

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

H3

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: **JUL 15 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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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

The applicant is a native and citizen of Kenya who was initially admitted to the United States in J-1 nonimmigrant exchange status in August 1992. 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) based on U.S. government financing. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen child, born in October 1998, would suffer exceptional hardship if he moved to Kenya temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Kenya.

The director determined that the applicant failed to establish that his U.S. citizen child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Kenya. *Director's Decision*, dated October 9, 2007. The application was denied accordingly.

On November 7, 2007, counsel for the applicant filed the Form I-290B, Notice of Appeal and an attachment detailing the basis for the appeal. Counsel also indicated on the Form I-290B that she would need 30 days to submit a brief and/or evidence to the AAO in support of the appeal. On February 17, 2008, counsel submitted a letter and numerous articles on country conditions in Kenya. In addition, on May 27, 2008, the AAO received an exhibit list with attachments containing updated Kenyan country information. The entire record was reviewed and considered in rendering this decision.

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 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."

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 is to establish that the applicant's U.S. citizen child would experience exceptional hardship if he resided in Kenya for two years with the applicant. To support this contention, the applicant states the following:

My American citizen son [REDACTED], is 8 years old now and is heavily involved in both the educational and cultural life of his country. He loves his school immensely and is a very active participant in the Sunday school children's activities at church. His teachers love him and predict a life of great social and intellectual achievement for him.... We have done our best to sustain the promise of this precocious child by giving him whatever opportunity we can afford to enhance his understanding of the world and to satisfy the immense intellectual curiosity that we as well as his teachers have perceived in him....

...Going back to Kenya portends imprisonment or death for me and consequent dire economic and social hardship for my family. This means that [REDACTED] would have no one to dutifully provide for his basic needs of food, clothing, and physical and emotional security. Moreover, for a young person like him, the cultural shock that he will experience in that vastly difference environment may only be mitigated by strong economic and social leverage. In other words, he would need to partake of a particular kind of international culture and social fare that Kenya can provide only at exorbitant costs.

...In Kenya today, the public primary school, the sole recourse of the poor who would be educated, has been so deeply and extensively damaged by an institutionalized culture of corruption and failed leadership that education has more and more become a tool for sharply dividing the society along economic class lines. These public schools have no facilities or equipment that can offer even the most rudimentary understandings of the workings of modern technologically oriented world...they have teachers that are poorly trained and poorly remunerated, and have little or no tradition of success to fall back on. Fewer than 1 percent of

students who attend these schools perform well enough in national exams to qualify for the limited places in public secondary schools and colleges....

... would have to share the fate of these unfortunate Kenyans unless we can somehow place him in one of the private or international academies.... To do so, we would need to command a household income far in excess of what we currently have here-- a necessity rendered unattainable by two insurmountable barriers. The first barrier is that even without the sort of political encumbrances that would attend my return to Kenya, the country's economy does not yield many opportunities for incomes like this.... Secondly, and more crucially, the political issues I have to contend with would make it impossible for me to benefit from such an opportunity even if it were otherwise available. In effect, I would be unable to save a from a life of poverty, disease, crime, and God forbid, untimely death.

An illustration of the dire prospects a would have to face on the economic front is the story of my brother, Mr. A quisling of the government who is a local rival of my family is said to have instigated the president against my family following the publication of my article, with the result that my brother was fired by the Government from his job, after being haunted for a long time, and left without any real tangible means of earning a living.... What is obvious from the foregoing is that even if they did not administer the ultimate penalty to me if I did go back, they will certainly make it impossible for me to make a living in that country.... Such a situation would constitute extreme hardship for who would thus be completely unable to access any of the services that he takes for granted here: food, clothing, and healthcare, among others....

Another terribly harrowing prospect for a is the general state of insecurity in the country. Violent and deadly robberies and indiscriminate murders have become the order of the day.... would thus be forced to live in an environment where capital crimes, robberies, and other reprehensible occurrences are attended by a shocking level of impunity. The lives of young people who show an interest in the trend of political developments have become especially precarious because of the Government's trigger-happy practices.... For instance, some time last year, they unleashed these mercenaries and some local security forces to invade and destroy the premises and equipment of The East African Standard Newspaper because the paper publishes articles (like mine) that are critical of the corruption and nepotism that the President and his henchmen practice.... This is the sort of security situation that a would be condemned to live under if we were to return to Kenya. His mere association with me would, moreover, render him a marked, and therefore, particularly endangered person. With parents either imprisoned or dead, or alive but otherwise persecuted and denied access to the

means of survival, this child's welfare, his very life, would be in great jeopardy in Kenya.

Letter from [REDACTED], dated February 9, 2007.

Counsel has provided extensive documentation regarding the problematic social and political situation in Kenya. Moreover, a Travel Warning, issued by the U.S. Department of State, Bureau of Consular Affairs, dated March 21, 2008, states the following, in pertinent part:

This Travel Warning is being issued to update U.S. citizens on safety and security conditions in Kenya. Threats of political demonstrations and violence have dramatically receded following the widely accepted power-sharing agreement signed on February 28. The U.S. Department of State has rescinded the authorized departure order for Kisumu and environs and USG personnel and families are able to return there. The temporary suspension of the United States Peace Corps program in Kenya is under review with the goal of resuming the program in the near future. The U.S. Department of State continues to recommend that private American citizens in Kenya and those considering travel to Kenya evaluate their personal security situation in light of continuing, potential threats from terrorism and crime. This Travel Warning supersedes the Travel Warning of February 8, 2008.

Kenya has a high rate of violent crime and remains potentially susceptible to attacks from terrorists in the region. The U.S. Government continues to receive indications of potential terrorist threats aimed at American, western, and Kenyan interests. Terrorist acts could include suicide operations, bombings, kidnappings, attacks on civil aviation, and attacks on maritime vessels in or near Kenyan ports. Many of those responsible for the attacks on the U.S. Embassy in 1998 and on a hotel in Mombasa in 2002 remain at large and continue to operate in the region.

Violent and sometimes fatal criminal attacks, including armed carjackings and home invasions/burglaries, can occur at any time and in any location, particularly in Nairobi. In January 2007, two family members of a U.S. Embassy employee were killed by armed carjackers. U.S. Embassy personnel continue to be victims of (non-fatal) carjacking incidents, as recently as mid-March 2008. In the short-term, the displacement of thousands of people by the recent civil unrest combined with endemic poverty and the availability of weapons could result in an increase in crime, both petty and violent. Kenyan authorities have limited capacity to deter, investigate and prosecute such acts.

Travel Warning, U.S. Department of State, Bureau of Consular Affairs, dated March 21, 2008.

Based on the documentation provided, the AAO concludes that the hardship the applicant's U.S. citizen child would encounter were he to relocate to Kenya for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year foreign residency requirement. The record indicates that the applicant's child is integrated into the U.S. lifestyle and educational system. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO finds *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern. To uproot the applicant's child at this stage of his education and social development, bearing in mind the documented problematic political and social situation in Kenya and the security concerns for U.S. citizens, as referenced above, and relocate him to Kenya would be a significant disruption that would constitute exceptional hardship.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen child would suffer exceptional hardship if he remained in the United States during the two-year period that the applicant resides in Kenya. As stated by the applicant,

...if, God forbid, we were required to return to Kenya.... We would have no reliable way of ensuring that [redacted] [the applicant's child] can remain here and continue to take advantage of the educational, social and cultural benefits that he is now enjoying. I have an older brother in this country that, unfortunately, is not married and does not, therefore, have the sort of family which a young child like [redacted] could properly be a part of. My brother would not be anywhere near able to replicate the social and emotional environment that my wife and I have been able to provide for this child. I am aware that institutional arrangements exist that might be willing to provide support for an American citizen who is unable to access the support of his parents. None of these alternatives, however, would compensate for the deep emotional privation that [redacted] would suffer if both of us (his parents) were to be removed to Kenya and to leave him in this country. [redacted] is a very sensitive child who is deeply attached to us (his parents) and to his older siblings. To suddenly deprive him of our company, love, and care would constitute a major psychological injury to him, and we would be loath to subject him to such an emotionally wrenching experience....

Supra at 1.

As the applicant, his spouse and two of their children are subject to the two-year foreign residency requirement based on their J status, the four of them are required to return to Kenya for a two-year period. Such a predicament would leave a young child in the United States without his parents and older siblings. This situation would constitute exceptional hardship to the applicant's U.S. citizen child.

The AAO finds that the applicant has established that his U.S. citizen child would experience exceptional hardship were he to relocate to Kenya and in the alternative, were he to remain in the United States without

the applicant, for the requisite two-year term. As such, 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 U.S. citizen child 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 DOS. Accordingly, this matter will be remanded to the director so that she may request a DOS recommendation under 22 C.F.R. § 514. If the DOS recommends that the application be approved, the secretary may waive the two-year foreign residence requirement if admission of the applicant to the United States is found to be in the public interest. However, if the DOS recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: 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.