U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

4-3

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 25 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

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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

The applicant is a native of Togo. 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 for the purpose of promoting international, educational and cultural exchange.

The record reflects that the applicant was admitted into the United States as a J1 nonimmigrant exchange visitor on June 15, 1988, and that his nonimmigrant status ended in 1992. The applicant filed an asylum application with the Immigration and Naturalization Service (INS, now, Citizenship and Immigration Services, CIS) in August 1993. The Newark Asylum Office found that the applicant had failed to establish that he had been persecuted in the past or that he had a well-founded fear of future persecution in Togo, and the applicant was placed into removal proceedings on May 22, 1996. The record reflects that the applicant married a U.S. citizen on October 17, 1996.

On November 18, 1996, the Embassy of Togo sent a letter to the United States Information Agency (USIA) Waiver Review Division (now, U.S. Department of State, Waiver Review Division) stating that it had no objection to a waiver of the applicant's two-year foreign residency requirement, and requesting that the applicant's foreign residence obligations be waived. The USIA Waiver Review Division sent notification to the INS Vermont, Eastern Service Center on January 17, 1997, recommending that the applicant be granted a waiver of the two-year foreign residence requirement of section 212(e) of the Act. The record reflects that no further action was taken by the INS regarding the applicant's "no objection" letter waiver.

The applicant filed a Form I-130, Petition for Alien Relative (Form I-130) in January 1997, and the petition was approved by the INS in February 1997. The applicant filed a Form I-485, Application to Register as a Lawful Permanent Resident (I-485 application) in March 1997. A March 1998, INS memo contained in the record reflects that ultimately, the applicant's I-485 application was not adjudicated by the INS because the applicant was in removal proceedings and under the jurisdiction of the immigration court. The memo noted further that the applicant's wife had separated from him around January 1998.

Removal proceeding notes contained in the record indicate that the applicant was told during removal proceedings that he had not been granted a waiver of his two-year foreign residence requirement under section 212(e) of the Act, and that he must file a new I-612 application in order to obtain a waiver. On August 30, 2002, the applicant filed an I-612 application with the Vermont Service Center, based on the claim that he would be persecuted if he returned to Togo. The director found the applicant had failed to establish that he would be persecuted if he returned to Togo. The application was denied accordingly on June 13, 2003.

The record reflects that the applicant, through counsel, appealed the denial of his I-612 application on June 26, 2003. On appeal, counsel asserts that the applicant was arrested by the Togolese government in the past and that his family has been targeted for harm by the government because of his father's leadership in a local political opposition group. Counsel asserts that the evidence establishes the applicant will be persecuted by the Togolese government on account of his political opinion, and on account of his relationship to his father and membership in the Cotocoli tribe. The AAO notes that, pending AAO adjudication of his present appeal, the applicant was granted asylum on September 24, 2003, by an immigration judge. The immigration judge's decision was not appealed. The AAO notes, however, that in order to adjust his asylee status to that of a

lawful permanent resident, the applicant must still obtain a wavier of his two-year foreign residence requirement under section 212(e) of the Act.

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 (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.

(Emphasis added). In support of the applicant's persecution claim, counsel submits evidence reflecting that the applicant was arrested by the Togolese military in November 1987, for engaging in anti-government protests at his university. The applicant was detained for three days and released on November 12, 1987. The record also contains a Togolese court summons stating that the applicant is summoned to appear in court on August 9, 1990, for matters which concern him. Counsel additionally submits copies of Amnesty International and Department of State Country Condition Reports for Togo

The AAO notes that unlike the *well-founded fear* of future persecution standard set forth in section 208 of the Act, 8 U.S.C. § 1158, for asylum purposes, section 212(e) of the Act requires that an applicant establish that he or she *would be subject* to persecution upon return to their country of nationality or last residence. The AAO notes further that asylum may be granted under section 208 of the Act if an applicant establishes a well-founded fear of persecution on account of race, religion, nationality, membership in a particular group, or political opinion. A persecution-based waiver under section 212(e) of the Act, however, may only be granted if the applicant establishes that he or she would be persecuted on account of race, religion or political opinion. Persecution based on nationality or membership in a particular group will thus not be considered for a waiver under section 212(e) of the Act. Accordingly, the AAO will not consider the applicant's membership in a particular social group claims that he would be persecuted by the Togolese government on account of his tribal affiliation or on account of his familial relationship to his father.

The record contains evidence that the applicant was arrested and detained by the Togolese government in November 1987, on charges of disturbing the peace and of being a member and participating in a subversive student movement to the detriment of the political leader of Togo. The record reflects that the applicant was released without injury after three days. The applicant had no other problems with the Togolese government, and the record reflects that the applicant has not been involved in any other political opposition activities since his arrest in 1987. The record reflects that after his release from jail, the applicant applied for and obtained a Togolese passport in 1988. The record indicates further that the government of Togo helped to fund the applicant's 1988, J1 international exchange program in the United States. The AAO notes further that, although the record contains a 1990 court summons for the applicant, neither the applicant nor counsel mention or explain the summons in the asylum or section 212(e) waiver, applications. Moreover, the record reflects that the applicant has initiated contact with the Togolese Embassy without incident, in order to renew his Togolese passport, and the applicant obtained a "no objection" letter from the Togolese government in November 1996, in which the Togolese government stated that the applicant had no legal obligations or liability to the Togolese government.

Based on the above facts, the AAO finds that the applicant has failed to establish that the Togolese government would persecute the applicant in Togo on account of an actual or imputed political opinion. Moreover, the record contains no facts or information to establish that the applicant would be persecuted on account of his race or religion if he returned to Togo. The applicant's appeal will therefore be dismissed.

In addition, chapter 45.5(b) of the CIS Adjudicator's Field Manual states:

> (b) Adjudication. Upon receipt of the "no objection" letter and the Waiver Review Division recommendation, review the case to ensure that documentation is in order and that the waiver is appropriate for the alien's circumstances (i.e. ensure that the alien did not come to the U.S.

> as an exchange visitor, or later acquire such status, in order to receive graduate medical training or education). If so, you may grant the waiver.

The record reflects that the applicant was granted J1 nonimmigrant visa status in order to promote general international exchange interests and to participate in a YMCA international summer program. The applicant thus did not come to the United States or acquire J1 status in order to receive graduate medical education or training. The record reflects further that the USIA recommended granting a "no objection" waiver on January 17, 1997. The director has not addressed or taken any final action on the "no objection" letter. This issue should be reviewed by the director to determine eligibility for a waiver of 212(e) foreign residence requirements on this basis.

ORDER: The appeal is dismissed.