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U.S. Citizenship and Immigration Services

#13

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 03 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:

SELF-REPRESENTED

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 Zimbabwe 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 March 19, 1998. The applicant's daughter is a U.S. citizen. The applicant seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his daughter and based on political persecution upon return to Zimbabwe.

The director determined that the applicant failed to establish his child would experience exceptional hardship if he fulfilled the two-year foreign residence requirement in Zimbabwe and that the grounds of persecution were not established by supporting evidence. *Director's Decision*, dated April 19, 2006. The application was denied accordingly.

On appeal, the applicant asserts that the fact that he traveled to Zimbabwe in 1998 and the evidence he provided were grossly misinterpreted. *Brief in Support of Appeal*, dated June 15, 2006.

The record includes, but is not limited to, the applicant's brief, the applicant's statements, a letter regarding the applicant's political affiliation and numerous articles on Zimbabwe. 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
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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 suffer exceptional hardship upon relocation to Zimbabwe for two years. The record reflects that the applicant's daughter is seven years old and there is no indication that she has ever resided outside of the United States. The applicant states that the conditions in Zimbabwe are very different from when he traveled there for two weeks in 1998. *Brief in Support of Appeal*, at 1. The applicant states that unemployment is over 85% and poverty over 90%. *Id.* In response to the director's statement that associates of the applicant have found employment, the applicant states that they were the lucky ones and it was before the current situation. *Id.* at 2. The applicant questions the date of a cited information sheet by the director which states that Zimbabwe is a developing country. *Id.* at 3. The AAO notes that the U.S. Department of State report cited by the director is dated March 6, 2006. *U.S. Department of State Consular Information Sheet on Zimbabwe*, dated March 6, 2006. Therefore, it is relevant evidence in this case. The applicant asserts that the healthcare system is inadequate, there are food and fuel shortages, the education system has collapsed, obtaining housing is a problem and garbage collection is a problem. *Applicant's Statement*, at 3-6, dated July 8, 2005.

The record includes numerous articles which detail exceptional poverty levels and inflation rates, fuel shortages, the United Nation recommendation for Zimbabwe to be downgraded to the status of a least developed country, political tyranny and persecution, poor salaries for university lecturers and their exodus to other countries, the lack of drinking water and sewage problems. The Department of State report details the nationwide fuel shortage, crime due to high rates of unemployment and deteriorating economic conditions, the unavailability of prescription medicine and the prevalence of Malaria. *U.S. Department of State Consular Information Sheet on Zimbabwe*, at 2-4. These articles and the report substantiate the applicant's claims that his daughter would suffer exceptional hardship upon relocation to Zimbabwe for two years.

The second step required to obtain a waiver is to demonstrate that the applicant's daughter would suffer exceptional hardship if she 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 Zimbabwe. This would leave their seven-year old daughter in the United States without her parents. By default, this situation would constitute exceptional hardship to their daughter if she remained in the United States.

As the applicant has shown exceptional hardship as the basis for a waiver of the two-year residency requirement, no purpose would be served in addressing the applicant's political persecution claim.

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 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.