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U.S. Citizenship  
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FILE:  Office: NEBRASKA SERVICE CENTER Date: **DEC 23 2005**

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.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Brazil. He was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on January 25, 2001 to participate in a training program in agriculture, fishing and forestry sponsored by California Polytechnic State University. The applicant 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). The record reflects that the applicant married [REDACTED] a United States citizen (USC), on March 30, 2004, and that [REDACTED] has a 23 year-old son from a prior relationship. The applicant seeks a waiver of his two-year residence requirement in Brazil, based on the claim that his wife would experience exceptional hardship if she moved to Brazil with the applicant for the two years he is required to live there, or if she remained in the United States.

The director concluded that the applicant failed to establish that his compliance with the foreign residence requirement would impose an exceptional hardship to his USC spouse. The director denied the I-612 Application for Waiver of the Foreign Residence Requirement accordingly. *Decision of the Director*, Nebraska Service Center, dated February 22, 2005.

On appeal, counsel contends that [REDACTED] will have trouble adjusting to life in Brazil because of her age, medical condition, and lack of family in Brazil. Counsel also maintains that the applicant has a close relationship with her mother, and that separating them could exacerbate the applicant's medical condition. In support of the appeal, counsel submitted a brief. In support of the original waiver application, counsel submitted a statement from [REDACTED] the divorce decree dissolving [REDACTED] first marriage; documents related the [REDACTED] employment; and a variety of other materials. The entire record was considered in rendering this decision.

At the outset, the AAO notes that counsel stated that the Brazilian consulate has orally indicated that they would not oppose a waiver of the applicant's two-year residence requirement. Counsel's assertion is not supported by evidence in the record. If the Brazilian government has no objection to granting the applicant's waiver, they must send a letter to the United States Department of State, Waiver Review Division.

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 the Immigration and Naturalization [now, the Director of 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, "[E]ven 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)."

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.)

**I. Potential Hardship to [REDACTED] if She Accompanies the Applicant to Brazil**

First analyzed is the potential hardship [REDACTED] will experience if she lives with the applicant in Brazil for two years. Counsel contends that [REDACTED] suffers from Fibromyalgia and Psoriatic Arthritis, and that substandard medical care in Brazil may cause her condition to worsen. Counsel provided no documentation concerning [REDACTED] medical condition or the availability of appropriate medical care in Brazil. Accordingly, counsel has not established that [REDACTED] suffers from a medical condition that cannot be treated in Brazil.

Counsel asserts that poverty and the dense population in Brazil will affect the general welfare of Ms. [REDACTED]. Counsel offered no documentation to support this assertion, nor did counsel explain why general country conditions in Brazil would cause [REDACTED] to experience exceptional hardship.

Counsel asserts that [REDACTED]'s 82 year old mother depends on her daughter both economically and physically, and because of [REDACTED]'s medical condition, the stress of leaving her mother behind could exacerbate [REDACTED] medical condition. As noted above, counsel provided no documentation regarding [REDACTED] medical condition or the availability of medical care in Brazil. Also, counsel submitted no evidence to establish that [REDACTED] daughter is dependent on her. In fact, the record does not even indicate where [REDACTED] mother resides. [REDACTED] stated:

I also have an 82-year-old mother in extremely poor health, which I do not believe will live for much longer. I would not want to be out of the country when he death is eminent [sic].

[REDACTED] statement does not establish that she will experience exceptional hardship if she is separated from her mother for two years. The AAO notes that [REDACTED] can return to the United States as needed, and that she has an adult son who may be able to assist with the care of the mother.

[REDACTED] stated that she does not speak Portuguese and that she would have a difficult time finding employment in Brazil. While [REDACTED]'s inability to speak the language would cause some hardship, it does not constitute exceptional hardship. In regard to finding a job, the record contains no evidence addressing the availability of employment in Brazil. Also, counsel has not established that the applicant would be unable to find suitable employment in Brazil and support [REDACTED]

[REDACTED] stated that her son needs her guidance and occasional financial support. The AAO notes that [REDACTED]'s son is 23 years old, i.e. he is not a child as defined by the Act. Counsel has not established that separating Ms. Kossoski from her son for two years would cause [REDACTED] to experience exceptional hardship.

**II. Potential Hardship if [REDACTED] Remains in the United States**

Next examined is the potential hardship to [REDACTED] if she stays in the United States while the applicant lives in Brazil for two years. As a USC, [REDACTED] is not required to accompany the applicant to Brazil. In her statement in support of the original waiver application, [REDACTED] stated:

In regards to exceptional hardship: Since [REDACTED] and I are recently married we are deeply in love and very committed to one and other. I can't imagine being separated for such a long

period of time. Not being able to communicate daily with one and other along with the loss of intimacy would be unbearable. If [REDACTED] were to return to Brazil for said time it would be quite difficult for me to pay our apartment rent and keep up all my necessary bills such as heat, electric, car insurance etc. without his pay check. It would also be near impossible for him to find a job that would support him during his stay there. And obviously I would not be able to help him with that. In his absence he has become estranged from his father and would not receive any help on that end.

Counsel has not shown that the effect of a two-year separation would cause [REDACTED] to experience exceptional hardship. First, counsel presented no evidence establishing that [REDACTED] would be unable to support herself in the United States. The record indicates that [REDACTED] earns \$13.00 per hour working for Wooden Birch at the Mall of America. The record contains no documentation of [REDACTED] expenses or of the financial contribution made by the applicant. The AAO notes that the applicant has a son who may be able to assist her financially. Second, [REDACTED] described the emotional effect of the separation as being unbearable, but the evidence in the record does not establish that the effect goes beyond what is normally expected from a two-year separation. Third, the record contains no evidence demonstrating that the applicant would be unable to obtain suitable employment in Brazil.

Counsel asserts that:

Moreover, if [REDACTED] has to return to Brazil to visa process, he will suffer irreparable harm. [REDACTED] will be subject to a ten-year bar for having accumulated more than one year of unlawful presence in the United States. [REDACTED] is eligible to adjust in the United States as he entered with a visa should he be granted this waiver.

The AAO notes that the applicant was responsible for maintaining legal status in the United States, and that he was expected to return to Brazil at the conclusion of his exchange visitor status. Counsel cannot use the consequences of the applicant's failure to maintain legal status as a factor to be considered in determining whether a qualifying relative will experience exceptional hardship if a waiver application is denied.

### III. Conclusion

The AAO finds that the evidence in the record fails to establish that the applicant's wife would experience exceptional hardship if she lived in Brazil for two years with the applicant. The AAO also finds that the evidence in the record fails to establish that the applicant's wife would experience exceptional hardship if she remained in the United States while the applicant returned temporarily to Brazil.

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 his burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.