U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: AUG 13 2014 Office: CALIFORNIA SERVICE CENTER FILE: [redacted]

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:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

Ron Rosenberg
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 record reflects that the applicant is a native and citizen of Brazil who obtained multiple J-1 visas and was last admitted to the United States as a J-1 nonimmigrant exchange visitor on October 28, 2003.[1] He 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 government financing. 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 he moved to Brazil 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 Brazil.

The director determined 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 Brazil. *Director's Decision*, dated February 18, 2014. The application was accordingly denied.

In support of the appeal, counsel submits the following: a brief; articles on healthcare in Brazil; updated letters from an HIV specialist, the spouse's physician, and his psychologist; an article on HIV/AIDs treatment; documentation of employment; an updated statement from the applicant's spouse; medical records; a death certificate; and documentation from the Centers for Disease Control website.

The record includes, but is not limited to, the following: the documents listed above; evidence of the applicant's non-immigrant visas and admissions into the United States; educational records; evidence of birth, marriage, divorce, and citizenship; statements from the applicant and his spouse; letters from physicians, psychologists, and an HIV specialist; documentation on healthcare in Brazil; articles on treatment of LGBT populations in Brazil; letters in support from family, friends, and community members; documentation of the applicant's community involvement; bank records; and photographs. The entire record was reviewed and considered in rendering this decision.

Section 212(e) of the Act states in pertinent part:

> 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,

[1] The applicant was subsequently admitted to the United States in B-1/B-2 non-immigrant status on June 17, 2004.

(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, "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:

> 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 U.S. citizen spouse would experience exceptional hardship if he resided in Brazil for two years with the applicant. In two declarations, the applicant's spouse explains that in 2004, he tested positive for HIV, and was told he had 10 years to live if he took care of himself. The spouse asserts that since then, he has been seeing a doctor every three months, and he has been taking the medication to make sure his HIV viral load levels stay at a manageable level. Letters from the spouse's physician are submitted in support. Therein, the physician confirms the diagnosis, and states that the spouse's prognosis is good if he can continue taking his specific antiretroviral treatment without interruption. Counsel contends that the director inappropriately relied on a 2001 article co-authored by a division of the to find that the necessary drugs to treat the spouse's HIV are available and widely distributed in Brazil. An HIV specialist asserts in a 2014 letter that he has visited Brazil, and that hundreds of Brazilians told him they are not in treatment because they don't have jobs, they don't qualify for federal assistance, and their incomes do not cover the cost of necessary medications. The spouse's physician indicates that the spouse has done very well on Atripla, but that Atripla is not available in Brazil. The physician adds that switching to another antiretroviral medication would have adverse consequences, such as increasing the risk of developing drug resistance, and that in any event the spouse may have difficulty accessing good health insurance in Brazil. An article on HIV drugs available in Brazil and information on health insurance in Brazil are submitted in support.

In addition to medical hardship upon relocation, the spouse contends he will experience family-related as well as other difficulties upon relocation, such as adjusting to life in Brazil. The spouse claims he does not speak Portuguese, would therefore have difficulty finding a job, and is entirely unfamiliar with Brazilian customs. He adds that such adjustment-related hardship, in

addition to difficulties accessing necessary HIV treatment, will exacerbate his psychological difficulties, which include anxiety, depression, panic disorder, and dysthymic disorder. Two psychological evaluations are submitted in support. The spouse moreover claims that relocation would separate him from his family, friends, and his new job.

The applicant has submitted sufficient evidence to establish his spouse would experience exceptional hardship upon relocation to Brazil while the applicant fulfills his two-year foreign residence requirement. Documentation of record demonstrates that the applicant's spouse is HIV positive, that he has been treated since 2006 with the medication Atripla. On appeal, the applicant submitted sufficient evidence to show that Atripla, a single-tablet regimen, is not yet approved in Brazil, and is therefore, difficult to access in that country. The spouse's physician has also indicated that switching to a new treatment regimen may have adverse health effects, such as increased drug resistance. In addition to medical hardship the spouse will experience, the applicant has shown that relocation to Brazil will entail living in a country where the spouse may have difficulties with the language, customs, and finding adequate employment. The applicant has also demonstrated that relocation will entail separation from the spouse's family members. Based on a totality of the circumstances, the AAO finds that the applicant's spouse would experience exceptional hardship upon relocation to Brazil for the applicant's two-year foreign residence requirement.

The second step required to obtain a waiver is to demonstrate that the applicant's U.S. citizen spouse would suffer exceptional hardship if he remained in the United States during the period the applicant resides in Brazil. The spouse declares that were the applicant to relocate abroad, he would experience psychological and financial hardship. A licensed clinical social worker ("LCSW") indicates that the spouse is currently under her professional care for treatment of mental illness, as the spouse presented with symptoms of anxiety, panic attacks, and depression, and that he has also had difficulties coping with his HIV diagnosis. In an updated evaluation, the LCSW opines that the recent death of the spouse's father, the denial of the I-612 waiver application, and the spouse's new job have aggravated the symptoms associated with the spouse's mental illness. Medical records and a death certificate for the spouse's father are submitted on appeal. The LCSW adds that the spouse has suffered an increase in panic attacks, intense grief, difficulty sleeping, challenges thinking clearly, and other symptoms. The spouse claims that the applicant has been a significant source of psychological and other support. The spouse explains that since his father passed away, his stepmother has started to depend on the applicant and his spouse for help with groceries, obtaining medication, helping with housework and other maintenance, and taking care of her two dogs. The spouse indicates that he does not know how he could continue working full-time, help his step-mother, assist his grandmother, cope with his medical issues, and maintain his psychological health without the applicant present.

The applicant has provided sufficient documentation to demonstrate that his spouse would experience exceptional hardship if he were separated from the applicant for the two-year foreign residence requirement. The record reflects that the applicant's spouse experiences psychological difficulties, which are exacerbated by his HIV diagnosis. Furthermore, the record reflects that the recent death of the spouse's father adds to those difficulties. The updated evaluation from the

LCSW indicates that the spouse will have difficulty maintaining his employment if his circumstances change, such as losing the applicant's presence and support. Therefore, based on the record, the AAO has determined that the applicant's U.S. citizen spouse would experience exceptional hardship if he remained in the United States while the applicant relocated to Brazil to comply with her two-year foreign residence requirement.

The AAO thus concludes that the applicant has established that his U.S. citizen spouse would experience exceptional hardship were he to relocate to Brazil and in the alternative, were he to remain in the United States without the applicant, for the requisite two-year term. The evidence in the record establishes the hardship the applicant's spouse would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. 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.