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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 2 3 2008

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ghana who obtained J-1 nonimmigrant exchange status in May 1989. The U.S. Department of State, in a letter dated May 3, 2007, confirmed that the applicant 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) based on government funding.[1] The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse and four children, born in June 1994, August 1996, November 2000, and July 2003, would suffer exceptional hardship if they moved to Ghana temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Ghana.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Ghana. *Director's Decision*, dated November 30, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated January 29, 2008; an advisory opinion from the U.S. Department of State, dated May 3, 2007; a letter from the applicant's neurologist, dated December 20, 2007; a letter from the applicant's spouse's treating physician; and information about the applicant's spouse's medical condition. The entire record was reviewed and considered in rendering this decision.

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

> 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

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[1] The applicant and counsel make numerous references to the fact that the applicant was not aware that he was subject to the two-year foreign residence requirement until he received a Form I-485, Application to Adjust to Permanent Residence, denial letter in July 2006. The AAO notes that the Form IAP-66, presented by the applicant to both consular officials, when applying for a J-1 visa, and to immigration officials, when applying for entry to the United States, in May 1989, clearly indicates that the applicant is subject to the foreign residency requirement due to government financing, namely, through the U.S. Department of Agriculture, a U.S. government agency. *See Form IAP-66.*

> (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 spouse and/or children would experience exceptional hardship if they resided in Ghana for two years with the applicant. The applicant, in his affidavit dated June 17, 2007, does not detail any specific hardships his spouse and/or children would suffer were they to relocate abroad for a two-year period. The AAO notes that counsel makes two brief references to the hardships the applicant's spouse and children would face were they to relocate. As counsel states,

> ...his [the applicant's] prospects for dairy farming in Ghana are very slim and he would not be able to...afford to raise his children in Ghana.....
>
> ...the children have lived in the U.S. for their entire lives....they should not be uprooted to live in a third-world country for two years....

Brief in Support of Appeal, dated January 29, 2008.

No documentation is provided to corroborate counsel's statements regarding the hardships the applicant's spouse and/or children would face were they to relocate abroad. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As such, it has not been established that the applicant's spouse and/or children would suffer exceptional hardship were they to relocate abroad for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's spouse and/or children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Ghana. As stated by the applicant,

> ...Since the date of our marriage, I have been the sole wage earner in our family. I am currently employed as a Site Manager at a dairy farm in Harlan, Iowa. My wife, [redacted], stays home with our children and has been their main caretaker during the course of our marriage.... If I return to Ghana for two years, I will lose my job in the United States and will be unable to earn sufficient income to support my family. [redacted] would be forced to return to work after spending the last thirteen years as a homemaker....

Affidavit of [redacted] dated June 18, 2007.

Counsel further elaborates on the hardships the applicant's spouse's family would encounter were the applicant to relocate abroad for two years. As stated by counsel,

> ...my clients made the decision to have Mrs [the applicant's spouse] stay at home to raise the children and she has not worked outside the home for over 13 years. It would not be easy for her to return to the workforce and would likely have to take a minimum-wage job and rely on government assistance to provide for her family. In addition, Mrs. has been diagnosed with fibromyalgia, 'a chronic condition characterized by widespread pain in your muscles, ligaments and tendons, as well as fatigue and multiple tender points.'... She is seeking treatment for this illness.... Therefore, Mrs. s ability to support the family is not likely....
>
> The Appellant's health could rapidly deteriorate if he does not receive the treatment and care that he needs. In the event that he returns to Ghana and falls victim to his cancer, Mrs. will lose any assistance that her husband could provide and will be forced to provide for her family for more than the two years that the Appellant would be outside the U.S.

Supra at 4-5.

Counsel has not provided any documentation that explains the severity of the applicant's spouse's medical condition, its limitations, both in the home and in the workplace, what specific support the applicant provides at this time, and what ramifications the applicant's spouse would experience were she to be separated from the applicant for two years. Moreover, although counsel has provided a letter from the applicant's neurologist, confirming that the applicant has undergone surgery for a brain tumor and that he needs to have continued follow up for at least 2 additional years, no documentation has been provided to establish that such follow ups can not be properly done in Ghana. *See Letter from* ***M.D., Ph.D., Neurological Surgery, Inc.***, dated December 20, 2007.

Moreover, no current financial documentation has been provided to establish the applicant's and his spouse's current economic situation, to corroborate that the applicant's spouse will suffer exceptional financial hardship with respect to her and her children's care, due to the applicant's two-year relocation abroad. Counsel provided a Monthly Expense list with the original Form I-612 filing, but it is undated, and does not detail income and assets, nor is it corroborated with objective evidence.

Nor has it been established that the applicant is unable to obtain gainful employment in Ghana, thereby assisting with the maintenance of the U.S. household. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). While the applicant's spouse may need to make adjustments with respect to her financial situation and the care of her children while the applicant resides abroad due to his foreign-residence requirement, it has not been shown that such adjustments would cause the applicant's spouse exceptional hardship.

The record, reviewed in its entirety, does not support a finding that the applicant's spouse and/or children will face exceptional hardship if the applicant's waiver request is denied. The record demonstrates that the applicant's spouse and children face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse/father temporarily relocates abroad based on a foreign residence requirement.

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 his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.