that establishes that the applicant and/or his spouse would be unable to obtain gainful employment in Yemen, ensuring financial viability for the family and a continuing education for the children. Finally, no documentation from a licensed professional has been provided that outlines, in detail, the specific hardships --academic, emotional, and/or psychological-- that the children would encounter were they to relocate to Yemen for a two year period. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 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 has thus failed to establish that the applicant's U.S. citizen spouse and/or children would experience exceptional hardship were they to relocate to Yemen with the applicant for a two-year period.

The AAO notes, however, that the U.S. Department of State has issued a Travel Warning for Yemen, dated September 17, 2008. As stated:

This Travel Warning updates information on security incidents in Yemen and reminds U.S. citizens of the high security threat level in Yemen due to terrorist activities. The Department of State has authorized the departure of non-emergency personnel and eligible family members of the U.S. Embassy in Sana'a. The Department recommends that American citizens defer non-essential travel to Yemen. U.S. citizens remaining in Yemen despite this warning should monitor the U.S. Embassy website at <http://yemen.usembassy.gov> and should make contingency emergency plans. This supersedes the Travel Warning for Yemen issued August 13, 2008.

The security threat level remains high due to terrorist activities in Yemen. On September 17 at approximately 9:15 a.m. local time, armed terrorists attacked the U.S. Embassy in Sana'a, Yemen. A number of explosions occurred in the vicinity of the Embassy's main gate. Several Yemeni security personnel were killed, as were a few individuals waiting to gain entry to the Embassy.

U.S. embassy employees have been advised to exercise caution when choosing restaurants, hotels or visiting tourist areas in Sana'a in order to avoid large gatherings of foreigners and expatriates. In addition, unofficial travel outside of the capital is not authorized at this time.

U.S. citizens who travel to or remain in Yemen despite this warning should exercise caution and take prudent security measures, including maintaining a high level of vigilance, avoiding crowds and demonstrations, keeping a low profile, varying times and routes for all travel, and ensuring travel documents are current. U.S. citizens in Yemen are advised to exercise particular caution at locations frequented by foreigners countrywide including restaurants and hotels.

The Department remains concerned about possible attacks by extremist individuals or groups against U.S. citizens, facilities, businesses, and perceived interests. On January 17, 2008, suspected al-Qa'ida operatives ambushed a tourist convoy in the eastern Hadramout Governorate, killing two Belgians. On July 2, 2007, suspected al-Qa'ida operatives carried out a vehicle-borne explosive device attack on tourists at the Belquis Temple in Marib, which resulted in the deaths of eight Spanish tourists and two Yemenis. The targeting of tourist sites by al-Qa'ida may represent an escalation in terror tactics in Yemen. On February 3, 2006, 23 convicts, including known affiliates of al-Qa'ida, escaped from a high-security prison in the capital city, Sana'a, some of whom remain at large. Two of the escapees were later killed in vehicle-based suicide attacks on oil facilities near Mukalla and Marib on September 15, 2006. Those attacks were followed by the arrest the next day in Sana'a of four suspected al-Qa'ida operatives, who had stockpiled explosives and weapons.

Since January 2007, the Government of Yemen has been battling al-Houthi rebels in and around the northern governorate of Saada. While foreigners have not been targeted, hundreds of soldiers and civilians have been killed in the violence. U.S. citizens traveling in Yemen should be aware that local authorities occasionally place restrictions on the travel of foreigners to parts of the country experiencing unrest. In addition, the U.S. Embassy itself often restricts travel of official personnel to the tribal areas north and east of Sana'a, such as the governorates of Amran, Al Jawf, Hajja, Marib, Saada, and Shabwa. Travelers should be in contact with the Embassy for up-to-date information on such restrictions.

Travel Warning-Yemen, U.S. Department of State, dated September 17, 2008.

As such, based on the problematic country conditions in Yemen and the U.S. Department of State's position on travel by U.S. citizens to Yemen, it has been established that the applicant's U.S. citizen spouse and/or

children would suffer exceptional hardship were they to relocate to Yemen with the applicant for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Yemen. As counsel for the applicant asserts:

The Applicant...is, and continues to be, the sole source of financial support for his family. The Applicant supports his family by operating and managing a retail establishment....

[T]he Applicant's spouse, given the fact that she has little education and work experience, simply could not handle the family's business affairs as well as her current child-rearing duties without extreme hardship being caused to the Applicant's spouse and children....

[T]he Applicant's absence from their lives would undoubtedly have a negative psychological impact, especially given their ages....

Id. at 3, 6.

No documentation has been provided that details the applicant and his spouse's financial situation, including income, expenses, assets and liabilities. In addition, although counsel asserts that the applicant's spouse is unable to obtain employment, said assertion is not substantiated and/or supported and as such, as previously noted, can not be considered by the AAO. Moreover, it has not been established that the applicant would be unable to obtain gainful employment in Yemen, thereby assisting his wife and children in the United States should the need arise.

With respect to the psychological impact referenced by counsel with respect to the applicant's children, no documentation from a mental health professional has been provided that establishes that the applicant's two-year physical absence would cause the applicant's children exceptional emotional and/or psychological hardship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)).

As such, it has not been established that the applicant's U.S. citizen spouse and/or children would suffer exceptional hardship were they to remain in the United States while the applicant returns to Yemen for two years. While the applicant's spouse may need to make adjustments with respect to the maintenance of the household and her and the children's care while the applicant resides abroad for two years, it has not been shown that such adjustments would cause the applicant's spouse and/or children exceptional hardship. The applicant's spouse's and children's hardships, if they remained in the United States for two years without the applicant, do not go beyond that normally suffered upon the temporary separation of a husband/father from his wife/children.

Although the AAO finds that that applicant's U.S. citizen spouse and/or children would suffer exceptional hardship were they to relocate to Yemen with the applicant, the applicant has failed to establish that they would suffer exceptional hardship were they to remain in the United States while the applicant resides in Yemen for a two-year period. Thus, the record, reviewed in its entirety, does not support a finding that the applicant's spouse and/or children will face exceptional hardship if the applicant's waiver request is denied.

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 his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.