

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

PUBLIC COPY

H3



FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

MAR 09 2010

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
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 Kenya who was admitted to the United States in J-1 nonimmigrant exchange status in May 2001. She 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, as further discussed in detail below. The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse 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 her two-year foreign residence requirement in Kenya.

The director determined that the applicant failed to establish that her spouse would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Kenya. *Director's Decision*, dated August 25, 2009. The application was denied accordingly.

In support of the appeal, counsel submits the Form I-290B, Notice of Appeal (Form I-290B), a letter, dated September 23, 2009, 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.

To begin, on appeal, counsel notes that the Form IAP-66 issued to the applicant does not clearly state a reason for why she is subject to section 212(e) of the Act. *See Form I-290B*, dated September 23, 2009. The record reflects that the applicant was issued the Form IAP-66, and subsequent J-1 Visa, to “serve as counselors at youth summer camps....” *See Form IAP-66*. The category detailed on the Form IAP-66 issued to the applicant is “Camp Counselor” and the specific field of study noted is “Physical Education.” *Id.* at 1. Based on a review of the Exchange Visitors Skills List¹ in

¹ As noted by the U.S. Department of State, at travel.state.gov,

The Exchange Visitor Skills List is a list of fields of specialized knowledge and skills that are deemed necessary for the development of an exchange visitor's home country. When you agree to participate in an Exchange Visitor Program, if your skill is on your country's Skills List you are subject to the two-year foreign residence (home-country physical presence) requirement, which requires you to return to your home country for two years at the end of your exchange visitor program. This requirement under immigration law is

effect at the time of the applicant's entry to the United States in 2001, the AAO notes that the categories of Physical Education, Group 7M, and Camp Counselor, Group 7Q, are listed as skills that are deemed necessary for Kenya's development. *See 62 Fed. Reg. 2447-2516* (January 16, 1997). As such, the AAO concurs with the director that the applicant is subject to section 212(e) of the Act based on the Exchange Visitor Skills List.

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 would experience exceptional hardship if he resided in Kenya for two years with the applicant. To begin, the applicant's spouse asserts that he would suffer emotional hardship, as he does not feel safe in Kenya. He states that he will be a target and would be put in harm's way by living there. *Affidavit from* [REDACTED], dated September 20, 2009. In addition, the applicant's spouse notes that he was born and raised in the United States, he does not speak Swahili, he is not familiar

based on Section 212(e) of the Immigration and Nationality Act, as amended. If your country does not appear on this list, there is no requirement to return to your home country for two years at the end of your program, based on the skills list.

with the culture and customs, and job opportunities are scarce in Kenya. *Affidavit of* [REDACTED], dated November 30, 2008.

Counsel has provided documentation regarding the problematic country conditions in Kenya. A Travel Warning regarding travel to Kenya by U.S. citizens, issued by the U.S. Department of State, Bureau of Consular Affairs, dated July 24, 2009, states the following, in pertinent part:

The U.S. Department of State warns U.S. citizens of the risks of travel to Kenya. American citizens in Kenya and those considering travel to Kenya should evaluate their personal security situation in light of continuing threats from terrorism and the high rate of violent crime. This replaces the Travel Warning of November 14th, 2008, to note increased security concerns in northeast Kenya near the Somali and Ethiopian borders.

The U.S. Government continues to receive indications of potential terrorist threats aimed at American, Western, and Kenyan interests in Kenya. Terrorist acts could include suicide operations, bombings, kidnappings, attacks on civil aviation as evidenced by the 2002 attacks on an Israeli airliner, 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.

In July 2009, three NGO workers were kidnapped and taken into Somalia by suspected members of a terrorist group that operates out of Somalia. In November 2008, armed groups based in Somalia crossed into Kenya near the town of El Wak and kidnapped two Westerners.

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. As recently as June 2008, U.S. Embassy personnel were victims of carjackings. In the short-term, the continued 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 or investigate such acts or prosecute perpetrators.

Travel Warning, U.S. Department of State, dated July 24, 2009.

Based on the problematic country conditions in Kenya, as confirmed by the U.S. Department of State in its Travel Warning, the applicant's spouse's unfamiliarity with the country and its customs and language, and the security concerns referenced above, the AAO concurs with the director that

the applicant's U.S. citizen spouse would experience exceptional hardship were he to accompany the applicant to Kenya for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would suffer exceptional hardship if he remained in the United States during the two-year period that the applicant resides in Kenya. The applicant asserts that she would be in danger in Kenya, thereby causing hardship to the applicant's spouse.² She further notes that she and her spouse are at the prime age for trying to conceive and start a family but waiting until she completes her foreign residency requirement will cause stress due to the risk of experiencing pregnancy complications as she approaches her mid-30s. *Affidavit from* [REDACTED] dated September 21, 2009. Finally, the applicant's spouse asserts that he would suffer financial hardship, as his spouse helps with the rent and bills and he would not be able to maintain the household by himself. *Supra* at 1.

To begin, although counsel has submitted information about country conditions in Kenya, the information is general in nature and does not establish that the applicant specifically will be in danger were she to relocate to Kenya based on her home town, her tribe, and/or the presence of an organized crime group in Kenya, thereby causing hardship to her U.S. citizen spouse. In fact, the U.S. Department of State does not reference violations against natives of Muranga in its Human Rights Report for 2008. Moreover, while there have been some incidents against Kikuyu members, as noted by the U.S. Department of State, counsel has failed to establish the applicant's specific role with respect to her tribe, to establish that the applicant specifically would be a target. As for the Mungiki criminal organization, it has not been established that said organization would cause hardship to the applicant specifically. Finally, while the AAO sympathizes with the applicant and her spouse's desire to have children, all couples separated by a foreign residency requirement have to make alternate arrangements if they want to conceive. It has not been documented that such arrangements rise to the level of exceptional emotional hardship.

As for the financial hardship referenced by the applicant, no current financial documentation has been provided, outlining the applicant and her spouse's income, expenses, assets and liabilities, to establish that without the applicant's physical presence in the United States, the applicant's spouse will experience financial hardship. In addition, no documentation has been provided that establishes that the applicant would be unable to obtain gainful employment in Kenya, thereby assisting in the U.S. household's finances. 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)). As such, it has not been established that the applicant's spouse would suffer exceptional emotional and/or financial hardship were he to remain in the United States while his spouse relocated to Kenya to fulfill her foreign residency requirement.

² Counsel further elaborates on this assertion. As counsel notes on the Form I-290B, the applicant is from the town of Muranga, and the Mungiki, an organized crime group, has its roots in Muranga. Moreover, counsel notes that the applicant is part of the Kikuyu tribe. *Supra* at 2.

The record, reviewed in its entirety, does not support a finding that the applicant's U.S. citizen spouse will face exceptional hardship if the applicant's waiver request is denied. Although the AAO finds that the applicant would suffer exceptional hardship if he moved to Kenya with the applicant for the requisite two-year period, the applicant has failed to establish that her spouse would suffer exceptional hardship were she to relocate to Kenya while he remained in the United States.

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. The waiver application is denied.