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U.S. Citizenship  
and Immigration  
Services

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[Redacted]

FILE:

Office: NEBRASKA SERVICE CENTER

Date:

MAR-02 2007

IN RE:

[Redacted]

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

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

The applicant is a native and citizen of Egypt 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 in J-1 nonimmigrant exchange status on August 6, 1998. The applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his U.S. citizen spouse, child and stepdaughter. Subsequent to his last J-1 entry, the applicant asserts that he has made several trips to Egypt and the cumulative time spent in Egypt was nearly one year. The record reflects that he has traveled to Egypt and the exact amount of time that he spent in Egypt would be deducted from the two-year requirement.

The acting director determined that the applicant had failed to establish that a qualifying relative would experience exceptional hardship if he fulfilled the two-year foreign residence requirement in Egypt, and the application was denied accordingly. *See Acting Director's Decision*, dated September 27, 2006.

On appeal, counsel asserts that the acting director ignored clear evidence from a psychologist regarding hardship to the applicant's spouse, and that the applicant's son would face exceptional hardship based on the applicant's inability to find work. *Form I-290B*, received October 26, 2006.

The record includes, but is not limited to, counsel's brief, a psychological evaluation of the applicant's spouse, statements from the applicant and his spouse, information on divorce in Egypt and letters of support. 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, Department of State Waiver Review Division] 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.

Counsel cites *Matter of Coffman*, 13 I&N Dec. 206 (D.A.C. 1969) and states that the acting director misinterpreted his argument related to it. *Brief in Support of Appeal*, at 5, dated November 22, 2006. The AAO notes that a liberal attitude was specifically taken in *Matter of Coffman* as the relevant exchange program participation was not to receive training but rather to impart skills to American teachers, the applicant was in the United States for a very short period (less than 90 days) and she had nearly completed two years of residence abroad. Therefore, *Matter of Coffman* is inapplicable to the applicant's case based on their significantly different fact patterns.

Counsel states that the applicant has a no objection letter from the Embassy of Egypt. *Id.* at 1. A no objection letter can be the sole basis for a waiver of the two-year requirement, however, this requires a favorable recommendation from the director of the U.S. Department of State Waiver Review Division.

22 C.F.R. § 41.63(d) states in pertinent part that:

Applications for waiver of the two-year home-country physical presence requirement may be supported by a statement of no objection by the exchange visitor's country of nationality or last legal permanent residence. The statement of no objection shall be directed to the Director through diplomatic channels; i.e., from the country's Foreign Office to the Agency through the U.S. Mission in the foreign country concerned, or through the foreign country's head of mission or duly appointed designee in the United States to the Director in the form of a diplomatic note. This note shall include applicant's full name, date and place of birth, and present address. Upon receipt of the no objection statement, the Waiver Review Branch shall instruct the applicant to complete a data sheet and to provide all Forms IAP-66 and the data sheet to the Waiver Review Branch. If deemed appropriate, the Agency may request the views of each of the exchange visitor's sponsors concerning the waiver application.

The record does not include a favorable recommendation from the director, therefore, the two-year requirement cannot be waived based on the no objection letter.

The acting director stated that the applicant's spouse had failed to provide evidence that her previous marriage was terminated, the record did not reflect that the applicant had obtained a valid divorce from his previous spouse, and their marriage is not considered legal for immigration purposes. *Acting Director's Decision*, at 2.<sup>1</sup> Counsel states that no request for evidence (RFE) was issued in determining the existence of the applicant's qualifying relatives and the case should be remanded. *Brief in Support of Appeal*, at 3.

8 C.F.R. § 103.2(b)(8) states, in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence of or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence and may request additional evidence, including blood tests.

A CIS RFE memo states that when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of an RFE is usually discretionary, but strongly recommended. *CIS Interoffice Memorandum*, at 3, dated February 16, 2005. Therefore, neither the regulations nor the RFE memo require the issuance of an RFE when the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility. In addition, counsel could have provided these documents with the instant appeal. As the record does not establish that the applicant's marriage to his current spouse is valid for immigration purposes, the applicant's spouse is not considered to be a qualifying relative.<sup>2</sup> The applicant's stepdaughter is older than 21 and does not meet the definition of a child under the Act. Based on the record, the only qualifying relative is the applicant's son.

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."

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<sup>1</sup> The record reflects that the marriage license was issued on February 26, 2003, but the date of marriage is March 6, 2002. *Certificate of Marriage*, dated March 12, 2003. However, the marriage certificate appears to be recorded on March 12, 2003, thereby indicating that "2002" was entered in error. Nevertheless, as the record does not contain the divorce decrees of the applicant and his current spouse, it does not establish that their marriage is valid for immigration purposes.

<sup>2</sup> The AAO notes that several assertions were made for the applicant's spouse, but some of the assertions were not supported with substantiating evidence.

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 Egypt for the two-year period. Counsel states that the applicant is required to pay for his son's medical care and schooling, and he is required to send him \$300 per month. *I-612 Cover Letter*, at 5. The record does not include substantiating evidence of the actual amount of money that the applicant sends to his son. Counsel asserts that the applicant's financial agreement with his ex-spouse was based on his ability to work as a physician in the United States, that his job prospects in Egypt will not allow him to comply with this agreement, that nonpayment of child support in Egypt can subject one to jail time and that the applicant's imprisonment will cause hardship to his U.S. citizen family members. *Brief in Support of Appeal*, at 6. The AAO notes that there is no evidence that the applicant cannot continue to pay the required amount of financial support while in Egypt. Based on the paucity of the evidence in the record, the AAO finds that the applicant's son would not suffer exceptional hardship upon remaining in Egypt for the two-year period.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon remaining in the United States during the two-year period. As the applicant's son's mother resides in Egypt, the applicant's nine-year old son would have to reside in the United States alone under this prong of the analysis. By default, the applicant's son would face exceptional hardship upon residing in the United States during the two-year period.

However, as the record does not establish that the applicant's son would experience exceptional hardship in Egypt, the applicant does not qualify for a waiver of the two-year foreign residency requirement.

The burden of proving eligibility for section 212(e) relief rests with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.