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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 01 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.

Ellen C. Johnson

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 Mexico 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 30, 1996 and he is subject to the two-year foreign residence requirement based on this admission. The applicant's spouse and three children are U.S. citizens and the applicant seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to them.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled the two-year foreign residence requirement in Mexico, and the application was denied accordingly. *Director's Decision*, dated March 1, 2007.

On appeal, counsel asserts that the decision was based on factual errors and erroneous assumptions, it failed to accord proper consideration to the factors of exceptional hardship and it failed to accord any weight to the documentation of mitigating factors. *Brief in Support of Appeal*, at 1, March 26, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's spouse's statement, a psychological evaluation of the applicant's oldest child, a doctor's letter related to the applicant's children and information on Mexico. 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
> >
> > (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.

Counsel asserts that he did not receive money from the United States Information Agency and he did not receive a grant from a United States or Mexican government agency. *Brief in Support of Appeal*, at 2. Counsel states that the applicant's scholarship was an interest-bearing loan from the Mexican government. *Id.* The AAO finds that the applicant is subject to the two-year requirement based on financing from the Mexican government.

Counsel contends that a mitigating factor is the applicant's role in providing biomedical systems at no cost to Mexico. *Id.* at 3. Counsel states that the applicant has maintained the spirit of collaboration that was the foundation of the exchange program. *Id.* at 4. Although the applicant has made impressive contributions, they do not mitigate his two-year requirement nor are they relevant to his qualifying relatives' proposed hardship. Counsel has not provided a legal basis for his mitigation argument.

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 Mexico for two years. The applicant's son is ten years old and his psychologist states that he has exhibited behavioral and emotional symptoms such as excessive crying, acting out, low self-esteem, excessive self-criticism, sadness, anxiety, anger and guilt. *Diagnostic Assessment Summary*, at 1, dated January 23, 2006. The psychologist states that these symptoms have occurred in conjunction with psychosocial stressors including the sudden death of his paternal grandfather, with whom he was extremely close, and the serious illnesses among his other grandparents, with whom he is close. *Id.* The record reflects that the applicant's son began treatment for over a year and he is receiving weekly fifty-minute sessions of psychotherapy. *Id.* The applicant's son has been diagnosed with adjustment disorder with mixed disturbance of emotions and conduct, and his psychologist states that he would suffer emotional hardship and psychological harm if he departed the United States with this parents. *Id.* at 1-2. In regard to country conditions, the record includes an article detailing the prevalence of kidnappings in Mexico. Based primarily on the applicant's son's adjustment disorder and the resulting loss of his established relationship with his psychologist, the AAO finds that exceptional hardship would be imposed on him upon relocation to Mexico for the two-year period.

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 for the two-year period. As mentioned previously, the applicant's son has been in treatment for over a year and he is receiving weekly fifty-minute sessions of psychotherapy. The applicant's son's psychologist states that the he would suffer emotional hardship and psychological harm if he were separated from his father for an extended period of time and separation would be detrimental to his treatment. *Diagnostic Assessment Summary*, at 2.

Counsel states that the applicant is the sole source of support for his spouse and children and they would face severe hardship including the loss of their home and inability to maintain their education. *Brief in Support of Appeal*, at 7. The applicant's spouse states that the applicant would be unable to obtain comparable employment in the distressed economic climate of Mexico and she would be unable to provide for the support of their children on her own. *Applicant's Spouse's Statement*, at 2, dated March 1, 2006. The record does not include substantiating evidence of these financial hardship claims. The AAO notes that going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

However, due to the serious problems that the applicant's son would encounter upon separation from his father, the AAO finds that exceptional hardship would be imposed on him if he remained in the United States during the two-year period.

As the applicant has established that exceptional hardship would be imposed on one of his U.S. citizen sons, the AAO will not address hardship to the other qualifying relatives.

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.[1] 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.

[1] Therefore, counsel's claims regarding the applicant's benefit to the United States will not be addressed at this time.