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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

H3

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 09 2010

IN RE: [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:

[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

Perry Rhew
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 matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The applicant is a native and citizen of Bolivia who obtained J-1 nonimmigrant exchange status in July 1999 to participate in graduate medical training. He 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 lawful permanent resident spouse and U.S. citizen child, born in 2006, would suffer exceptional hardship if they moved to Bolivia temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Bolivia.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Bolivia. *Director's Decision*, dated July 29, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits the following: a brief, dated August 25, 2009; a letter from the applicant's spouse, dated August 20, 2009; and a copy of the applicant's residential lease. 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
>
> > (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).

The first step required to obtain a waiver is to establish that the applicant's lawful permanent resident spouse and/or U.S. citizen children would experience exceptional hardship if they resided in Bolivia for two years with the applicant. In a declaration, the applicant contends that his spouse and child would suffer emotional, physical and financial hardship were they to relocate to Bolivia to reside with the applicant for a two-year period. He notes the poor environmental conditions, the exposure to diseases, including malaria and tuberculosis, and the unavailability of quality health care, the high level of crime and anti-Americanism, political and social instability, and the substandard economy of Bolivia. He further references that his child, [redacted] is at the prime age for language development, but a relocation to Bolivia would cause a setback in her English language acquisition and educational development, thereby causing difficulties when she returns to the United States. *Affidavit of* [redacted], dated December 23, 2008. Finally, the applicant contends that were his spouse to relocate to Bolivia, she would be at risk of having her permanent resident status revoked due to long-term absence from the United States. *Affidavit of* [redacted] dated June 19, 2009.

In support, counsel has submitted extensive documentation regarding the problematic country conditions in Bolivia. Moreover, documentation has been provided establishing the difficulties the applicant would face in obtaining gainful employment in Bolivia to maintain his spouse's and child's quality of living, due to low wages, a surplus of surgeon specialists, not enough demand in the major urban areas, and long waiting lists in order to apply for surgical or academic privileges. *Letters from* [redacted], dated November 15, 2008 and [redacted], dated November 21, 2008. Moreover, the AAO notes that the U.S. Department of State confirms that Bolivia is a medium to high crime threat country, where express kidnappings are common, and corroborates the

applicant's statements regarding substandard health care in Bolivia. *Country Specific Information-Bolivia, U.S. Department of State,* dated November 12, 2009.

Based on the problematic country conditions in Bolivia, the prevalence of disease and substandard health care, financial hardship due to the applicant's inability to find gainful employment to support his spouse and child, and the risk that the applicant's spouse would lose her permanent residency status due to a relocation abroad for a two-year period, the AAO concurs with the director that the applicant's spouse and child would experience exceptional hardship were they to accompany the applicant to Bolivia for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's spouse and/or child would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Bolivia. To begin, the applicant notes and documents that his spouse is dependent on his assistance in taking care of their child, because of her demanding work schedule. The record reflects that the applicant's spouse is a gastroenterology and hepatology fellow at the Beth Israel Deaconess Medical Center, a position that requires her to be at the hospital for long periods of time, as well as being called at night and on weekends. Based on her demanding work schedule, the applicant asserts that his spouse would be required to obtain child care for 60 to 70 hours per week plus weekends, a costly proposition for the family, both financially and emotionally, as their child would be cared for almost exclusively by child care services for nearly all of her waking hours. Such a predicament, the applicant notes, would cause emotional hardship on both the applicant's spouse and child. In addition, the applicant contends that his daughter is very attached to him, and a two-year separation would cause her emotional hardship. *Supra* at 6-7.

Finally, the applicant declares that his spouse makes $2,760 per month after taxes but their monthly expenses are about $11,000. His salary while in the United States is over $9,000. *See Monthly Budget Statement.* Due to the difficulties in obtaining gainful employment in Bolivia, as asserted above, the applicant's spouse and child would experience financial hardship as the applicant would not be able to continue supporting them.

As the applicant's spouse further details:

> We have no immediate family in the US and that would mean for me to take care of our daughter alone. Due to the extreme demanding schedule that my job requires, I could not possibly do it alone. My husband [the applicant] and I rely on each other to care for our little daughter. Whenever one of us is on call, the other one remains at home caring for her. Being physicians, while on call our pagers can go off anytime even in the middle of the night, and we will have to report to the hospital within 15 minutes. So far, during these years we alternated and have been able to arrange it in a way that one has always been off duty whenever the other one is on call.

> I would not be able to sustain our mortgages and monthly expenses with just once (sic) salary.... We recently relocated to Pennsylvania and have not been able to sell our condo back in Boston. We have leased a temporary place here while we continue to try to sell our unit. The Bolivian mean salary for a surgeon is extremely low compared to our salaries here in the US. This would pose an extreme hardship on our family.... I could not sustain the both of us and all the expenses with a single salary and my current schedule

Letter from [redacted], dated August 20, 2009.

In support, documentation has been provided establishing the applicant's spouse's current employment as a fellow, and confirming the demanding schedule, averaging 60 to 70 hours per week, and night and weekend calls covering eight weekends per year, 33 weekdays and 7 holidays. On weekends, "the fellows cover the hospital's Gastroenterology service from Friday night at 5 pm until Monday morning at 8 am. During this time, the fellow's responsibilities are to cover all the patient calls, see all in-patients and see all new consults.... During weeknight call, the fellow is expected to cover the Gastroenterology service from 5 pm, until 8 am the next morning...." *Letter from* [redacted], dated December 5, 2008. In addition, financial documentation has been provided to establish that without the applicant's physical presence and employment in the United States, the applicant's spouse and child will suffer financial hardship.

Based on a totality of the circumstances, the AAO finds that the applicant has established that his spouse and child would suffer emotional and financial hardship were they to remain in the United States while the applicant relocated abroad to fulfill his two-year foreign residency requirement. The applicant's spouse would be required to assume the role of primary emotional and financial caregiver to herself and her young child, while pursuing a demanding career, without the complete emotional and financial support of her spouse. The AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse and child emotional and financial hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

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 DOS. Accordingly, this matter will be remanded to the director so that she may request a DOS recommendation under 22 C.F.R. § 514. If the DOS 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 DOS recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: 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.

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