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U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 29 2008

IN RE:

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:

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 is a native and citizen of Malaysia who is subject to the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e), because she participated in a J-1 exchange program that was funded in part by the Malaysian government, and because the Director, Waiver Review Division (WRD), U.S. State Department Visa Office has designated Malaysia as requiring the services of persons with the applicant's specialized knowledge or skill. The applicant seeks a waiver of the two-year foreign residence requirement based on persecution on account of religion. The applicant also seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her U.S. citizen spouse.

The director found that the applicant had failed to establish she would be subject to persecution on account of religion if she returned to Malaysia. The director additionally determined that the applicant failed to establish that her U.S. citizen spouse would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Malaysia. *Director's Decision*, dated March 6, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated May 24, 2007; an affidavit from the applicant, dated May 24, 2007; a copy of *Syariah Criminal Offences (Federal Territories) Act 1997*; and numerous articles about religion and conversion in Malaysia. The entire record was reviewed and considered in rendering this decision.

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, 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. (Quotations and 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 first step required to obtain a waiver based on hardship is to demonstrate that exceptional hardship would be imposed on the applicant's spouse if he moved with the applicant to Malaysia. As the applicant's spouse states,

...I was raised Catholic and I still practice the Catholic faith. [REDACTED] has told me that her family would not accept me and that they would probably disown her for marrying outside of her faith...I am employed by [REDACTED] as a chemist and I would not be able to find employment in Malaysia if we were to return there.

*Affidavit of [REDACTED], dated January 9, 2007.*

To begin, it has not been established that the applicant's spouse would be unable to practice the Catholic faith. As stated in the *International Religious Freedom Report 2007-Malaysia*, Catholics comprise 9% of the Malaysian population, almost 10 million people. Moreover, there have been no reports of forced religious conversion. Finally, the report states that there were few incidents of societal abuse or discrimination based on religious belief or practice. *International Religious Freedom Report 2007-Malaysia, issued by the Bureau of Democracy, Human Rights and Labor*, dated September 14, 2007. As such, it has not been established that the applicant's spouse would experience exceptional hardship based on his religion were he to reside in Malaysia.

Moreover, the record contains no evidence to substantiate the applicant's spouse's claim that he will not be able to find employment in Malaysia and will thus suffer financial hardship. Finally, no evidence has been provided to establish that the applicant's spouse would experience emotional and/or psychological hardship were he not accepted by the applicant's family. 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)). Therefore, the AAO finds that exceptional hardship would not be imposed on the applicant's spouse if he moved with the applicant to Malaysia for the requisite two-year period.

The second step required to obtain a waiver based on hardship is to establish that exceptional hardship would be imposed on the applicant's spouse if he remained in the United States during the two-year period. As there is no evidence in the record that addresses this prong of the analysis, the AAO finds that exceptional hardship would not be imposed on the applicant's spouse if he remained in the United States during the two-year period.

The AAO further finds that counsel has failed to establish that the applicant would be subject to persecution in Malaysia on account of her religion. Persecution has been defined as "... a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I&N, Dec. 211 (BIA 1985) In addition, dress and conduct rules concerning women in Muslim countries have been found not to constitute persecution. *Fisher v. INS*, 79 F.3d 995, 961-62 (9<sup>th</sup> Cir. 1996) *Sharif v. INS* 87 F.3d 932 (7<sup>th</sup> Cir. 1996)

Unlike applicants for refugee or asylee status, who may establish a well-founded fear of persecution on account of five separate grounds including race, religion, nationality, membership in a particular social group, or political opinion, an applicant for a waiver under section 212(e) of the Act must establish that he or she **would be** persecuted on account of one of three grounds, race, religion or political opinion.

To support the assertion that the applicant would suffer persecution on account of her religion if she returned to Malaysia, counsel submitted an affidavit written by the applicant. As stated by the applicant,

...I was born in Malaysia and was raised as a Muslim. However, since my marriage to my Catholic husband, [REDACTED], in 1997, I have rejected Allah and have accepted Christianity as my form of worship.

When we have children, [REDACTED] and I want them baptized and raised Catholic.

...If I am returned to Malaysia and my family finds out that I refuse to return to Islam or that I still love [REDACTED] and consider him my husband, I do not doubt for one second that they will turn me over to Islamic authorities for full punishment. My family will give me no shelter.

As a result, I am certain that I would be treated as an apostate by Islamic authorities. I do not believe that I would have any chance before Shari'a courts to obtain recognition of my rejection of Islam and acceptance of Christianity. I am assure my family would be in the court urging the court to not allow me to convert. I fell (sic) that there is a high likelihood that with my family's support Islamic authorities would try to place me in one of their 're-education' camps...But I will not go back to Islam. I want nothing to do with it.

My marriage to [REDACTED] would not be recognized as valid under Shari'a law because [REDACTED] will not convert to Islam. Without [REDACTED] conversion, my marriage to him is unlawful under Shari'a law...

In addition, I will never be able to have children with [REDACTED]. If I were to become pregnant through [REDACTED] it would be seen as proof of adultery for which I can be fined, imprisoned, and in my experience, caned.

Affidavit of [REDACTED], dated May 24, 2007.

The applicant further states,

...When I married [REDACTED] I did not have the specific intent to convert. But since we married I have only attended Catholic Church. While I have not formally converted, all of my religious practice is Catholic.

*Affidavit of* [REDACTED] dated January 8, 2007.

As noted, the record indicates that the applicant has not formally converted to Catholicism. As such, any claims that the applicant would be subject to persecution based on being Catholic are unfounded, as she is not Catholic. Nor has she indicated that she would apply to convert to Catholicism pursuant to Malaysian law. The AAO further notes that several of the exhibits presented by counsel indicate that Sharia law is selectively enforced by local officials in each of Malaysia's 13 federal states, and that the national capital, Kuala Lumpur, is more relaxed. The record does not establish that the applicant would be unable to reside in Kuala Lumpur or another less restrictive state.

While the AAO sympathizes with the applicant's situation with respect to her religious practice as a Catholic and its ramifications pursuant to Malaysian law, any repercussions she may face would be based on a violation of state laws in Malaysia, not for being Muslim per se. The statute requires that the applicant establish she would be persecuted, a very high standard. The applicant remains a Muslim; her claim that she would be persecuted based on her religion has not been established.

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 her burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.