U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

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PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUN 17 2008

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.

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 dismissed.

The applicant is a native and citizen of Argentina who obtained J-1 nonimmigrant exchange status in August 2004. The applicant 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 the Exchange Visitors Skills List. The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to Argentina temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Argentina.

The director determined that the applicant failed to establish that her spouse would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Argentina. *Director's Decision*, dated October 30, 2007. The application was denied accordingly.

In support of the appeal, the applicant provided the Form I-290B, Notice of Appeal, and a letter, dated November 27, 2007. In addition, on December 6, 2007, the applicant and her spouse sent a follow up letter, and enclosed a copy of a no objection letter issued by the Embassy of the Argentine Republic with respect to the applicant, dated November 30, 2007.[1] The entire record was reviewed and considered in rendering this decision.

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
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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, 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

[1] The applicant indicates in her letter, dated December 6, 2007, that based on the no objection recommendation issued by the Embassy of the Argentine Republic on November 30, 2007, her two-year foreign residency requirement should be waived. However, as the record does not indicate that the U.S. Department of State has issued a waiver recommendation based on the no objection letter issued by the Argentine embassy, the AAO is required to proceed with a review of the instant appeal based on the exceptional hardship standard set forth in section 212(e) of the Act, as requested by the applicant on the submitted Form I-612, Application for Waiver of the Foreign Residence Requirement.

> 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 record contains references to the hardship that the applicant's spouse's sibling would suffer were the applicant's waiver request denied. Section 212(e) of the Act provides that a waiver is applicable solely where the applicant establishes exceptional hardship to his or her citizen or lawfully resident spouse or child. In the present case, the applicant's spouse is the only qualifying relative, and hardship to his sibling and/or the applicant cannot be considered, except as it may affect the applicant's spouse.

The first step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would experience exceptional hardship if he resided in Argentina for two years with the applicant. To support this contention, the applicant's spouse states the following:

> I have lived in Fairfax County, Virginia, all of my life. I was born in July of 1974. I have never been outside the United States.... Both of my parents are deceased now. My mother passed away when I was twenty-one, and my father died last January. Both of my parents were ill and I helped take care of both of them from the time I was in junior high. My mother was physically challenged, being paralyzed from the waist down, and my father had pulmonary emphysema until his passing.
>
> I have a 30 years-old mentally challenged sister that I took care of when my parents were ill, and still continue to this day. She lives with my wife [the applicant] and me. **We both provide for what she needs. She has speech and phonological** problems, and for that she has a hard time pronouncing and producing words in her own language, English. Only family members and close people understand her.
>
> My sister has a job at the courthouse and even though she has social care, Medicare, and a special job, she cannot be left alone at any time....
>
> If I were to leave, I would be abandoning my sister who desperately needs not only me but also my wife.... I would be forced to leave my own country, friends, family and employment for a country that is totally different to what I am used to in the US.
>
> I have a lot of barriers for adjusting my life in Argentina. First, the language. I do not speak, read, write or understand Spanish. Second, it would be nearly impossible to earn a living in Argentina, where the per capita income is of about $400 a month, and here I make more than that twice a month. Third, if anything were to happen to my sister, it would be extremely difficult for me to travel back to my country since a flight ticket, which costs from $1,000 to $3,000, would be a lot higher than what I could afford there. Fourth, I would be stranded in a country that I am not from and

even though my wife fits in Argentina, she would never have the same income she does now as a teacher here in this country. And finally, I do not think I could leave my wife, or my sister. It would be a terrible decision to make between the two persons that I love.

Viewing another option as whether to take my sister to Argentina, both my wife and I lack the financial means to support what she receives from Fairfax County, the state of Virginia and U.S. government.

If she stays in a special house in this country, my sister could not get to visit us there, in Argentina, on her own and she could not avoid feeling abandoned. She has the functional age of a five years-old person and could not travel alone. And again, traveling to the United States from Argentina, once or twice a year would mean a huge amount of money we will not make working as a teacher and at any other job.

I was in no position to abandon my sick mother and my sick father before, and also disabled sister growing up as a child. I sacrificed my personal life that normal teenagers have growing up, so I was there to take care of my family....

As a U.S. citizen, what I am asking is not to be put in the position of choosing between my sister and my wife and living a separate life from them for two or more years....

Statement from [redacted], dated June 18, 2007

A letter is provided from the applicant's spouse's sibling's case manager that corroborates the above statements. As [redacted], Case Manager, Mental Retardation Services, Fairfax-Falls Church Community Services Board states:

I work as a case manager for [redacted]s [the applicant's spouse's] younger sister, who receives services through the Virginia Medicaid Community-Based Care Waiver for individuals with mental retardation. As of this writing, I can attest that Mr. [redacted] and his wife [the applicant] are providing shelter and personal care for his sister, and that his sister would be without home or a primary caregiver should Mr. [redacted] be forced to leave his home....

Letter from [redacted] *Case Manager, Mental Retardation Services, Fairfax-Falls Church Community Services Board,* dated May 22, 2007.

Based on the applicant's spouse's familial situation, taking into account his sibling's mental challenges, her complete dependence on her brother for shelter and personal care, and the applicant's spouse's need to be close to his sibling to assist her on a daily and/or emergent basis, the problematic economic situation in Argentina, and the applicant's spouse's unfamiliarity with the culture and language in Argentina, the AAO concurs with

the director that the applicant's spouse would encounter exceptional hardship were he to relocate to Argentina based on his spouse's two-year foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would suffer exceptional hardship if he remained in the United States during the two-year period that the applicant resides in Argentina. As stated by the applicant:

> Both my husband and I take care and provide guidance for my sister-in-law who is not able to provide for herself. Being his fiancée I moved in last November 2006. With his father dead, he is the only immediate family she has. Since the death of his father, my husband is the next of kin for his sister; he is the sole guardian of her.
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> Even though my sister-in-law has social care, Medicare, and a special job at the courthouse, she cannot be left alone at any time. It is for that reason that my husband and I have been there when needed, such as staying with my sister-in-law in snow days; when the social worker was not able to make it for personal reasons or when she was sick and could not get to work. My husband and I also provide the only overnight care for my sister-in-law.
>
> I help my sister-in-law with her bath, her hair, her clothes and the preparation of her meals. She needs someone to supervise her actions.
>
> My sister-in-law goes with my husband and me to all the places we go, such as house shopping, to the movies, to play basketball, to the pool, or to dine out, on the weekends, holidays and weekdays.
>
> The three of us, my sister-in-law, my husband and I, are living in the household and so sharing the payment of all the utilities. My income is an integral part of my husband and sister-in-law's integral economic well being. Furthermore, the family unity we have come to be would be detrimentally affected if I was to leave for two years.
>
> My departure would have a great negative effect on my sister-in-law because she has formed a strong bond with me. She waits for my arrival from work to tell me about some special things of her day or her job; I accompany her in her extra sport activities; we have been to birthday's [sic] parties together or we run errands when needed [sic] be.

Letter from [redacted], dated June 11, 2007.

No documentation from a mental health professional has been provided that describes the ramifications that the applicant's spouse would experience were he to be separated from the applicant, and without her support with respect to his sibling's care, for two years. Nor has any medical documentation been provided with respect to the applicant's spouse's sibling's condition, to support the assertion that the applicant's temporary absence

would cause hardship to the applicant's spouse's sibling, thereby causing exceptional hardship to the applicant's spouse due to the fact that he is his sibling's primary caregiver.

Nor has it been established that the applicant is unable to obtain gainful employment in Argentina, thereby assisting with the maintenance of the U.S. household. Finally, nothing in the record indicates that the applicant's spouse would be unable to travel to Argentina to visit his wife there. 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)). While the applicant's spouse may need to make adjustments with respect to his financial situation and the care of his sibling while the applicant resides abroad due to her foreign-residence requirement, it has not been shown that such adjustments would cause the applicant's spouse exceptional hardship.

The record, reviewed in its entirety, does not support a finding that the applicant's spouse will face exceptional hardship if the applicant's waiver request is denied. Although the applicant has established that her spouse would suffer exceptional hardship if he moved to Argentina with the applicant for the requisite two-year period, the applicant has failed to establish that her spouse would suffer exceptional hardship were she to relocate to Argentina while he remained in the United States. The record demonstrates that the applicant's spouse faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse temporarily relocates abroad based on a foreign residence requirement.

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 not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.