

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H3



FILE:



Office: NEBRASKA SERVICE CENTER

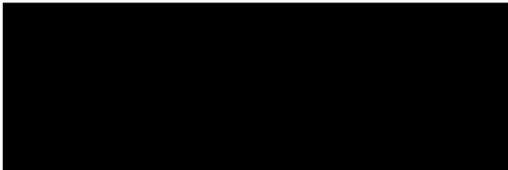
Date: APR 04 2007

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Director, Nebraska 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 Spain 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 J-1 nonimmigrant exchange status on September 22, 1999. The applicant's son is a U.S. citizen and the applicant seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his son.

The acting director determined that the applicant had failed to establish a qualifying relative would experience exceptional hardship if the applicant fulfilled the two-year foreign residence requirement in Spain and the application was denied accordingly. *See Acting Director's Decision*, dated September 21, 2006.

On appeal, counsel asserts that the acting director misapplied the law by making a determination in an overly narrow and mistaken manner. *Form I-290B*, dated October 19, 2006.

The record includes, but is not limited to, counsel's brief, a speech evaluation for the applicant's son, a psychological evaluation for the applicant's son, a developmental evaluation for the applicant's son and several affidavits from health-related professionals regarding the applicant's son's learning disorder. 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 a qualifying relative would suffer exceptional hardship upon relocation to Spain for two years. Counsel states that the applicant's son suffers from mixed

receptive-expressive language disorder. *Brief in Support of Appeal*, at 1, dated November 14, 2006. The record includes separate speech, developmental and psychological evaluations which reflect the applicant's son's language problems. Counsel states that the applicant's son's language disability has damaged his brain's communication centers and thus, he cannot acquire a strong language base in English or understand Spanish to receive therapy. *Id.* The record includes an evaluation from a psychologist who states that the applicant's son has significant delays in receptive and expressive language, he has begun to show language growth with intense therapy, a Spanish language environment will negatively affect his language development and he will experience significant difficulties with social and intellectual development. *Addendum to Psychological Evaluation*, dated September 29, 2005.

The record includes an affidavit from a professor of hearing and speech science who has reviewed the applicant's son's evaluations and case history. The professor states that because therapy has been required to move him to within 30 points of the best estimate of overall intellectual ability, placing the applicant's son in a new language environment would be devastating and likely result in long-term, irreparable harm to his intellectual and social development. *Affidavit from [REDACTED]* at 3, dated November 13, 2006. The professor states that it is essential not to move the applicant's son to a Spanish-language environment and to do so would make him functionally retarded. *Id.*

The applicant's son's psychologist states that another language environment would be deleterious to the applicant's son's overall development. *Addendum to Psychological Evaluation*. Counsel states that eight special education professionals from different educational and psychological disciplines are united in their opinions that moving the applicant's son to an unfamiliar language and teaching environment will irreparably harm him in different behavioral, language learning and developmental ways. *Brief in Support of Appeal*, at 4. The record reflects that the applicant's son has been evaluated by three different professionals and his case has been reviewed by several other highly-qualified professionals.¹ Based on the evidence contained in the record regarding the applicant's son's medical disorder, the AAO finds that the applicant has established that his son would suffer exceptional hardship upon relocation to Spain.

The second step required to obtain a waiver is to demonstrate that the applicant's son would suffer exceptional hardship if he remained in the United States during the two-year period. As the applicant's spouse's legal status is based on the applicant's legal status, both of them would have to leave the United States. This would leave their six-year old son in the United States without his parents. By default, this situation would constitute exceptional hardship to their son if he remained in the United States.

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 AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without

¹ In addition, counsel asserts that the applicant's son exhibits characteristics of pervasive developmental disorder (PDD), a condition related to autism. *Brief in Support of Appeal*, at 1. In a speech evaluation, the applicant's son was found to demonstrate PDD behaviors such as failure to develop peer relationships and marked impairment in the ability to sustain a conversation. *Speech and Language Evaluation, Wendy Trotter, MS*, at 2, dated April 12, 2005. The AAO also notes that the applicant's son's psychological evaluation reflects that he does not meet the criteria for autistic disorder, he had little difficulty with social interaction and communication in response to the examiner, and his performance IQ score was well within the normal limits. *Psychological Evaluation*, at 3, dated September 30, 2005.

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.