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U.S. Citizenship and Immigration Services

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NOV 23 2004

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of the Foreign Residence Requirement of 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, Director
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 remanded for further action consistent with this decision.

The record reflects that the applicant is a native of the Philippines. The applicant was admitted into the United States as a J1 nonimmigrant exchange visitor from October 2, 1988 through July 29, 1991. The record reflects that the applicant remained in the United States and that she did not participate in the nonimmigrant exchange visitor program for which she was admitted. In July 1997, the applicant married a lawful permanent resident [redacted] Mr [redacted] became a naturalized U.S. citizen on September 24, 1999, and the applicant and her husband had a U.S. citizen child in March 1999. The applicant presently seeks a waiver of her two-year foreign residence requirement based on the claim that her husband will suffer exceptional hardship if she is required to return to the Philippines for two years.

The director noted that the applicant was deportable as a nonimmigrant status violator, and the director determined that, although the terms of the applicant's J1 status admission into the U.S. indicated that she was 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 not entitled to apply for a waiver of the foreign residence requirement because she had not participated in her intended nonimmigrant exchange visitor program. The director subsequently denied the application without adjudicating the merits of the applicant's Form I-612, Application for Waiver of the Foreign Residence Requirement (I-612 application).

Counsel asserts that the terms of section 212(e) of the Act indicate the applicant is subject to its two-year foreign residence requirement, despite the fact that she did not actually participate in the J1 nonimmigrant exchange program under which she was admitted. Counsel asserts that the application should therefore be remanded to the director for full adjudication on its merits, or that, in the alternative, the application should be remanded to the director for a clear policy decision stating that the applicant is not required to comply with the two-year foreign residence requirements set forth in section 212(e) of the Act, prior to being able to adjust her status to that of a permanent resident.

Section 101(a)(15)(J) of the Act, 8 U.S.C. § 1101(a)(15)(J) states:

> (15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens
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> > (J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j), and the alien spouse and minor children of any such alien if accompanying him or following to join him.

The J1 visa approval document contained in the record reflects that the applicant will participate in a "program to provide courses of study, teaching, lecturing, research, or a combination thereof, in the various fields of instruction and research conducted by the University of Birmingham, for qualified foreign students, professors, and specialists, to promote the general interest of international exchange." The AAO finds that the above description clearly falls within the nonimmigrant definition contained in section 101(a)(15)(J) of the Act.

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
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> > (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
> >
> > (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 Park,* 15 I&N Dec. 436, 437 (BIA 1975), the Board of Immigration Appeals (Board) held that an alien who was admitted into the United States as a nonimmigrant exchange visitor under section 101(a)(15)(J) of the Act, and who had not complied with his nonimmigrant exchange visitor status, was "[i]neligible to apply for permanent resident [status] until he had he had either fulfilled the foreign residency requirement contained in section 212(e) of the Immigration and Nationality Act, as amended, secured a waiver therefore, or established that he was otherwise exempt therefrom." The Board stated further:

> We construe the language of amended section 212(e) to encompass a person who fraudulently gains admission to the United States or status as an exchange visitor under section 101(a)(15)(J) with the knowledge that he is being accorded such status. Any other interpretation would permit an alien who has perpetrated a willful fraud to reap the benefit of his own misdeed, and would allow the circumvention of the immigration laws through the exchange visitor program in contravention of the intent of Congress in establishing it.

In *Espejo v. INS,* 311 F.3d 976, 978-79 (9th Cir. 2002), the Ninth Circuit Court of Appeals (Ninth Circuit) further addressed the issue of whether actual participation in a J1 visa nonimmigrant exchange program is required in order for foreign residence requirements to apply. The Ninth Circuit affirmed the principles set forth in *Matter of Parks, supra.* The Ninth Circuit noted further that "[t]he foreign residence requirement was enacted to ensure that exchange visitors would return to their country of origin and serve the needs of that country by using the skills learned in the United States." *Id.* at 979. (Citations omitted). The Ninth Circuit pointed out, however, that the foreign residence requirement, "[w]as also intended to prevent visitors from using the exchange program to circumvent the operation of the immigration laws. That objective implies that Congress would have intended the requirement to apply to exchange visitors regardless of whether they fraudulently obtained their exchange visas." *Id.* (Citations omitted).

Because the applicant was admitted into the United States as a nonimmigrant exchange visitor pursuant to section 101(a)(15)(J) of the Act, the AAO finds that the applicant must meet the two-year foreign residence requirements set forth in section 212(e) of the Act, regardless of the fact that she did not actually participate in the nonimmigrant exchange program. The AAO therefore finds that that director erred in not adjudicating the merits of the applicant's Form I-612, Application for Waiver of the Foreign Residence Requirement.

In view of the foregoing, the application will be remanded to the director for adjudication of the Form I-612 application, and entry of a new decision which, if adverse to the applicant, will be certified to the AAO for review, accompanied by a properly prepared record of proceedings.

**ORDER:** The matter is remanded to the director for further action consistent with this decision.