

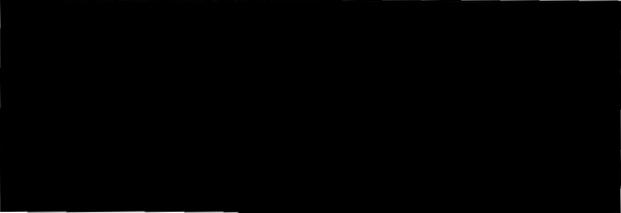
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U.S. Citizenship
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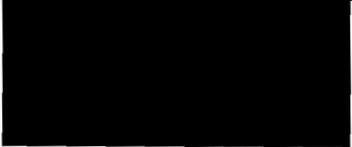
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FILE:

Office: VERMONT SERVICE CENTER Date: **MAR 03 2006**

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 Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and 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 (WRD).

The record reflects that the applicant is a citizen of India 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 obtained J1 nonimmigrant exchange status on June 15, 1996. The applicant's qualifying relatives are his U.S. citizen spouse and child and he presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his child.

The director determined that the applicant failed to establish his spouse or child would experience exceptional hardship if he fulfilled his two-year foreign residence requirement in India. *Director's Decision*, dated September 9, 2004. The application was denied accordingly.

On appeal, counsel asserts that the applicant has established that exceptional hardship would be imposed on his child if the applicant returned to India for two years. *Form I-290B*, dated October 6, 2004.

The record includes, but is not limited to, counsel's brief, a termination letter and proof of unemployment compensation for the applicant's spouse, the applicant's child's school payment plan, the applicant's statement, psychological evaluations of the applicant's child, pictures and support letters. 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 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 child would experience exceptional hardship if he moved to India for two years. The director stated that the applicant's child would

experience exceptional hardship abroad, therefore, the applicant is not appealing this step of the case. *Director's Decision*, at 2.

The second step required to obtain a waiver is to establish that the applicant's child would suffer exceptional hardship if he remained in the United States during the two-year period. Counsel states that the applicant's child was diagnosed with pervasive developmental delays, childhood disintegrative disorder, severe language and speech deficiencies and other learning disabilities at the age of three. *Brief in Support of Appeal*, at 1, dated October 4, 2004. Counsel states that the applicant's child is now six years old and he attends a school for children with developmental disorders while receiving speech therapy, occupational therapy and psychological care. *Id.* The record includes documentation which verifies these statements including a detailed affidavit from the applicant, a letter from the applicant's child's school psychologist, mid-year reports from the school, two psychological evaluations and a language evaluation. Counsel asserts that the applicant's child has a history of problems interacting with others and to remove a key figure in his life will have devastating effects on his psychological well-being. *Id.* at 3. In addition, the school psychologist states that separation from the applicant could cause the applicant's child to lose all of the progress he has made in overcoming his disabilities. *Letter from the [REDACTED] School's Psychologist*, at 2, dated July 22, 2004.

Furthermore, counsel states that the applicant's spouse was laid off from her job and she has been unable to find new employment. *Brief in Support of Appeal*, at 4. The record includes evidence of termination of employment and receipt of unemployment benefits for the applicant's spouse. Counsel states that if the applicant returned to India, he would not earn enough money to pay for his child's tuition. *Id.* The contract for the school states that the tuition is \$31,500 for the full school year. [REDACTED] *School Contract for Full-Day Program*, dated April 14, 2004. The AAO notes that the director's decision was based on the applicant's spouse holding employment. *Director's Decision*, at 3. Without the applicant's spouse's salary, the applicant's child would be unable to attend the special needs school which the record evidences as being critical to his well-being.

Considering the applicant's child's disabilities, the need and benefit for him to attend a special needs school, the need for him to have stability in the form of his father being present and the inability of the family to afford the school based on the spouse's lack of employment, the AAO finds that the applicant has established that exceptional hardship would be imposed on his child if the child remained in the U.S. while the applicant returned temporarily to India.

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 WRD. Accordingly, this matter will be remanded to the director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD recommends that the application be approved, the Secretary may waive the two-year foreign residence requirement if admission of the applicant to the United States is found to be in the public interest. However, if the WRD recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.