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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



Public Copy

FILE:

Office: Vermont Service Center

Date: 11 DEC 2001

IN RE: Applicant:



APPLICATION:

Application for Waiver of the Foreign Residence Requirement under § 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e)

IN BEHALF OF APPLICANT:



Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision 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 the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Vermont Service Center, and a subsequent appeal was dismissed by the Associate Commissioner. The matter is before the Associate Commissioner on a motion to reopen. The motion will be granted. The order dismissing the appeal will be withdrawn. The matter will be remanded to the director to request a section 212(e) waiver recommendation from the Director, Waiver Review Division (WRD), U.S. State Department Visa Office.

The applicant is a native and citizen of Chile 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 he participated in graduate medical education or training. He is also subject to the two-year foreign residence requirement because the Director, United States Information Agency (USIA), has designated Chile as clearly requiring the services of persons with the applicant's specialized knowledge or skill.

The applicant was admitted to the United States as a nonimmigrant exchange visitor in June 1977. The applicant filed the application on June 3, 1994, initially alleging that he could not return to the country of his nationality or last foreign residence because he would be subject to persecution on account of race, religion, or political opinion. The applicant married his present spouse in Chile in November 1974. He is now seeking the above waiver after alleging that his departure from the United States would impose exceptional hardship on his qualifying relatives.

The director determined the record failed to establish his qualifying relatives, namely his U.S. citizen son and daughter and lawful permanent resident daughter, now a U.S. citizen, would suffer exceptional hardship and denied the application accordingly. The Associate Commissioner affirmed that decision on appeal.

On motion, counsel states that no compelling Service interest or purpose would be served by the applicant's departure. Counsel further describes the financial hardship that would be imposed upon the applicant's citizen children if he had to return to Chile after such a lengthy residence in the United States and have to maintain two households.

On motion, counsel describes the continuing failing health of the applicant's elderly parents who now live with and are under the care of the applicant. Counsel also refers to the psychiatric assessment of Dr. Kim regarding the diagnosis of the applicant's son, [REDACTED] Dr. Kim stated in that report dated July 6, 2000, that [REDACTED] condition of Attention Deficit and Hyperactivity disorder; Depressive disorder, NOS; and Learning Disability, currently being treated with the medication Wellburtin and Adderall, will be greatly effected by either being required to move to Chile for two years or remaining in the United States separated from his parents. Dr. Kim states that [REDACTED] has to repeat 8th grade due to these disabilities and would suffer greater troubles if he were forced to

continue schooling in Chile where the language is Spanish and is foreign to him. Dr. Kim states that being separated from his parents for two years as a teenager would cause greater stress and anxiousness. Dr. Kim indicates that [REDACTED] is making progress over the past three months after stabilizing on his medications.

Section 212(e) of the Act provides, in part, that:

No person admitted under section 101(a)(15)(J) or acquiring such status after admission... (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 sections 101(a)(15)(H) or 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or 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...the Commissioner of Immigration and Naturalization 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),....

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that 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 does not represent exceptional hardship as contemplated by section 212(e) of the Act. See Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

The record now contains specific documentation which reflects that the applicant's son, [REDACTED], has certain medical problems, present and potential, which go beyond the normal. These problems would be exacerbated whether [REDACTED] accompanies his parents to Chile

temporarily for two years or remains in the United States without them. It is concluded that the record now contains evidence of hardships which, in their totality, rise to the level of exceptional as envisioned by Congress.

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957), and Matter of Y--, 7 I&N Dec. 697 (BIA 1958). In this case, the burden of proof has been met, and the order dismissing the appeal will be withdrawn.

It must be noted that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the WRD. Accordingly, this matter will be remanded to the director to file a Request For WRD Recommendation Section 212(e) Waiver (Form I-613) together with the waiver application in this case (Form I-612). If the WRD recommends that the application be approved, the application must be approved. On the other hand, if the WRD recommends that the application not be approved, then the application must be re-denied without appeal.

ORDER: The order of March 17, 2001, dismissing the appeal is withdrawn. The record of proceeding is remanded to the director for action consistent with the foregoing.