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U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

H3

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 29 2006

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 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 Egypt 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 J1 nonimmigrant exchange status on May 25, 2000. The applicant's son is a U.S. citizen and the applicant seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his son.

The director determined that the applicant failed to establish a qualifying relative would experience exceptional hardship if the applicant fulfilled the two-year foreign residence requirement in Egypt. *See Director's Decision*, dated December 19, 2005.[1] The application was denied accordingly.

On appeal, counsel asserts that the applicant has demonstrated that fulfillment of the foreign residency requirement would impose exceptional hardship on his U.S. citizen child. *Form I-290B*, dated January 13, 2005.

The record includes, but is not limited to, counsel's brief, the applicant's statement, letters of support, photographs of the applicant's family, a psychological evaluation and medical documents for the applicant's son, information on anti-American sentiment in Egypt, evidence of inter-tribal violence related to the applicant's family in Egypt and information on Egypt. 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

[1] The director also states that the applicant may be accruing unlawful presence, he concealed his immigrant intent to the consulate that issued his visa on March 26, 2000 (by not disclosing his spouse's impending child delivery) and he concealed his immigrant intent to U.S. officials at the time of his last entry. *Director's Decision*, at 3. The AAO notes that these assertions are not supported by the record.

> (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).

Counsel notes that the director found that exceptional hardship to the applicant and his spouse was not established, the director referred to the applicant's spouse as a U.S. citizen and the director failed to evaluate hardship to the applicant's child. *Brief in Support of Appeal*, at 3, dated January 30, 2006. The AAO notes that hardship to the applicant and his spouse, who is in J-2 status, is not relevant, except to the extent their hardship causes hardship to the applicant's son. The AAO's analysis will focus on hardship to the applicant's son, the only qualifying relative under the statute.

The first step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to Egypt for two years. Counsel states that the director did not take into account the dangerous conditions in Egypt and that potentially outdated Library of Congress information was cited by the director. *Id.* The record includes numerous articles detailing safety issues and anti-America sentiment in Egypt. The applicant states that his son does not speak Arabic very well, he has developed an American identity and he would be singled out for teasing and bullying due to hostility towards the United States. *Applicant's Statement*, at 3, dated March 5, 2005. It appears plausible that the applicant's six-year old son will face difficulty in socially adapting to Egypt based on these statements.

The applicant states that his son has psychological issues which would be intensified by a move to Egypt. *Id.* at 2. The record includes a psychological evaluation which states that the applicant's son has panic disorder without agoraphobia. *Psychological Evaluation*, at 6, dated December 6, 2004. The AAO acknowledges the important role of a clinical psychologist, however, it gives minimal weight to the submitted report as it is based on a one-time meeting and there is no mention of a follow-up appointment, proposed therapy or treatment for the applicant's son. The record does reflect that the applicant's son had a hallucination, likely secondary to a terror reaction, but this was in 2003. *Final Report, Children's Hospital*, at 1, dated March 4, 2003.

The applicant's son's doctor states that the applicant's son has asthma, his breathing problems started during a trip to Egypt due to the environment and moving back to Egypt would exacerbate his symptoms which would require the use of side-effect inducing steroids. *Letter from James Cisco, M.D.*, dated June 23, 2005. The record reflects that the applicant's son visited a doctor four times on his trip to Egypt due to respiratory problems, he was placed on steroids and air pollution was a major trigger factor for his asthma. *Letter from Ashraf Hasaneen, M.D.*, at 1, dated December 4, 2004. The doctor states that the applicant's son had five asthma episodes per week with exacerbation of symptoms at night resulting in interruptions of his sleep twice per week. *Id.* These letters reflect a nexus between the applicant's son's health and residing in Egypt.

The applicant asserts that moving to Egypt will compromise his career and pose an extreme financial hardship to his family. *Applicant's Statement*, at 5. However, the record does not include persuasive evidence of financial hardship. Lastly, the applicant states that his family is embroiled in a tribal feud that would put his son at great risk. *Id.* at 4. The record includes police documents detailing violence against the applicant's male family members. The AAO notes that the applicant's son traveled to Egypt previously without any harm, although this trip was before the most recent incident of the alleged intertribal violence.

Based on the evidence contained in the record regarding the applicant's son's medical problems and the difficulty in adapting to a new culture , the AAO finds that the applicant has established that his son would suffer exceptional hardship upon relocation to Egypt.

The second step required to obtain a waiver is to demonstrate that the applicant's son would suffer exceptional hardship if he remained in the United States during the two-year period. As the applicant's spouse's legal status is based on the applicant's legal status, both of them would have to return to Egypt. This would leave their six-year old son in the United States without his parents. By default, this situation would constitute exceptional hardship to their son if he remained in the United States.

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 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.