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U.S. Citizenship and Immigration Services

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[redacted]

FILE: Office: NEBRASKA SERVICE CENTER Date: JAN 04 2007

IN RE: [redacted]

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:

[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 is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native and citizen of Germany 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 to the United States in J1 nonimmigrant exchange status on October 10, 1999. The applicant has a lawful permanent resident spouse and a U.S. citizen child. The applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse and child.

The acting director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in Germany, and the application was denied accordingly. *See Director's Decision*, dated April 17, 2006.

On appeal, counsel asserts that the acting director erred in applying the law to the facts of the case. *Form I-290B*, dated January 3, 2006.

The record includes, but is not limited to, counsel's brief, photos of the applicant and her spouse, support letters, financial documents, medical records and information on Germany. The entire record was considered in rendering this decision.

Counsel asserts that the acting director failed to issue a request for evidence (RFE) on those aspects of the application that formed the basis of the denial.[1] *Brief in Support of Appeal*, at 3, undated. 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.

The USCIS 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, although it is strongly recommended. The AAO notes that the initial submission of the Form I-612 contained documents and statements related to the hardship that the applicant's spouse and then unborn child would experience if the waiver was not granted. The RFE requested proof of the child's birth as well as copies of the applicant's IAP-66's. This documentation was necessary for a thorough and accurate review of the Form I-612. The AAO does not find that the RFE that was issued was deficient.

In addition, as counsel has supplemented the record on appeal, no purpose would be served in remanding the case to the acting director for the purpose of having the record supplemented with new evidence.

[1] The AAO notes that an RFE was issued, but the RFE did not request evidence of exceptional hardship.

Counsel asserts that the denial was based upon an assumption that the marriage was entered into to create hardship and this assumption lead to the evidence being ignored. *Brief in Support of Appeal*, at 5, 12. The director quotes *Orife v. Salturelli*, No. 5571229 (E.D. Mich. Dec. 31, 1975) in asserting that creation of exceptional hardship through marriage to a U.S. citizen would ignore the clear purpose of the statute. *Id.* The AAO notes that the quoted line from *Orife v. Salturelli* was made in the context of sham marriages, however, the record reflects that the applicant and her spouse are in a bona fide marriage.

Counsel asserts that the acting director presumed that the couple knew of the foreign residence requirement and the acting director ignored hardship to the child as a result. *Id.* at 7. Although the AAO cannot state with certainty that the applicant or her spouse knew of the requirement, the applicant's visa states that she is subject to the requirement and in general, it is reasonable to expect that an applicant would discuss the foreign residence requirement with a spouse prior to marriage. In the event that they were unaware of the requirement, this would not absolve them of complying with the relevant statutory requirements. Hardship to the qualifying relatives will be analyzed based on the relevant case law.

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 [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 experience exceptional hardship upon relocation to Germany for two years. Counsel states that applicant's spouse does not speak German and would be ineligible for most positions. *Brief in Support of Appeal*, at 5. Counsel asserts that due to xenophobia and high unemployment, the applicant's spouse's career as a software engineer would be disrupted. *Id.* Counsel states that the applicant's spouse would not be able to receive a work permit for ten to twelve months. *Id.* at 10. The record includes supporting documentation of these claims. Counsel states that the applicant would not be able to practice medicine in Germany as her training was in the United States. ***Brief in Support of Waiver*, at 3, dated March 25, 2005. The record includes supporting** documentation of this claim. Counsel states that the applicant could work as a medical resident, but this

would not result in enough income to pay the rent. *Supra.* at 5. The record includes a letter which states that apartments in Munich are very expensive, however, there is no reason that they could not stay in a relatively less expensive apartment or that they do not have savings which could assist them during the two-year period. In addition, the AAO notes that relocation often involves financial and logistical problems. The record does not reflect hardship beyond that which would normally be expected. Counsel states that the applicant's son has a heart condition which requires monitoring and he is covered through insurance. *Brief in Support of Appeal*, at 11-12. However, there is no evidence that he could not be monitored in Germany. Based on the evidence contained in the record, the AAO finds that the applicant has failed to establish that a qualifying relative would suffer exceptional hardship upon relocation to Germany.

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. Counsel states that the applicant would not be able to earn a living for herself and her child in Germany, and her husband would be unable to meet his financial needs and those of the child should the child remain with him. *Id.* at 9. The record does not establish that the applicant's spouse could not adjust his expenses to support himself and the child. In addition, the record does not establish that the applicant could not obtain any employment in Germany that would support herself and the child.

Counsel cites a doctor's letter which details the negative effects of separation. *Brief in Support of Waiver*, at 10. Counsel states that the applicant's spouse would need full-time day care for the child and a nanny for the weekend or if he worked late. *Id.* at 11. The AAO notes that separation entails inherent emotional stress and financial and logistical problems which are common to those involved in the situation. The record does not demonstrate that a qualifying relative would face exceptional hardship upon remaining in the United States 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 not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.