



U.S. Citizenship  
and Immigration  
Services

H<sub>2</sub>



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 02 2009

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:



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.

A handwritten signature in black ink that reads "John F. Grisson".

John F. Grisson  
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 matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The record reflects that the applicant, a native and citizen of Venezuela, obtained J-1 nonimmigrant exchange status in July 1999. He 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.<sup>1</sup> The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his lawful permanent resident spouse and U.S. citizen child, born in 2008, would suffer exceptional hardship if they moved to Venezuela 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 Venezuela.

The director determined that the applicant failed to establish that his spouse and/or child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Venezuela. *Director's Decision*, dated June 18, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated July 9, 2008<sup>2</sup>, and referenced supplemental exhibits. The entire record was reviewed and considered in rendering this decision.

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<sup>1</sup> Counsel, on appeal, asserts that the Director mistakenly identified the applicant as a citizen of the Philippines. Counsel further states that "this paragraph is a smoking gun that shows that this denial is in bad faith, something just cranked out from a predisposition to deny...." See *Brief in Support of Appeal*, dated July 9, 2008. Despite counsel's assertion to the contrary, the decision of the director, including the copy submitted by counsel on appeal, notes in numerous instances that the applicant is from Venezuela. *Decision of the Director*, dated June 18, 2009. The director makes no reference to the applicant being from the Philippines.

Moreover, counsel notes that the director erred in noting that the applicant is subject to the two-year foreign residency requirement based on graduate medical training when in reality, he is subject "because his exchange program was funded by the government of Venezuela, as is clear from the application...." *Supra* at 10. The AAO notes that the Form I-612, Application for Waiver of the Foreign Residence Requirement (Form I-612), executed by both the applicant and counsel, clearly indicates box D under question 4 marked, which states "I entered the United States as, or my status was changed to that of, an exchange visitor on or after January 10, 1977 to participate in graduate medical education or training." See *Form I-612*, executed by the applicant on March 9, 2009 and by counsel on February 26, 2009. Based on a thorough review of the record, the AAO concludes that irrespective of the notation on the Form I-612, the applicant is subject to the two-year foreign residency requirement based on government financing, as noted above.

<sup>2</sup> The Decision of the Director was issued on June 18, 2009. However, counsel notes that the appeal was filed by U.S. Express Mail on July 9, 2008. *Supra* at 24. As the appeal was received by the USCIS on July 10, 2009, the AAO will proceed with the understanding that counsel filed the appeal by U.S. Express Mail on July 9, 2009. The incorrect date noted on the appellate brief is harmless error.

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

(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 lawful permanent resident spouse and/or U.S. citizen child would experience exceptional hardship if they resided in Venezuela for two years with the applicant. To begin, the applicant's spouse notes that returning to Venezuela would put her family at risk, due to the volatile political and social environment. She asserts and documents that her father, [REDACTED], a retired military officer from the Venezuela National Guard with the rank of general, fought against Hugo Chavez before he was president, and has since voiced his concerns regarding Chavez's political agenda; her father's name has recently appeared on a government list of conspirators. The applicant's spouse contends that her ties to her father would endanger her family were they to reside in Venezuela. In addition, the applicant's spouse contends that her child's safety may be compromised, based on Venezuela's crime rate, including violent crimes such as kidnapping. She references that her sister-in-law was recently threatened with the kidnapping of one of her sons; the family had to adopt safety measures, such as temporary hiding, hiring bodyguards and avoiding exposure. The bodyguard hired by her sister-in-law has since been murdered. She notes that many family members are planning to leave

Venezuela due to the problematic country conditions and moreover, many members have already fled; in fact, the applicant's brother and his family obtained political asylum in the United States because of persecution by the Chavez regime. Finally, the applicant's spouse references the strong anti-American sentiment and the indoctrination of children to follow the political agenda and ideology of the regime. *Affidavit of* [REDACTED] dated March 9, 2009.

Based on the documented problematic country conditions and security concerns for U.S. citizens and lawful permanent residents residing in Venezuela and strong anti-American sentiment, as confirmed by the U.S. Department of State<sup>3</sup>, and the applicant's and his wife's family's past traumatic experiences in Venezuela and their effect on the applicant's spouse's and child's emotional and psychological well-being, the AAO concurs with the director that the applicant's spouse and child would experience exceptional hardship were they to accompany the applicant to Venezuela for a two-year period. A relocation abroad would cause the applicant's spouse and child hardship that

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<sup>3</sup> The U.S. Department of State references the following, in pertinent part, regarding conditions in Venezuela:

The political climate in Venezuela is highly polarized and volatile. Violent crime is a serious problem, and the capital city of Caracas has been cited as having the highest per capita homicide rate in the world. Kidnappings, assaults and robberies occur throughout the country. ...

Violent crime in Venezuela is pervasive, both in the capital, Caracas, and in the interior. The country's overall per capita murder rate is cited as one of the highest in the world, and Caracas was listed as the murder capital of the world in the September 2008 Foreign Policy magazine. Kidnapping is another serious concern. The Venezuelan National Counter Kidnapping Commission was created in 2006, and since then, official statistics have shown an alarming 78 percent increase in the number of reported kidnappings. Surveys show that the overwhelming majority of kidnappings are not reported to the police. Armed robberies take place throughout the city, including areas generally presumed safe and frequented by tourists. Well-armed criminal gangs operate widely, often setting up fake police checkpoints. Only a very small percentage of crimes result in trials and convictions....

Harassment of U.S. citizens by pro-government groups, Venezuelan airport authorities, and some segments of the police occurs but is quite limited. Venezuela's most senior leaders, including President Chavez, regularly express anti-American sentiment. The Venezuelan government's rhetoric against the U.S. government, its American culture and institutions, has affected attitudes in what used to be one of the most pro-American countries in the hemisphere....

would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's lawful permanent resident spouse and/or U.S. citizen child would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in Venezuela. As the applicant and his spouse state:

Not only are the country conditions extremely dangerous for someone like [redacted] [the applicant] to return to, his ties to [redacted] (retired) [redacted] [the applicant's spouse's father], his brother's persecution by the Chavez regime, his sister's issues with kidnapping, and his ties to the United States makes his risk of harm exacerbated. The only thought of this fill us with anguish and anxiety.

[redacted] [the applicant's spouse] has suffered anxiety and psychological distress.... [redacted] relies on [redacted] for support and emotional stability.... There are many risks in Venezuela for [redacted] and perhaps the possibility that he might not be able to return. The constant fear and worry for the well being of [redacted] will be psychologically devastating added to her chronic illnesses (Diabetes and Hypertension). In these circumstances, she would not be able to properly take care of herself and even worse our son, [redacted]

We also fear that our son...apart from not being able to enjoy the company of his father, will be also living in an unstable family environment filled with anxiety and stress.... We believe that separation from his dad while [sic] cause extreme psychological hardship on our son....

[O]ur family will suffer serious financial difficulties if [redacted] were to return to Venezuela.... It will be extremely hard for [redacted] to find a job. He has been preparing for a career in public education and administration. Due to the Chavez regime's control of all public institutions in Venezuela and his background and ties to the United States, [redacted] won't be able to find and/or maintain a job.

With [redacted] income itself, we foresee that she will have a hard time paying for our current financial responsibilities and living expenses.... Furthermore, due to the possibility of being deprived from [redacted] help in taking care of our son, [redacted] will not be able to establish a career in the legal field.

If [REDACTED] is to return to Venezuela, we might not be able to sustain mortgage payments. With the current market situation, it seems almost impossible to sell our town-home without losing the money we invested. We have also incurred in debt due to [REDACTED]'s Law School expenses as well as medical expenses. If [REDACTED] were to return to Venezuela, it is likely that we might not be able to fulfill these financial responsibilities....

*Letter from [REDACTED] and [REDACTED], dated July 2, 2009.*

Counsel has provided extensive documentation with respect to country conditions in Venezuela, the applicant's spouse's medical conditions, and the finances of the household. As such, due to the applicant's spouse's professional goals, her and her child's dependence on the applicant for their own emotional, psychological and financial well being, the fears and anxieties with respect to the applicant's anticipated return to Venezuela, a country of political and social turmoil, in light of the traumatic experiences suffered by numerous family members, and the hardships the applicant's son will experience due to separation from his father, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse and child emotional, psychological and financial hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

The AAO thus finds that the applicant has established that his lawful permanent resident spouse and U.S. citizen child would experience exceptional hardship were they to relocate to Venezuela and in the alternative, were they to remain in the United States without the applicant, for the requisite period. The evidence in the record establishes the hardship the applicant's spouse and child would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.

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 his 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 DOS. Accordingly, this matter will be remanded to the director so that she may request a DOS recommendation under 22 C.F.R. § 514. If the DOS 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 DOS recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** 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.