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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

#3

PUBLIC COPY

[REDACTED]

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: NOV 02 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:

[REDACTED]

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 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 Pakistan 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 admitted to the United States in J1 nonimmigrant exchange status on August 23, 1994 and is subject to the two-year foreign residence requirement. The applicant has two U.S. citizen children.¹ The applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his children.

The director determined that the applicant failed to establish exceptional hardship to a qualifying relative if he fulfilled the two-year foreign residence requirement in Pakistan. *See Director's Decision*, dated November 3, 2004. The application was denied accordingly.

On appeal, counsel asserts that the applicant's U.S. citizen children would experience exceptional emotional and financial hardship if the applicant returned to Pakistan. *Brief in Support of Appeal*, at 3.

The record includes, but is not limited to, counsel's brief, affidavits from the applicant and his spouse, a speech language pathologist's letter and speech language evaluation for the applicant's younger U.S. citizen child, financial information for the applicant's family and information on Pakistan country conditions. 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

¹ The record indicates that the applicant's spouse was expecting another child at the time that counsel's brief was submitted. *Brief in Support of Appeal*, at 3, dated December 3, 2004.

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, Department of Homeland Security (DHS), "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 a qualifying relative would suffer exceptional hardship upon relocation to Pakistan for two years. The record reflects that the applicant’s qualifying relatives are six and ten years old respectively. The AAO will first discuss the situation of the applicant’s six-year old child. Counsel states that the applicant’s spouse is an asylee and cannot return to Pakistan. *Brief in Support of Appeal*, at 4. Therefore, the applicant’s child would be separated from his mother for two years. Counsel cites U.S. State Department reports and other articles which detail the human rights and safety issues in Pakistan. The record includes a travel warning for Pakistan due to ongoing security concerns for U.S. citizens. *U.S. State Department Pakistan Travel Warning*, dated September 24, 2004. In addition, there is no indication that the applicant’s child has ever resided in Pakistan and there are serious issues related to the treatment he will face from the applicant’s family. Considering his age, separation from his mother, safety issues and the significant change in circumstances he will face in Pakistan, the AAO finds that the applicant’s younger child would suffer exceptional hardship if he moved with him to Pakistan.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship by remaining in the United States during the two-year period. The AAO will first discuss the situation of the applicant’s six-year old child. Counsel asserts that the applicant’s child would face emotional trauma in his absence as he has been diagnosed with severe expressive language aphasia. *Brief in Support of Appeal*, at 6. The record includes an evaluation which states that the applicant’s child meets the eligibility criteria for special education services as a student with a developmental delay. *Clark County School District Evaluation*, at 6, dated March 9, 2003. The record reflects that the applicant contributed to his child’s progress by completing speech and language homework and home activities. *Letter from Speech Language Pathologist*, dated March 18, 2004. Counsel states that the younger child has finished his speech therapy program and the absence of his father would have a serious detrimental impact on his continued language and social development. *Brief in Support of Appeal*, at 6. Based on the applicant’s prior involvement with his child’s progress in dealing with his problem, counsel’s contentions are plausible.

Counsel asserts that the applicant’s child would experience hardship as a result of the financial impact of the applicant’s departure. *Id.* Counsel states that there are thousands of unemployed physicians in Pakistan and assuming the applicant is employed, his wages will not be substantial. *Id.* at 8. The record includes articles which note the large amount of unemployed doctors in Pakistan and issues related to low physician salaries. In regard to the applicant’s spouse’s ability to support the family, the record includes a physician letter which states that the applicant’s spouse should be on modified bed rest for at least six months after the delivery of her child. *Letter from Southwest Medical Associates*, at 2, dated November 16, 2004. The physician states that if there are no additional complications, the applicant’s spouse should be scheduled for major surgery to deal with three other serious medical issues. *Id.* Therefore, it appears unlikely that the applicant’s spouse will be able to financially support her U.S. citizen children.

In addition to the aforementioned issues, the applicant’s child will face the common problems associated with a two-year separation from a parent. Therefore, the record reflects that the applicant’s younger U.S. citizen child will face exceptional hardship during the two-year period. As such, no purpose would be served in discussing the applicant’s older U.S. citizen child’s hardship claim.

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 her 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.