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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship and Immigration Services

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[Redacted]

FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: SEP 28 2010

IN RE: [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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**ACTION COMPLETED
APPROVED FOR FILING**
Initials: JT Date: 6/22/11
FCO/Unit (OW)

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, a native and citizen of Yemen, was admitted to the United States in J-1 nonimmigrant status in January 1990 to participate in a program sponsored by the Agency for International Development. He is thus 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 government financing. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse and children, born in 1998, 2002 and 2004, would suffer exceptional hardship if they moved to Yemen 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 Yemen.

The director determined that the applicant failed to establish that his U.S. citizen spouse and/or children would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Yemen. *Director's Decision*, dated June 23, 2010. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits the Form I-290B, Notice of Appeal (Form I-290B), dated July 20, 2010, and referenced exhibits. 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 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 U.S. citizen spouse and/or children would experience exceptional hardship if they resided in Yemen for two years with the applicant. The applicant contends that his spouse and children will suffer emotional and financial hardship were they to relocate to Yemen for a two-year period. To begin, he asserts that although his spouse was born in Yemen, she has lived most of her life in the United States and has no ties to Yemen. He further notes that his children, all born in the United States, are completely acclimated to life in the United States. In addition, he references the substandard economy in Yemen and the inability to obtain gainful employment in Yemen to maintain his spouse and children's quality of living. Finally, he notes the hostility and lack of educational and employment opportunities for women in Yemen, and the anti-American sentiment in the country. *Declaration of* [REDACTED] dated May 10, 2009.

The AAO notes that the U.S. Department of State has issued a Travel Warning for Yemen, dated February 25, 2010. As stated, in pertinent part:

The Department of State warns U.S. citizens of the high security threat level in Yemen due to terrorist activities. The Department recommends that American citizens defer non-essential travel to Yemen.... This replaces the Travel Warning for Yemen issued June 26, 2009.

The security threat level remains high due to terrorist activities in Yemen. The U.S. Embassy in Sana'a, Yemen closed on January 3 and 4, 2010, in response to ongoing threats by Al-Qaeda in the Arabian Peninsula (AQAP) to attack American interests in Yemen. Following the attempted attack aboard Northwest Airlines flight 253 on December 25, 2009, Al-Qaeda in the Arabian Peninsula (AQAP) publicly claimed responsibility for the incident and stated that it was in response to what they described as American interference in Yemen. In the same statement, the group made threats against Westerners working in embassies and elsewhere,

characterizing them as “unbelievers” and “crusaders.” On the morning of September 17, 2008, armed terrorists attacked the U.S. Embassy in Sana'a, Yemen. A number of explosions occurred in the vicinity of the Embassy's main gate. Several Yemeni security personnel and one Embassy security guard were killed, as were a few individuals waiting to gain entry to the Embassy, one of whom was a U.S. citizen.

U.S. Embassy employees have been advised to exercise caution when choosing restaurants, hotels or visiting tourist areas in Sana'a in order to avoid large gatherings of foreigners and expatriates. Only limited travel outside of the capital is authorized at this time.

U.S. citizens who travel to or remain in Yemen despite this warning should exercise caution and take prudent security measures, including maintaining a high level of vigilance, avoiding crowds and demonstrations, keeping a low profile, varying times and routes for all travel, and ensuring travel documents are current. American citizens in Yemen are advised to exercise particular caution at locations frequented by foreigners countrywide, including restaurants and hotels frequented by expatriates. From time to time, the Embassy may restrict official Americans from restaurants, hotels, or shopping areas....

The Department remains concerned about possible attacks by extremist individuals or groups against U.S. citizens, facilities, businesses, and perceived interests. On June 12, 2009, seven Germans, one Briton, and one South Korean were kidnapped in Sa'ada resulting in three confirmed deaths. There have been no claims of responsibility in this incident and the investigation is ongoing. On March 15, 2009, four South Korean tourists were killed in a suicide bomb attack in the city of Shibam in southern Hadramout province. On March 18, 2009, a South Korean motorcade was attacked by a suicide bomber near Sana'a International Airport. On January 17, 2008, suspected al-Qaeda operatives ambushed a tourist convoy in the eastern Hadramout Governorate, killing two Belgians. On July 2, 2007, suspected al-Qaeda operatives carried out a vehicle-borne explosive device attack on tourists at the Belquis Temple in Marib, which resulted in the deaths of eight Spanish tourists and two Yemenis. The targeting of tourist sites by al-Qaeda may represent an escalation in terror tactics in Yemen. On February 3, 2006, 23 convicts, including known affiliates of al-Qaeda, escaped from a high-security prison in Sana'a, some of whom remain at large. Two of the escapees were killed in vehicle-based suicide attacks on oil facilities near Mukalla and Marib on September 15, 2006. Those attacks were followed by the arrest the next day in Sana'a of four suspected al-Qaeda operatives, who had stockpiled explosives and weapons.

The Government of Yemen has been battling al Houthi rebels in and around the northern governorate of Sa'ada intermittently since 2004. A ceasefire was announced on February 12, 2010.

Travel Warning-Yemen, U.S. Department of State, dated February 25, 2010.

The U.S. Department of State further confirms that “[p]ervasive and significant discrimination against women continued, as did early marriage, child labor, and child trafficking....” *Country Reports on Human Rights Practices-Yemen, U.S. Department of State, dated March 11, 2010.*

Based on the problematic country conditions in Yemen and the U.S. Department of State’s position on travel by U.S. citizens to Yemen, the AAO concurs with the director that it has been established that the applicant’s U.S. citizen spouse and/or children would suffer exceptional hardship were they to relocate to Yemen with the applicant for a two-year period.

The second step required to obtain a waiver is to establish that the applicant’s U.S. citizen spouse and/or children would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in Yemen. The applicant’s spouse contends that she is dependent on her spouse to help care for her and their three young children, emotionally and financially, on a daily basis. She explains that she is depressed and her mental health condition will be exacerbated should her spouse relocate abroad for a two-year period. Moreover, the applicant’s spouse asserts that she only has a 6th grade education, is unemployed and is dependent on her spouse’s financial contributions, but were he to relocate abroad while she remains in the United States, she will become sole breadwinner and caregiver to her young children, while suffering from numerous medical and mental health conditions, thereby causing her exceptional hardship. *Declaration of* [REDACTED] dated May 10, 2009.

Extensive documentation has been provided establishing that the applicant’s spouse has been suffering for a long time with depression. *Psychological Evaluation from* [REDACTED] dated October 5, 2009, *Initial Visit, dated February 25, 2009, Initial Visit, dated July 7, 2010, and Letter from* [REDACTED] dated July 6, 2010. The record further establishes that she is being treated with anti-depressants. *Prescription, dated July 7, 2010.* Moreover, a letter has been provided from [REDACTED], confirming that the applicant’s spouse underwent an extensive abdominal surgery that requires continuous monitoring and treatment by physicians familiar with the procedure and its appropriate care. *Letter from* [REDACTED], *Advanced Bariatric Centers of California, Inc., dated October 6, 2009.* In addition, financial documentation has been provided establishing the applicant’s critical financial contributions to the household as proprietor of Bargain Dollar Mart, Inc., a company that grossed in excess of \$133,000 in 2008. *U.S. Income Tax Return for an S Corporation-2008.* Finally, as noted above, a travel warning has been issued, recommending that U.S. citizens defer travel to Yemen due to a high security threat level as a result of terrorist activity.

The AAO has determined that the applicant's U.S. citizen spouse would experience exceptional hardship if she remained in the United States while the applicant relocated to Yemen to comply with his two-year foreign residency requirement. The applicant's spouse would be required to assume the role of primary emotional and financial caregiver to herself and their three young children, while suffering from numerous medical and mental health conditions and fearing for her husband's safety in Yemen, without the complete support of her spouse.

The AAO thus concludes that the applicant has established that his U.S. citizen spouse would experience exceptional hardship were she to relocate to Yemen and in the alternative, were she to remain in the United States without the applicant, for the requisite term. The evidence in the record establishes the hardship the applicant's spouse would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.¹

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 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.

¹ As the AAO has determined that exceptional hardship exists with respect to the applicant's U.S. citizen spouse were the applicant to relocate to Yemen for a two-year period, it is not necessary to further evaluate whether the applicant's U.S. citizen children would experience exceptional hardship were the applicant to relocate abroad for a two-year period.