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U.S. Citizenship  
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FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: JUN 03 2008

IN RE:

[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, 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 Nigeria who was initially admitted to the United States in J-1 nonimmigrant exchange status in October 1987. 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 the Exchange Visitor Skills List.<sup>1</sup> The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his three U.S. citizen children, born in July 1994, August 1998 and February 2002, would suffer exceptional hardship if they moved to Nigeria temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Nigeria.

The director determined that the applicant failed to establish that his children would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Nigeria. *Director's Decision*, dated October 15, 2007. The application was denied accordingly.

On November 14, 2007, counsel for the applicant filed the Form I-290B, Notice of Appeal, and provided reasons for the appeal on said form and in a corresponding attachment. Counsel also indicated on the Form I-290B that she would need 120 days to submit a brief and/or evidence to the AAO in support of the appeal. On May 7, 2008, the AAO sent a fax to counsel, stating that to date, the AAO had no record that any further evidence or brief was ever received, and requesting that counsel submit a copy of the brief and/or evidence to AAO, along with evidence that it was originally filed with the AAO within the 120 day period requested, within five business days. On May 13, 2008, the AAO received a faxed copy of counsel's brief and referenced supporting attachments and on May 20, 2008, the AAO received the original documentation. 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

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<sup>1</sup> The record indicates that the applicant departed the United States upon completion of the above-referenced J-1 program, re-entered the United States in January 1989 as a B visitor visa holder, and obtained a change of status to J-1 in January 1990. The corresponding Form IAP-66 for the change of status to J-1 indicates that the applicant is subject to the two-year foreign residency requirement based on government financing. The AAO notes that irrespective of whether the applicant is subject to the foreign residency requirement based on the Exchange Visitor Skills List and/or Government Financing, a waiver under section 212(e) of the Act is still required.

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."

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 three U.S. citizen children would experience exceptional hardship if they resided in Nigeria for two years with the applicant. To support this contention, the applicant states the following:

...My twelve year old daughter, [REDACTED], will be in the eighth grade....She is an excellent student....

[REDACTED] is very active in activities at the school. She is a member of the Handbell and Youth choirs. [REDACTED] plays basketball.... [REDACTED] is also very involved in activities outside of school. In addition to being a choir member in the handbell and youth choir at school, she takes voice lessons and plays piano. [REDACTED] is very active in our church.

[REDACTED] native language is English. She was born here and has learned English as her first language. Although we tried to speak our native language, Ibo, at home, she understands some but does not speak it. She does not read or write Ibo either....

Our eight year old, [REDACTED], will be in the third grade.... He loves to read. He enjoys school very much. His first language is also English. He is very well adapted, has learned his routine, and has achieved stability. [REDACTED] is a member of the Jubilation choir at our church, he plays soccer and takes swimming lessons in the summer. [REDACTED] is involved with Cub Scouts for the past three years....

Our five year old, [REDACTED] will start kindergarten in the fall of 2007. He is involved in activities at pre-school and other school programs, as well as vacation bible school....

All three of our children are very well-adapted to their lives. They have settled into their routines and are familiar with the area....

If we had to move to Nigeria, finding employment there would be a real challenge.... The unemployment rate in Nigeria seems to be increasing. I have six siblings in Nigeria, only one is employed. The others have not been able to find a job for many years. Few clinics or hospitals are currently hiring physicians. The only option for us [the applicant and his spouse] would be to open our own practice.... however, the problem is that in Nigeria because people usually do not have health care coverage nor the funds to pay for a doctor...a lot of services are not compensated.... Because of the economic conditions of the country, many people do not have the money to pay for their doctor....

Additionally, one of my main concerns...is education for my children. Nigeria's education system is very poorly served and is very unstable.... One of the main reasons is funding.... I am afraid if we have to go back to Nigeria, my children will lose two years of quality education. Schools in Nigeria, for example, do not have any computers.... Moreover, most families only send their male children to school. My daughter [REDACTED] would be very likely to encounter discrimination at school based on her gender.

Furthermore, all three of my kids have regular American diets.... The extreme change in their diet would definitely cause an adverse reaction in all of them, but especially in my daughter [REDACTED] I am very concern (sic) about her having severe digestive problems and not being able to have the adequate resources to treat her....

Our two youngest children have atopic dermatitis. Although normally this would not cause major problems, it predisposes them to allergies. These allergies when treated with the appropriate medication and care would not be a problem, but...the resources in Nigeria are very limited and I am very afraid of my kids becoming sick there because I know they would not receive appropriate treatment.

Moreover, [REDACTED] and [REDACTED] have sickle cell anemia traits.... There are certain occasions in which having the trait would trigger severe complications known as sickle cell crises. These occasions include high altitude, pressure changes, temperature changes, severe dehydration, or low oxygen levels....

Other illnesses could also provoke complications. In Nigeria, malaria is very common. It is extremely likely for anyone to contract malaria. In my children's situation, this could bring out complications with their sickle cell traits....

Likewise, children are more exposed to illnesses because the lack of sanitation in Nigeria. Homes in Nigeria do not have running water. People have to obtain their water from streams. There is not potable water. There are no flush toilets. The septic system is unhygienic. Because of lack of appropriate maintenance, sometimes these symptoms overflow. This, combined with the lack of appropriate medical care makes people, especially children, very susceptible to diseases.

...Doctors and hospitals do not have the resources to treat patients. A lot of the medicine they used is expired and doctors do not have the knowledge of [sic] ability of doctors here in the US. Sometimes, the patients worsen after going to the doctor and being prescribed the wrong or expired medication. Such was the case of my niece in Nigeria. She went to the doctor in Nigeria because she had a fever. After going to the doctor she worsened. She was subsequently treated in London where [sic] they determined that the medication she was given was the cause she became so sick. She eventually had to undergo surgery because of that.

Another one of my main concerns if we all had to go back to Nigeria is security. Crime has worsened in Nigeria in the last few years. Because of the economic and political situation, people do anything to be able to eat and survive one more day.... The streets are not safe....

*Affidavit of* [REDACTED], dated July 19, 2007

Counsel has provided documentation with respect to the applicant's two children's above-referenced medical diagnosis of sickle cell trait and its implications. In addition, counsel has submitted a number of articles regarding the problematic political and social situation in Nigeria. Moreover, a Travel Warning, issued by the U.S. Department of State, Bureau of Consular Affairs, dated October 30, 2007, states the following, in pertinent part:

This Travel Warning is being issued to warn U.S. citizens of the possible dangers of travel to Nigeria, and to note the continued unstable security situation in the Niger Delta region.... This Travel Warning supersedes the Travel Warning for Nigeria issued January 19, 2007.

The Department of State continues to warn U.S. citizens of the possible dangers of travel to Nigeria. Periodically, travel by U.S. mission personnel is restricted based on changing security conditions, often due to crime, general strikes, or student/political demonstrations or disturbances. The lack of law and order in Nigeria poses considerable risks to travelers. Violent crime committed by ordinary criminals, as well as by persons in police and military uniforms, can occur throughout the country and tends to peak between November and January, during the holiday period.

...order remains fragile and the potential for violent outbreaks still exists. In 2007, over 150 foreigners in the Niger Delta region have been kidnapped from off-shore and land-based oil facilities, residential compounds, and public roadways mainly in Delta, Bayelsa, and Rivers states. While most hostages have been released unharmed, two expatriates have died since November 2006 while in captivity and many were held for weeks in hostile conditions. In response to the high number of kidnappings and two car bombs at oil company compounds in Port Harcourt, most oil industry personnel in the Niger Delta removed their dependents from the area and implemented "essential travel only" policies. U.S. citizens and other foreigners have been threatened during labor disputes. Criminal groups have kidnapped and held for ransom expatriate workers, including American citizens, and family members.

Despite Federal and State Government efforts to quell the violence and address concerns voiced by militant leaders, one faction threatened to resume attacks and kidnappings unless its demands are met. Although kidnappings of foreigners have declined since an informal cease-fire in late July, the Department of State continues to advise Americans to defer all but essential travel to Delta, Bayelsa, and Rivers states at this time. American citizens residing in the Delta are strongly advised to consider the information contained in this Travel Warning when deciding whether to remain.

Crime in Lagos and Abuja is an ongoing problem. Visitors and resident Americans have experienced armed muggings, assaults, burglary, kidnappings and extortion, often involving violence. Carjackings, roadblock robberies, and armed break-ins are common in many parts of Nigeria. Traveling outside of major cities during hours of darkness is not recommended. Visitors to Nigeria, including a number of American citizens, have been victims of armed robbery on the road from Murtala Mohammed International Airport during both daylight and nighttime hours. Even Victoria and Ikoyi Islands, which are generally safer than other parts of Lagos, have seen an increase in crime, including some involving expatriates.

Road travel is dangerous. Robberies by armed gangs have been reported on rural roads and within major cities. Travelers should avoid driving at night. Because of poor vehicle maintenance and driving conditions, public transportation throughout Nigeria can be dangerous and should be avoided....

*Travel Warning, U.S. Department of State, Bureau of Consular Affairs, dated October 17, 2007.*

Finally, the U.S. Department of State, in its Country Specific Information-Nigeria, states the following regarding medical care in Nigeria:

Medical facilities in Nigeria are poor. Diagnostic and treatment equipment is most often poorly maintained, and many medicines are unavailable. Counterfeit pharmaceuticals are a common problem and may be difficult to distinguish from genuine medications. This is particularly true of generics purchased at local pharmacies or street markets. While Nigeria has many well-trained doctors, hospital facilities are generally of poor quality with inadequately trained nursing staff. Hospitals often expect immediate cash payment for health services.

*Country Specific Information-Nigeria, U.S. Department of State, dated April 16, 2007.*

Based on the documentation provided, the AAO concludes that the hardship the applicant's three U.S. citizen children would encounter were they to relocate to Nigeria 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 children are 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 children at this stage of their education and social development, bearing in mind the documented problematic political and social situation in Nigeria and the security concerns for U.S. citizens, as referenced above, and relocate them to Nigeria 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 three U.S. citizen children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Nigeria. As stated by counsel,

...Both of the [REDACTED] are subject to the two year foreign residence requirement and are seeking waivers of the two year foreign residence requirement because of the exceptional hardship their U.S. citizen children would suffer if they...remained in the US without both parents....

The Administrative Appeals Office (AAO) has recognized that when the parents are both subject to the two year foreign residence requirement, as in this case, the

children do suffer exceptional hardship if both parents must leave the US and the children remain in the US without both their parents. See, AAO decision dated Hay [sic] 11, 2007, attached.

If the [REDACTED] children remained in the US without their parents for a two year period, they would also suffer exceptional hardship. The loss of their home, school, friends and love and support of their parents is exceptional hardship. Again, this is not your typical 212(e) waiver case where the Administrative Appeals Office is considering hardship to an adult spouse who is able to care for themselves. Here we have three children who clearly cannot support themselves if their parents must reside in Nigeria for two years.

Since both [REDACTED] are seeking an exceptional hardship waiver, if both must comply with the two year foreign residence requirement, the three [REDACTED] children must travel to Nigeria with their parents, or remain in the US without any parents....

All three of the [REDACTED] children are at an age that require their parents' care love, and attention. Taking that away from them for two years would be exceptionally hardship for them....

*Brief in Support of Appeal.*

As the applicant and his spouse are both subject to the two-year foreign residency requirement based on their past J status, both of them are required to return to Nigeria for a two-year period. Such a predicament would leave the young children in the United States without their parents. This situation would constitute exceptional hardship to the applicant's three young children.

The AAO finds that the applicant has established that his three U.S. citizen children would experience exceptional hardship were they to relocate to Nigeria and in the alternative, were they 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 three children 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.