U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 15 2008

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver 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 The appeal will be dismissed, the previous decision of the director will be withdrawn and the application declared moot.

The applicant is a native and citizen of Peru who was admitted to the United States in J1 nonimmigrant status, as an Au Pair, on August 12, 2002. The District Director, New York, New York determined that the applicant was 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 Visitor Skills List and denied her Form I-485, Application for Adjustment of Status, on March 9, 2007. Consequently, on April 24, 2007, the applicant applied for a waiver of her two-year residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to Peru temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Peru.

The director concurred with the district director that the applicant was subject to the two-year foreign residence requirement due to the Exchange Visitor Skills List, and further 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 Peru. *Director's Decision*, dated November 5, 2007. The application was denied accordingly.

In support of the appeal, the applicant completed Form I-290B, Notice of Appeal, dated December 4, 2007, and stated the following, inter alia:

> ...In my J-1 visa that is stamped in my passport said: I'm subject to two years residency as required by 212(e), but in the form DS-2019, (copies attached) that was stamped by the Immigration at Newark International Airport when I arrived, the box #1, just below the Immigration stamp, is checked and says: Is Not Subject to the two years residence regulations. As the copies are not very clear, I assume that the Immigration officer who denied the petition could not see, or either not pay attention in this matter....

Form I-290B, dated December 4, 2007.

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
>
> (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 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.

Based on the record, the applicant did not receive government financing to participate in the J-1 program, nor is she subject to the Exchange Visitor Skills List, nor did she enter the United States to participate in graduate medical education or training. As such, the AAO concurs with the applicant that she is not subject to the two-year foreign residence requirement under section 212(e) of the Act.

The AAO finds that the director erred in concurring with the district director that the applicant was subject to section 212(e) of the Act. As such, the waiver application is unnecessary and the issue of whether the applicant established exceptional hardship to a qualifying relative pursuant to section 212(e) of the Act is moot and will not be addressed. Accordingly, the appeal will be dismissed, the prior decision of the director

is withdrawn and the instant application for a waiver of the two-year foreign residency requirement is declared moot.

ORDER: The appeal is dismissed, the prior decision of the director is withdrawn and the instant application for a waiver of the two-year foreign residency requirement is declared moot.