



U.S. Citizenship
and Immigration
Services

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H9

[Redacted]

FILE:

[Redacted]

Office: NEBRASKA SERVICE CENTER

Date: JAN 11 2007

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 Acting Director, Nebraska 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 acting 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 Ghana 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 June 14, 2003. The applicant's spouse is a U.S. citizen and he presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his spouse.¹

The acting director determined that the applicant failed to establish his spouse would experience exceptional hardship if he fulfilled his two-year foreign residence requirement in Ghana. *See Acting Director's Decision*, dated November 29, 2005. The application was denied accordingly.

On appeal, counsel asserts that the acting director erroneously denied the application and failed to consider the totality of the circumstances. *Brief in Support of Appeal*, at 1, undated.

The record includes, but is not limited to, counsel's brief, statements from the applicant and his spouse, support letters, photographs and information on Ghana. 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, Department of State Waiver Review Division] 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

¹ The record indicates that the applicant may also have a U.S. citizen child as applicant's spouse was expected to deliver a child on March 23, 2006. *Letter from [REDACTED] M.D.*, dated September 1, 2005.

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 the applicant's spouse would experience exceptional hardship if she moved to Ghana for two years. In regard to family ties, the applicant's spouse states that her parents and three younger siblings reside in the United States. *Applicant's Spouse's Statement*, at 1, dated August 8, 2005. Counsel states that the applicant's spouse is a third-year medical student and is expecting a child. *Brief in Support of Appeal*, at 1-2. Counsel asserts that educational or career disruption constitutes a hardship for J-1 hardship waiver purposes. *Id.* at 4. Counsel cites *Matter of Chong*, 12 I&N Dec. 793 (DD 1968) in support of this assertion. *Id.* Counsel states that the applicant's case is similar to *Matter of Chong* in that the applicant's spouse is a full-time medical student who would have to indefinitely postpone her education preparatory to practicing medicine. *Id.* at 5.

Counsel cites *Matter of Savetamal*, 13 I&N Dec. 249 (Reg. Comm'r 1969), which involved a qualifying relative who would be forced to give up an established career and start over again upon return to the United States, in relation to the applicant's spouse's abandonment of her highly regimented career path which involves residency and licensing exams. *Id.* at 6-7. Counsel states that the applicant's spouse would be forced to begin an internship and residency program following a two-year absence from medical studies, there is no guarantee that any program would accept her, there is no comparable course of study in Ghana, departure could trigger repayment of student loans, it is unlikely they could earn enough money to pay her student loans and it is unlikely that she would be able to find work in the medical profession. *Id.* at 7. The record includes substantiating evidence of the applicant's spouse's student loans in excess of \$100,000 and disruption of her medical education and career if she relocates to Ghana. Counsel states that the applicant's spouse suffers from migraine headaches and fainting spells for which she is taking a standard course of medication and moving to Ghana would interrupt her medical care resulting in deteriorated physical health. *Id.* at 13. The record includes substantiating evidence of headaches, but there is no indication that she cannot receive treatment in Ghana. The record also includes information on Ghana and the generally lower standard of living compared to the United States. Considering the totality of the circumstances, the AAO finds that exceptional hardship would be imposed on the applicant's spouse if she relocated to Ghana for two years.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if she remained in the United States during the two-year period. Counsel states that the applicant's spouse is totally dependent on him and this is similar to the facts in *Matter of Chong*. *Id.* at 5. Counsel states that the applicant's spouse is not working and the applicant is a medical resident and sole-earner of the family. *Id.* at 8. Counsel asserts that the court in *Matter of Savetamal*, 13 I&N Dec. 249 held that supporting two households would impose unusual hardship. *Id.* at 9. However, the record does not include supporting evidence that the applicant cannot find employment in Ghana during the two-year period.

Counsel states that the applicant's spouse would lose her medical insurance, which is based on the applicant's employment, and she will require many medical appointments due to delivering their child. *Id.* at 14. Counsel also states that the applicant's spouse will be a first-time mother without assistance in raising the child. *Id.* Considering the applicant's spouse's financial dependence on the applicant, her loss of medical insurance, the common difficulties involved with separation, the relevant medical issues and the inherent difficulties of raising a child while in medical school, the AAO finds that exceptional hardship would be imposed on the applicant's spouse if she remained in the United States without the applicant for two years.

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 acting 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 acting director for further action consistent with this decision.