

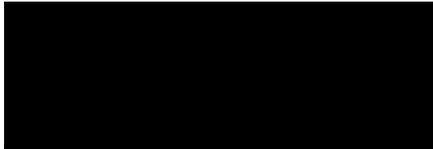
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U.S. Citizenship
and Immigration
Services

H3



FILE:



Office: NEBRASKA SERVICE CENTER

Date: **OCT 27 2005**

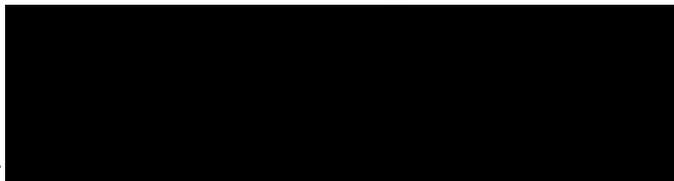
IN RE:



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, Nebraska 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 and citizen of Kenya. He was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on April 4, 2002 to receive training sponsored by the American Hospitality Academy. The applicant 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 record reflects that the applicant married Beverly Gardinier ([REDACTED] a United States citizen (USC), on December 6, 2003. The applicant seeks a waiver of his two-year residence requirement in Kenya, based on the claim that his wife would suffer exceptional hardship if she moved to Kenya with the applicant for the two years he is required to live there, or if she remained in the United States.

The director concluded that the circumstances of a two-year separation of the family with accompanying anxiety, loneliness and altered financial circumstances are the hardships to be anticipated by compliance with the two-year residence requirement, not exceptional hardships. The I-612 Application for Waiver of the Foreign Residence Requirement was denied accordingly. *Decision of the Director, Nebraska Service Center*, dated September 1, 2004.¹

On appeal, counsel contends that the applicant's wife will suffer hardship if she accompanies the applicant to Kenya, or if she stays in the United States. In support of the appeal, counsel submitted a letter; an affidavit from [REDACTED]; a newspaper article regarding the training program that the applicant participated in; and country conditions information on Kenya. In support of the original waiver application, counsel submitted a letter from the applicant; a copy of a diploma the applicant received in Kenya; a letter from the applicant's father in Kenya; letters written in support of the applicant; financial documents; and a "no objection" letter from the Kenyan Embassy in Washington. The entire record was considered in rendering this decision.

At the outset, the AAO notes that the record contains a letter dated June 23, 2004 from the Kenyan Embassy in Washington that indicates that the Government of the Republic of Kenya has no objection to the applicant not returning to Kenya to fulfill the two-year residency requirement. The record contains no evidence that the United States Department of State Waiver Review Division has received and considered this letter. Accordingly, the letter is not relevant to the adjudication of the applicant's appeal.

The AAO also notes that counsel asserts that the program the applicant participated in did not provide the training that was promised. Counsel submitted an April 26, 2002 article from the *Orlando Sentinel* entitled "Foreign Hospitality Interns Feel Misled; Oversees College Students and Graduates Who Pay for Training in the Orlando Area as Managers in the Hotel, Time-Share and Theme-Park Industries Often Get Menial Jobs." The evidence in the record does not support counsel's assertion. First, the applicant was not placed in a menial job as described in the article. The applicant indicated he was given "a respectable position in the reservations department" and that he was nominated as a national star of service. Second, the applicant stated that he quit the program after six months because he was dissatisfied with the training provided and because

¹ The director's decision is undated. Counsel requested a dated copy of the decision but never received one. The record contains the applicant's I-612 with a handwritten notation from the Nebraska Service Center that the application was denied on August 23, 2004. The I-612 also shows a Nebraska Service Center stamp with a handwritten date of September 1, 2004. The AAO will consider the later date as the date the decision was issued. The AAO finds that the applicant's appeal was timely filed.

he learned that the interns were not receiving minimum wage. The applicant voluntarily left the program. Third, even if counsel's assertion is accepted, the circumstances related to the applicant's decision to quit the program early are not relevant to the determination of whether the applicant's wife will experience exceptional hardship if he returns to Kenya for two years.

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 at 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 the Immigration and Naturalization [now, the Director of 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, "[E]ven 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)."

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.)

I. Potential Hardship if [REDACTED] Accompanies the Applicant to Kenya

First analyzed is the potential hardship [REDACTED] will experience if she relocates to Kenya with the applicant for the two years he is required to live there. Counsel submitted numerous articles on country conditions in Kenya, as well as the *United States Department of State Country Reports on Human Rights Practices in Kenya for 2003*. Counsel does not explain how any of these articles relate specifically to [REDACTED] or to the applicant. Accordingly, these materials do not establish that Ms. Kutto will experience exceptional hardship if she lives with the applicant in Kenya for two years.

The applicant contends that:

If I were to go back to Kenya with my wife, she will not only miss out on her chance to achieve her dream in due time, but advancing her career through further education. But also in Kenya unskillful [sic] labor is really hard work and the unemployment rate so high that I know college graduates who are jobless. I could not possibly support my wife and provide her with what she is accustomed to. We would have to first settle in the rural area while I try and secure a job in the tourism industry, which is currently at a bad phase, many hotels, lodges, national parks and game reserves closing down due to lack of tourists.

The employment opportunities are thus very scarce if any, thus meaning my wife might be stuck in my rural town of Eldoret in a small thatched grass roof hut with mud walls, no beds, no electricity, walking long distances to collect firewood for cooking and fetching water from the river, pit latrines, etc. Insufficient medical facilities, coupled with the fear of terrorists as they previously have once targeted Americans living in Kenya.

The record does not support the applicant's contentions. First, the applicant provided no proof that the unemployment rate in Kenya would prevent him from finding suitable employment in the hospitality industry. Second, the applicant attended Kenya Utalii College in Nairobi from October 1998 until September 2002, earning a diploma in hotel management. The applicant has received additional training and experience in the United States. His training and experience should assist him in securing employment. The applicant provided no evidence that he has attempted to find suitable employment in Kenya. Third, the applicant described the dreary conditions of rural life. The AAO notes that the applicant is not required to live in a small village. For example, he and his wife could live in Nairobi. Fourth, under the terms of his J-1 visa, the applicant is expected to return to Kenya and work, utilizing the training and experience that he gained in the United States. It would seem logical that the applicant gave consideration to possible employment opportunities upon return to Kenya when he applied for the J-1 visa. Fifth, the fact that [REDACTED] will have to delay attending college is the normal result of such a move and does not constitute exceptional hardship. Fifth, the applicant refers to the risk of terrorist attacks but does not explain how [REDACTED] is at particular risk. The terrorist attack that the applicant referred to (the bombing of the American Embassy in Nairobi) occurred in 1998 and targeted an American government office.

The applicant stated that his family in Kenya does not approve of his marriage, because his wife is white. The record contains a December 12, 2003 letter from the applicant's father in which he stated:

Secondly we heard from a reliable source that you are now married to a white lady. Please son, remember our advice to you before you left for the states. You know very well that your grandfather and grandmother cannot approve of the same arrangement. So please don't attempt to do such a thing because it will be a disgrace to our own family, following the stigma left by the colonists.

The applicant's parents indicated that the marriage would disgrace the family, however, the applicant provided no evidence to show that this would cause [REDACTED] to experience exceptional hardship if she lived in Kenya for two years. Also, the AAO notes that the applicant and his wife do not have to live in the same village as his parents.

II. Potential Hardship if [REDACTED] Remains in the United States

Next examined is the potential hardship to [REDACTED] if she stays in the United States during the two years the applicant is required to live in Kenya. The applicant stated that "if I were to go back to Kenya, my wife will not be able to go to school and at the same time pay off her debt, car, afford rent, the bills and all the other basic needs." The applicant submitted several financial documents that do not establish that [REDACTED] will be unable to support herself while the applicant lives in Kenya for two years. The applicant provided no evidence to establish that [REDACTED] could not delay her college education until the applicant returns from Kenya, or that she could not make other financial arrangements to meet her expenses.

[REDACTED] indicated that she cannot survive emotionally without the applicant:

I can't imagine what it would be like if [REDACTED] has to return to Kenya without me. Or what it would be like to live here in the United States without him. Even though in the scheme of things the time that [REDACTED] and I have spent together is next to nothing I feel that we have

know [sic] each other for a life time. The strength and love that I receive from James is unimaginable.

The situation described by the applicant is the normal effect of a two-year separation of spouses. Accordingly, it does not constitute exceptional hardship.

III. Conclusion

The AAO finds that the evidence in the record fails to establish that the applicant's wife would experience exceptional hardship if she traveled to Kenya with the applicant. The AAO also finds that the evidence in the record fails to establish that the applicant's wife would experience exceptional hardship if she remained in the United States 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 his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.