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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 08 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Elena C. Johnson

John F. Grissom, Acting 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 Peru who obtained J-1 nonimmigrant exchange status to participate in graduate medical training. The applicant is thus 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 presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse would suffer exceptional hardship if she moved to Peru temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Peru.

The director determined that the applicant failed to establish that his U.S. citizen spouse would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Peru. *Director's Decision*, dated June 26, 2008. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits the following, *inter alia*: a brief, dated August 26, 2008; financial documentation relating to the applicant and his spouse; and additional information regarding country conditions in Peru. 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 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).

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.[1] In the present case, the applicant's U.S. citizen spouse is the only qualifying relative and hardship to the applicant, his mother-in-law and/or the applicant's spouse's extended family members 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 she resided in Peru for two years with the applicant. To support this contention, the applicant's spouse states the following:

> I remember ten years ago...the bad news about my mother's stroke.... My brothers [redacted] and I spend time with her but especially me because I am a woman too. We organize in a way she can not be alone and feel like she is at home because she lives in a nursing home. When I am with her, we talk; I do some make up to her, every day I go to give her dinner at 5 p.m. because she eats slowly, we watch television together. Before I leave her, I want to make sure she feels comfortable in bed, I return around 10 p.m. to check if she is with a clean pamper before she sleeps. Sometimes on Saturday's I go with [redacted] [the applicant] and Sunday's after church, actually I go to see her at any moment, the nursing home is about 10 minutes driving from where I live **besides I was laid off from my job.** [redacted] are good brothers to me and they help me a lot with my mother's care, they are good to my mom spite being men because they also have their own families to take care but they make time so they can spend with our mom.
>
> [I]f I go with my mother will suffer too since when I am not at her side, she keep asking for me, it will be hard for me not to see her. My brothers will suffer; they need me too to help them with our mom's care.

Letter from [redacted] dated August 1, 2007.

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[1] As noted by the director, although the applicant references his spouse's children from a previous marriage as his step-children, thereby making them eligible for consideration as qualifying relatives under section 212(e) of the Act, no birth certificates have been provided. As such, it has not been established that the applicant's spouse's children's hardship should be considered, as section 101(b)(1)(b) of the Act states that a stepchild is defined as a child that had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred. Thus, the applicant's spouse's children's hardship can not be considered by the AAO in regards to the instant appeal.

While the AAO recognizes that the applicant's spouse plays an important role in her mother's well-being, it has not been established that any alternate arrangements for the applicant's spouse's mother's continued care, such as additional and/or extended visits, from the applicant's spouse's family, including her siblings, one who is retired, their spouses, her own children, and her nieces and nephews, would cause exceptional hardship to the applicant's spouse. Moreover, it has not been documented that were the applicant's spouse to depart the United States for two years, her mother's condition would deteriorate to such a point that the applicant's spouse would experience exceptional hardship. Finally, counsel has failed to establish that the applicant's spouse would be unable to return to the United States on a regular basis to visit with her mother, children, and extended relatives. 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)).

As for the financial hardship referenced by counsel were the applicant's spouse to relocate to Peru, the documentation provided is general in nature, and does not establish that the applicant, a physician, and/or his spouse, a native of Peru, would be unable to obtain gainful employment in Peru. Moreover, the AAO notes that the U.S. Department of State has not issued any travel warnings for Peru, references the fact that Peru is a developing country with an expanding tourism sector, and states that medical care in Peru is generally good. *See Country Specific Information-Peru, U.S. Department of State,* dated December 17, 2008. Thus, the AAO finds that the applicant has not established that his U.S. citizen spouse would encounter exceptional hardship were she to temporarily relocate to Peru based on her 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 she remained in the United States during the two-year period that the applicant resides in Peru. As stated by the applicant's spouse:

> I do not know what will happen if I have to be separated from [redacted][the applicant] since I had a bad experience in my first marriage due to separation from my first husband....
>
> Willie is the second part of my life but the most important one. I never thought I will restart my life and meet another man who will make me happy for all what I experienced in the past. It will be very sad to separate from the person who I love, I can confirm with great certainty that I have a good husband who is very dedicate to us in every way.... I do not want to separate from the person who I love; I do not want to suffer again...

Supra at 2.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As noted by the director, counsel has not provided any objective documentation from a mental health professional that describes the ramifications that

the applicant's spouse would experience were she to be separated from the applicant for two years. Moreover, no documentation has been provided that establishes that the applicant's spouse would be unable to travel to Peru, her home country, to visit the applicant on a regular basis. Finally, it has not been established that the applicant's spouse would be unable to obtain gainful employment in the United States, with a schedule that would permit her to continue visiting her mother on a regular basis, as she presumably did before she was laid off, and/or, as referenced above, that the applicant would be unable to obtain gainful employment in Peru, thereby ensuring financial viability for the applicant's spouse.

Alternatively, the record indicates that the applicant's spouse has a vast support network in the United States; it has not been established that they would be unable to assist the applicant's spouse financially and/or emotionally, should the need arise, while the applicant relocates abroad temporarily. While the applicant's spouse may need to make adjustments with respect to her daily care while the applicant resides abroad due to his foreign-residence requirement, it has not been shown that such adjustments would cause the applicant's spouse exceptional hardship. As such, it has not been established that the applicant's U.S. citizen spouse would suffer exceptional hardship were she to reside in the United States while the applicant returns to Peru for two years

The record, reviewed in its entirety, does not support a finding that the applicant's U.S. citizen spouse will face exceptional hardship if the applicant's waiver request is denied. The applicant has failed to establish that his spouse would suffer exceptional hardship if she moved to Peru with the applicant for the requisite two-year period and alternatively, the applicant has failed to establish that his spouse would suffer exceptional hardship were he to relocate to Peru while she 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 his burden. Accordingly, the appeal will be dismissed.

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