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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: AUG 04 2006

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:



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 appeal will be dismissed.

The record reflects that the applicant is a citizen of Italy who 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 applicant was last admitted to the United States in J1 nonimmigrant exchange status on June 15, 2005. The applicant has a U.S. citizen spouse. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse.

The director determined that the applicant failed to establish her spouse would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in Italy. *Director's Decision*, dated April 17, 2006. The application was denied accordingly.

On appeal, counsel asserts that the evidence shown is suitable to waive the two-year requirement. *Brief in Support of Appeal*, at 1, undated.

The record includes, but is not limited to, counsel's brief, photos of the applicant and her spouse, the applicant's statement, the applicant's spouse statement, a "no objection" letter, support letters from friends of the applicant's spouse and articles on Italy. The entire record was considered in rendering this decision.

Section 212(e) of the Act states in pertinent part that:

- (e) 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 [now the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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 demonstrate that the applicant's spouse would experience exceptional hardship upon relocation to Italy for two years. Counsel states that the applicant's spouse has a successful alarm company and he researched the possibility of venturing into a business in Italy with no success. *Brief in Support of Appeal*, at 5. Counsel states that Naples is controlled by the mafia and the applicant's spouse would not be allowed to start a business there. *Id.* The AAO notes that there is no

evidence that the applicant's spouse would be unable to find someone to assist with his U.S. business while away, that he cannot find employment in another area of Italy or that the applicant cannot find employment considering her impressive credentials in order to support them. Counsel also states that the applicant's spouse would lose cultural and family ties in the United States as well as his religious support group. *Id.* at 6. The AAO notes that these are common problems associated with relocation for two years.

Counsel asserts that the "no objection" letter indicates that Italy has no interest in sharing culture and information about the United States with the applicant and this defeats the purpose of the two-year requirement. *Id.* at 7. However, this contention is not relevant to a finding of exceptional hardship as required by statute. Therefore, based on the evidence contained in the record, the AAO finds that the applicant has failed to establish that her spouse would suffer exceptional hardship upon relocation to Italy.

The second step required to obtain a waiver is to demonstrate that the applicant's spouse would suffer exceptional hardship upon remaining in the United States during the two-year period. The applicant states that marriage is based on mutual feelings, love and sentiments and this cannot be done if living on two different continents. *Applicant's Statement*, at 1. The AAO notes that separation entails inherent emotional stress and financial and logistical problems which are common to those involved in the situation. The record does not demonstrate that the applicant's spouse would face exceptional hardship upon remaining in the United States during the two-year period.

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.