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**U.S. Citizenship
and Immigration
Services**

H3



FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

NOV 25 2008

IN RE:



APPLICATION:

Application for Waiver 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.


John F. Grissom, Acting 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 Brazil 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 June 2, 2006. The applicant has three U.S. citizen children. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her children.

The director determined that the applicant had failed to establish that her children would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in Brazil and the application was denied accordingly. *Director's Decision*, at 5, dated November 30, 2007.

On appeal, counsel asserts that the applicant has established that exceptional hardship would be imposed on her children if she fulfilled the two-year foreign residence requirement. *Form I-290B*, received December 31, 2007.

The record includes, but is not limited to, counsel's brief, information on Brazil, the applicant's statements, a physician's letter, letters from two social workers, and photographs of the applicant's family. 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. (Quotations and citations omitted).

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 experience exceptional hardship upon relocation to Brazil for two years. Counsel states that the applicant's spouse has a pending adjustment of status application and his return to Brazil would result in the abandonment of his application. *Brief in Support of Appeal*, at 3, dated January 17, 2008. Counsel states that the applicant does not have family or friends who could supervise the children while she is working, as her family is busy with their own jobs. *Id.* The applicant states that her mother works full-time, her father is retired and suffers from depression, her parents do not speak English, and her other relatives are juggling families and jobs of their own. *Applicant's Statements*, at 2, dated August 15, 2007 and January 15, 2008.

Counsel states that the applicant's annual approximate salary in Brazil would be \$10,944. *Brief in Support of Appeal*, at 3. Counsel states that it would not be possible for the applicant to afford private education for her children in addition to child care, housing and food, and that Brazil has an inferior public school system. *Id.* at 4. This record does not include substantiating evidence of counsel's claim, although the record reflects that the state of education in the Sao Paulo public school system is dismal. *Basic Education in Brazil: What's Wrong and How to Fix It*, 25 *Thinking Brazil* 1, 2 (2007). Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. See *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)). Counsel also states that the applicant's spouse's net monthly salary will be insufficient for him to meaningfully assist with the children's education, housing and food. *Id.* at 5. While the record includes financial information for the applicant's spouse, it does not include sufficient evidence for the AAO to determine that he would not be able to assist the applicant.

Counsel states that U.S. citizens are in imminent danger in Brazil. *Id.* at 4. The record reflects that crime levels are very high in Brazil and its murder rate is several times higher than the United States. *Department of State Consular Information Sheet, Brazil*, at 3, dated October 20, 2006. Although the record does not reflect that the applicant's children are in imminent danger, it does indicate that the city to which they will relocate, Salvador, is experiencing especially high levels of crime in a country where crime is prevalent.

Counsel states that none of the applicant's children speak, read or write Portuguese, it will be difficult for them to integrate and be accepted by their peers, and they will be in a disadvantage at school. *Brief in Support of Appeal*, at 5. The applicant states that their children have been raised as Americans, her daughters prefer to speak English and the United States is their home. *Applicant's Statement*, at 3-4. Counsel states that the applicant's children receive health insurance through the applicant's spouse's employment, the insurance does not cover family members residing abroad and the children will not be able to obtain proper medical care. *Id.* However, the record does not reflect that the applicant's children could not obtain health insurance through the applicant's employment in Brazil.

Based on separation from their father, safety issues in Salvador, their unfamiliarity with the Brazilian educational system and assimilation issues, the AAO finds that the applicant's children would experience exceptional hardship upon relocation to Brazil for two years.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would experience exceptional hardship upon remaining in the United States during the two-year period.

The record includes a letter from [REDACTED], the pediatrician caring for the applicant's children, stating that a separation from the applicant would affect her children in a very negative way while they are in their

crucial years of development. *Letter from* [REDACTED], dated December 27, 2007. The record also contains a letter from [REDACTED] an infant development specialist who is familiar with the applicant and her children. [REDACTED] states:

. . . . It is important for young children to attach to their primary caregiver and in this case, [the applicant] is the primary caregiver

Bonding and attachment are two very important components in a child's early social-emotional development In the event that [the applicant] is returned to her home country without her children they will develop an insecure attachment to her which can have significant negative effects on [them] as they grow older

Letter from [REDACTED] MSC, at 1, undated.

[REDACTED] prognosis for the applicant's children if they are separated from their mother is supported by [REDACTED] a child psychotherapist who is the clinical director of a group mental health practice. Ms. [REDACTED] observes that the mother/child relationship is primary during the early years of development and, if disrupted, a child's sense of attachment and self is damaged irrevocably. *Letter from* [REDACTED] dated December 20, 2007. Considering the effect that separation from the applicant would have on her children, the AAO finds that they would experience exceptional hardship if they remained in the United States without the applicant during the two-year period.

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.