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

U.S. Citizenship and Immigration Services

H3

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 1 2 2005

IN RE: Applicant: [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:

[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 dismissed.

The record reflects that the applicant is a native of Nigeria 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 into the United States as a J1 nonimmigrant exchange visitor from October 24, 1978 to December 31, 1982. On April 27, 1984, the applicant married a U.S. citizen. The applicant's wife died on November 22, 1999. The record reflects that the applicant has two U.S. citizen children. The applicant presently seeks a waiver of his two-year foreign residence requirement based on the claim that his departure to Nigeria would impose exceptional hardship on his U.S. citizen children.

The director determined the applicant had failed to establish that his children would suffer exceptional hardship if he fulfilled his two-year foreign residence requirement. The application was denied accordingly.

On appeal, counsel asserts that the director's decision did not fully consider the hardship the applicant's children would suffer if he were required to return to Nigeria. Counsel asserts that the applicant pays child support and provides medical coverage for his children. Counsel asserts further that the applicant's children face the risk of permanently losing their father because he suffers from a heart condition and could die if he had to return to Nigeria. In addition, counsel asserts that the government of Nigeria has stated in a letter to the Director, Waiver Review Division, U.S. State Department Visa Office, that it does not object to a waiver of the applicant's two-year foreign residence requirement.

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
> >
> > . . .
> >
> > [s]hall not 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 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 . . . And provided further, That . . . 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, "[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)".

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:

> Courts have recognized that the "exceptional hardship" standard must be stringently construed lest the waiver exception swallow the salutary two-year residence rule . . . . Forceful application of the standard also guards against attempts by applicants to manufacture hardship in order to come within its terms. (Citations omitted).

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 record reflects that the applicant has two U.S. citizen children born out-of-wedlock to different mothers. [redacted] was born in Fresno, California on June 22, 1989, to the applicant and Ms. [redacted] [redacted] is presently fifteen years old. He has been in the custody of his mother since birth, and the record contains no evidence to establish that that the applicant has, at any time, provided financial assistance to Jabarie, or that he has provided [redacted] with medical insurance coverage.

The applicant asserts on appeal that he is presently trying to obtain custody [redacted] The record contains no evidence, however, to substantiate this assertion. The applicant also submitted photos of himself and [redacted] to establish that he has a father-son relationship with Jabarie. The AAO notes that three of the photos were taken on the same day, when [redacted] was five years old. The other two photos do not contain the applicant, and they are undated and appear to have been taken several years prior to [redacted] fifteenth birthday. Based on the above evidence, the AAO finds that the applicant has failed to establish that Jabarie is emotionally, financially or legally tied on the applicant.

The applicant's second child was born on January 1, 1993, in Fresno, California, to is presently eleven years old and she has been in the custody of her mother since birth. The record contains no evidence to establish that the applicant has had a father-daughter relationship with In order to establish a father-daughter relationship, the applicant submitted a copy of an undated photo, which he states is a picture of him with when she was a young girl. The AAO notes, however, that the applicant indicates in his affidavit that he had no contact with from the time of her birth until April 2001, when he was ordered to submit to DNA testing, and the record contains no evidence of any other contact with

The record reflects that mother is on welfare and that the Fresno County Department of Child Support Services (Child Support Services) initiated paternity proceedings in court against the applicant. On June 4, 2003, the applicant was determined to be father and he was ordered to pay bi-weekly child support payments through the Child Support Services office.

The AAO notes that the California Child Support Handbook states in pertinent part, that:

> "[I]f a child receives CalWORKs, Foster Care, or Medi-Cal benefits, the welfare department refers the case to the county Department of Child Support Services . . . . Parents who apply for CalWORKS must cooperate with the child support caseworker to be eligible for public assistance
>
> . . . .
>
> Persons must trade their right to child support to the county in exchange for CalWORKS, Foster Care, or Medi-Cal benefits. Child support collected by the county Department of Child Support Services goes toward paying for these benefits.
>
> Except in a Foster Care case, the first $50 of child support that is collected each month is paid directly to the custodial party. This is called a "pass through" of support payments. It does not reduce the CalWORKS benefits that a family otherwise receives.
>
> When CalWORKS benefits end, all current and past due child support collected by the country Department of Child Support Services for periods after aid is terminated is sent to the custodial party. Whatever remains goes to the county as reimbursement for benefits paid.

See www.sfgov.org. California Child Support Handbook (Handbook) at 32-33. The Handbook notes further that if a noncustodial parent cannot be found, the child remains eligible to receive CalWORKS or Medi-Cal benefits while the county Department of Child Support Services tries to find the noncustodial parent to enforce child support obligations. *Id.* at 35.[1]

Based on the evidence in the record and the Handbook information contained above, the AAO finds that the applicant's child support payments presently reimburse the State of California for paying welfare related benefits to Hillary. The AAO finds further that Hillary would continue to receive her present welfare related

[1] The AAO notes that California's welfare program is also known as CalWORKS welfare to work program. *See* www.dss.cahwnet.gov.

benefits if the applicant were required to move to Nigeria. In addition, the AAO finds that would be entitled to Medi-Cal health insurance benefits if the applicant were required to move to Nigeria. The AAO therefore finds that, based on all of the above factors, the applicant has also failed to establish that is emotionally or financially tied on him.

The AAO additionally finds that the applicant has failed to establish that medical practitioners in Nigeria would be unable to monitor or treat his heart condition, or that Nigerian medical practitioners would be unable to monitor or treat the applicant for hypertensions or seizures. The AAO therefore finds that the applicant has failed to establish that he suffers from a health condition that would put his life at risk in Nigeria, such that his children would permanently lose the possibility of knowing their father.

The AAO notes that the applicant also failed to establish that he qualifies for a waiver of the two-year foreign residence requirement based on the written "no objection" letter that he received from the Nigerian Federal Ministry of Education, as the record contains no evidence that the Director, Waiver Review Division, U.S. State Department Visa Office has provided a favorable recommendation in the applicant's case.

Accordingly, the AAO finds that the applicant has failed to establish that he is entitled to a section 212(e) waiver of his two-year foreign residence requirement. 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, and the appeal will be dismissed.

ORDER: The appeal is dismissed.