



U.S. Citizenship
and Immigration
Services

H₂

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

DEC 03 2009

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.

A handwritten signature in black ink, appearing to read "John F. Grissom".

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 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, a native and citizen of Hungary, obtained J-1 nonimmigrant exchange status in July 1999. 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 the receipt of a grant from the Fulbright Commission to participate in the exchange program. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse and three children, born in 2006, 2008 and 2009, would suffer exceptional hardship if they moved to Hungary temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Hungary.

The director determined that the applicant failed to establish that his U.S. citizen spouse and/or children would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Hungary. *Director's Decision*, dated June 16, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated July 13, 2009 and referenced supplemental exhibits. 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 U.S. citizen spouse and/or children would experience exceptional hardship if they resided in Hungary for two years with the applicant. The applicant's spouse contends that she and her three young children would suffer medical hardship, as they would not be eligible for state-supported health benefits and insurance and moreover, would be exposed to the comparatively poor health conditions in Hungary. In addition, the applicant's spouse notes that she would suffer career disruption, as she is a self-employed ballroom dance instructor with a student base in the United States, and a relocation abroad would mean losing the business she has created, and having to start over upon her return to the United States. Finally, the applicant's spouse notes the substandard economy in Hungary and the difficulties she and her husband would encounter in terms of obtaining gainful employment to support themselves and their three children. *Affidavit of* [REDACTED] dated July 29, 2008.

Based on a totality of the circumstances, the AAO concurs with the director that the applicant's U.S. citizen spouse and children would suffer exceptional hardship were they to relocate to Hungary due to the lack of medical coverage, substandard medical and economic conditions, and significant career disruption with respect to the applicant's spouse. A relocation abroad would cause the applicant's spouse and children hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or children would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in Hungary. In a declaration the applicant's spouse states that she would suffer exceptional emotional hardship due to the long and close relationship she has with the applicant and due to the fact that she would be forced to raise three young children without the applicant's daily presence and support. She further notes that her children would suffer exceptional emotional hardship due to their father's long-term absence. The applicant's spouse further states that she has no extended family members in the United States that can help care for their children while she is at work, and the financial burden of hiring a caregiver would cause her and the children exceptional financial hardship.¹ Finally, she notes that she and the children would not be able to afford to travel regularly to visit the applicant in Hungary. *Supra* at 8-11.

¹ As the applicant's spouse states and documents,

Based on the record, the AAO has determined that the applicant's U.S. citizen spouse and children would experience exceptional hardship if they remained in the United States while the applicant relocated to Hungary to comply with his foreign residency requirement. The applicant's spouse would be required to assume the role of primary caregiver and breadwinner to three young children, while continuing to manage and maintain her business, without the complete support of the applicant. In addition, due to the young age of the children, the applicant's spouse would need to obtain a childcare provider who could provide the constant monitoring and supervision the children require while the applicant works, a costly proposition for the applicant's spouse. Alternatively, the applicant's spouse would be required to find employment with a reduced work schedule, as the applicant would no longer be residing in the United States and assisting in the care of the children, thereby causing her career disruption. Finally, as the applicant's spouse asserts, separating three young children from their father, who has played a pivotal role in their day to day care, would cause hardship to the applicant's spouse and children. As such, were the applicant to relocate abroad to comply with his foreign residency requirement, the applicant's spouse and children would suffer exceptional hardship.

The AAO thus finds that the applicant has established that his U.S. citizen spouse and children would experience exceptional hardship were they to relocate to Hungary and in the alternative, were

I teach ballroom dancing from a home studio.... If my husband [the applicant] left overseas then the children would have to go to daycare. With the additionally daycare costs detailed...I will not be able to make payments on the mortgage...from current...income. Selling a house would not lower my cost. Should I sell the house and rent instead, I would have to rent floor space from studios where I can teach.... Selling the house would not help financially at all, while I would never see my infant, the toddler and my soon 4 year old son.

Refinancing to lower mortgage is not an option either. We tried to take advantage of historically low interest rates but we were turned down...because we don't have enough income....

Additionally, USCIS didn't take into account that we're already heavily in debt.... In essence debt financing for two to ten years with an income/expense gap of \$30,000/year is impossible to accomplish....

Again, the only reason we are afloat because my husband, [REDACTED] stays home with the kids eliminating the need for a daycare, a saving of over \$37,900/year for three children. Plus Dad [the applicant] fixes everything in the house from plumbing to electrical, works on the cars etc. With Daddy home I can work, get emotional, psychological and all sorts of support that makes my life normal....

they to remain in the United States without the applicant, for the requisite period. The evidence in the record establishes the hardship the applicant's spouse and children would suffer if the applicant temporarily departed the U.S. would go 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.