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U.S. Citizenship
and Immigration
Services

H3

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 03 2004

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver 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:

[redacted]

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 sustained and the matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division (WRD).

The applicant is a native of Nigeria. He 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), because he participated in an exchange program financed by the Nigerian and United States (U.S.) governments for the purpose of promoting international, educational and cultural exchange, and because the U.S. has designated Nigeria as requiring the services of persons with the applicant's specialized knowledge or skill.

The record reflects that the applicant was admitted into the United States as a J1 nonimmigrant exchange visitor on September 11, 1978. The applicant completed his exchange visitor program on August 31, 1980, however he violated the terms of his visa status by not returning to his country after completion of his program. The applicant married a U.S. citizen on December 15, 1994. He and his wife had three U.S. citizen children born July 11, 1986, Ijeoma, born July 30, 1987, and born June 13, 1994). The record reflects that the applicant filed a Form I-485, Petition for Alien Relative (I-485 application) on July 30, 1999. The applicant misrepresented his J1 entry status on his I-485 application, by claiming that he was admitted into the U.S. with a student visa and by claiming that he had never been a J nonimmigrant exchange visitor who was subject to the two-year foreign residence requirement and who had not yet complied with the requirement or obtained a waiver.[1] The applicant presently seeks a waiver of his two-year foreign residence requirement in Nigeria based on the claim that his U.S. citizen wife and children will suffer exceptional hardship if they are separated from the applicant for two years, or if they move with the applicant to Nigeria for two years.

The director determined that the applicant had failed to demonstrate his family would suffer exceptional hardship if he were required to fulfill his two-year residency requirement in Nigeria. The application was denied accordingly.

On appeal, counsel asserts that the applicant's wife and three children are native-born U.S. citizens and that they have lived their entire lives in the United States. Counsel asserts that the applicant's wife (Ms. recently suffered a cerebral aneurysm, which caused her serious physical ailments, including the partial paralysis of the left side of her body. was discharged from the hospital after seven months of therapy, in October 2003, and she was scheduled to be cared for in a long-term convalescent home. Counsel asserts that due to financial concerns, as instead resided with and been cared for by an aunt. Counsel asserts that annot receive the medical care she needs in Nigeria. Counsel asserts further that the applicant's eighteen-year-old daughter has asthma and that his sixteen-year-old daughter has sickle cell disease, and that they would also suffer medical hardship if they moved to Nigeria. Counsel additionally asserts that the applicant's children plan to attend college and that they would be financially unable to attend university if the applicant were required to temporarily return to Nigeria. Moreover, counsel asserts that the applicant's children would suffer exceptional hardship if the

[1] The AAO notes that the misrepresentation made on the applicant's I-485 application appears to render the applicant inadmissible under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i). The applicant may therefore also need to apply for a waiver of inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i).

applicant went to Nigeria and they remained in the U.S. because the applicant is the sole financial provider for his family, and he is now the sole caretaker for his three children.

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
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> > (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 (USIA) 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 Bridges,* 11 I&N Dec. 506 (BIA 1965), the Board of Immigration Appeals (Board) stated:

> In determining the merits of an application for a waiver of the foreign residence requirement, we must consider the Congressional intent of the statute . . . the Subcommittee reiterates and stresses the fundamental significance of a most diligent and stringent enforcement of the foreign residence requirement. The report states, "It is believed to be 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 this country would cause personal hardship."

Matter of Bridges states further that, "[t]emporary separation is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e)".

In *Huck v. Attorney General of the U.S.,* 676 F. Supp. 10 (D.D.C. 1987) the U.S. District Court, District of Columbia, stated that the Immigration and Naturalization Service (INS, now CIS) must consider the totality of circumstances when making a 212(e) waiver exceptional hardship determination. (Citing *Slyper v. Attorney General,* 576 F.Supp. 559, 560 (D.D.C. 1983) and *Ramos v. INS,* 695 F.2d 181, 189 (5th Cir. 1983)).

The record in the present case establishes that the applicant has three children, aged eighteen, sixteen and ten-years-old. The applicant's children were born in the U.S., they have attended school in the U.S., and they have never lived outside of the United States. The record also establishes that one of the applicant's daughters has an asthma condition and that another daughter has been diagnosed with sickle-cell disease. The record additionally reflects that the applicant would lose his present job as a pharmacist as well as his medical insurance coverage if he were required to depart the U.S. for two years, and the record reflects that the applicant's wife is presently unable to work or to care for or support herself or her family, and that the applicant must presently care for his children and provide financial support to his family.

The evidence in the record establishes that in March of 2003, the applicant's wife suffered a brain aneurysm, which led to serious breathing and pneumonia-related problems as well as partial paralysis to the left side of her body. The record reflects that [redacted] remained in the hospital, alternating between the acute care and rehabilitation units for seven months before being discharged on October 1, 2003. [redacted] medical discharge summary reflects that she experienced marked improvement in her physical and medical condition while at the hospital, and that, "at the time of her discharge on October 1, 2003, she was awake, alert, in no acute distress, stable, and participating well in physical therapy." *See* October 1, 2003, Discharge Summary, by [redacted]r, M.D. of the St. Mary Medical Center in Long Beach, California (medical summary). The AAO notes, however, that the medical summary also indicates tha[redacted] used a walker or required personal assistance to walk at the time of her discharge from the hospital, that she had mild left facial weakness at the time of her discharge from the hospital, and that her left lower leg remained weak. The medical summary stated further that, "[t]he plan was to discharge the patient to an extended convalescent care facility for further rehabilitation, for further wound care, and for further treatment with her discharge medications being reviewed and written." *See id.* The AAO notes that the record contains no evidence to indicate whether the applicant's wife went to a convalescent care facility, or the type of progress she had at any such facility. The applicant's affidavit states, however, that his wife cannot walk very well and that she is not fully coherent. However, because they do not have the resources to place Ms. [redacted] into a hospital or any other long term care facility, her aunt and family are presently caring for her.

Upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's wife and children would suffer if the applicant temporarily departed the U.S. for two years would go significantly beyond that normally suffered upon the temporary separation of families.

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 met his burden. The appeal will therefore be sustained. The AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the USIA. Accordingly, this matter will be remanded to the director so that he may request a USIA recommendation under 22 C.F.R. § 514. If the USIA recommends that the application be approved, the application must be approved. If, however, the USIA recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.