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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

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[REDACTED]

FILE:

[REDACTED]

Office: VERMONT SERVICE CENTER

Date:

SEP 28 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.

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Center Director, Vermont Service Center. **The applicant timely appealed the decision.** On April 14, 2008, the Center Director, Vermont Service Center, improperly dismissed the appeal as motion to reopen or reconsider.¹ The matter was reopened by the AAO, the April 14, 2008 decision was withdrawn, and the appeal was dismissed. On June 23, 2009, the Center Director, Vermont Service Center, improperly rejected the motion to reopen as untimely filed. The matter is now before the AAO on a motion to reopen. The matter will be reopened, the June 23, 2009 decision will be withdrawn, and the matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver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 France who was admitted to the United States in J-1 nonimmigrant exchange status in August 2003. 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 and child, born in March 2006, would suffer exceptional hardship if they moved to France 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 France.**

The acting center director determined that the applicant failed to establish that his U.S. citizen spouse and/or child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in France. *Acting Center Director's Decision*, dated December 9, 2006. The application was denied accordingly.

On appeal, the AAO concurred with the acting center director that exceptional hardship to a qualifying relative had not been established, as required by section 212(e) of the Act. Consequently, the appeal was dismissed. *Decision of the AAO*, dated December 30, 2008.

On January 30, 2009, counsel for the applicant submitted a motion to reopen, dated January 30, 2009, and referenced 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

¹ As outlined in the AAO's decision, the April 14, 2008 decision by the Center Director was withdrawn. *Decision of the AAO*, dated December 30, 2008.

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.

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. In the present case, the applicant's U.S. citizen spouse and child are the only qualifying relatives, and hardship to the applicant and/or his mother-in-law cannot be considered, except as it may affect the applicant's U.S. citizen spouse and/or child.

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 part of the analysis requires the applicant to establish exceptional hardship to his U.S. citizen spouse and/or child were they to relocate abroad for a two-year period based on the applicant's foreign residency requirement. The AAO, in its decision dated December 30, 2008, concluded that the hardship the applicant's U.S. citizen spouse would encounter were she to relocate to France for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year foreign residency requirement. *Supra* at 6. As such, this criteria with respect to the applicant's spouse does not need to be re-addressed at this time.

As for the applicant's U.S. citizen child, the AAO concluded that "counsel has failed to elaborate on what specific hardships said child would face were he to relocate to France for a two-year period with the applicant. While general references are made to the high unemployment rate in France, the information provided is general in nature and does not establish that the applicant's child will suffer exceptional financial hardship were he to reside in France. Even if the applicant is unable to obtain gainful employment in France, it has not been established that the applicant's spouse, gainfully employed in the United States, would be unable to assist in their child's daily care while he lives in France. Finally, it has not been established that the applicant's spouse would be unable to travel to France regularly to visit her spouse and child...." *Supra* at 6.

With the instant motion, counsel for the applicant addresses the issues raised by the AAO, as noted above, and further elaborates on the hardships the applicant's U.S. citizen child would encounter were he to relocate abroad for a two-year period. Counsel has provided letters from the applicant's child's pediatrician, [REDACTED] from his mental health counselor, [REDACTED] and from his speech language pathologist, [REDACTED] Speech Language Pathology. All three experts conclude that a relocation abroad would cause the applicant's child's exceptional hardship.

As [REDACTED] asserts:

[the applicant's child] is a very sensitive child who continues to demonstrate breath-holding spells when upset. These events...result in him turning blue and in certain scenarios can lead to syncope (passing out). It is unpredictable what situations and triggers will lead to such episodes.

If a child like [REDACTED] were to be separated from either his mother or his father for any prolonged period, it would cause him significant emotional distress and subject him to exceptional physiological, as well as psychological, hardship.

[REDACTED] is almost 3 years old and has an intense attachment to both his mother and father....

This being the case, in [REDACTED]'s eyes, his extended deprivation of either parent would be the direct result of, or even punishment for, something he did.

At this young age, clearly he would be unable to understand or distinguish that the result of being separated from his mother or father was due to the implementation of U.S. immigration laws rather than from some act on his part.

If [redacted] is separated from his mother by being sent to France to live with his father [the applicant]...there would be exceptional emotional hardship for [redacted] which could cause him significant behavioral, developmental and social regression.

[redacted] does not speak French and is unfamiliar with French culture.... [H]e may struggle because of the dramatic changes in his environment. In my professional opinion, the circumstances of moving to France with his father will constitute exceptional hardship to this child who is both emotionally sensitive and in the delicate process of acclimating to his place in the outside world....

Letter from [redacted], Pediatric Associates of NYC, P.C., dated January 23, 2009.

[redacted] Licensed Mental Health Counselor, notes as follows:

[redacted] [the applicant's child] is at critical stage in his language acquisition. He is working hard to master his first language (English), which he has not yet done, and a move to another country where he does not know the language is likely to disrupt and delay his language development. He would suddenly find himself in a foreign society and would most likely suffer feelings of extreme isolation when he cannot communicate with other children. I have no doubt as an expert in the social, cognitive and emotional development of children, that a child like [redacted] a U.S. citizen, will suffer exceptional hardship if he were relocated to France. Additionally, upon his return to the United States, he will likely experience further development delays, given the two year gap in the development of his English....

More importantly, however, [redacted] will be separated from his mother....

[redacted] is a vulnerable and sensitive child who has been known to have bouts of extreme frustration and has held his breath until almost fainting. Due to this developmental vulnerability and already difficulty expressing his frustrations in an age appropriate and typical manner, I have serious concerns about the effect of residing in France with relatively sporadic contacts with his mother will have on him. Most children in this situation might outwardly throw tantrums and exhibit behaviors with difficulty eating or sleeping. It is [redacted] internal exhibitions of how he demonstrates his fear, stress and confusion that is troubling....

[M]y professional assessment which includes consideration of [REDACTED] age, coupled with his sensitive and vulnerable stage of psychosocial development between the ages of 3 and 5 make the likelihood of his of suffering exceptional long-term emotional hardship as a result of this type of separation and are just too high to risk.

Furthermore, [REDACTED] would lose consistency in his relationship with his mother, who would be able to see him only during infrequent visits given her new job responsibilities and travel requirements sending her predominately to Latin America, quite out of the path of a lay-over or extended weekend in France....

Letter from [REDACTED], dated January 25, 2009.

Finally, [REDACTED], contends that the applicant's child was referred to her by his pediatrician based on some concerns regarding his speech development and concludes as follows:

If [REDACTED] moves to France for two years during this critical language acquisition development period (ages 3-5) where he will be in a French speaking environment, it is my expert opinion that he will have an English language delay by the time he returns to the United States. This could negatively affect his academic performance and peer relationships with his English-speaking classmates. Moreover, as a result of these exceptional circumstances, [REDACTED] could experience negative psychosocial development ramifications due to reduced ability to effectively communicate...and the difficulties he could face when attempting to achieve the academic standards expected of a child of his age in the United States.

Letter from [REDACTED] CCC-SLP, Speech Language Pathology, Supervisor, Pediatric SLP, Rusk Institute of Rehabilitation Medicine, New York University Medical Center, dated January 29, 2009.

Based on the documentation provided on motion, the AAO concludes that the applicant's U.S. citizen child would suffer exceptional hardship were he to relocate abroad to reside with the applicant for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen 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 France. With respect to the applicant's spouse, the AAO concluded that it had not been established that the applicant's U.S. citizen spouse would suffer exceptional hardship were she to remain in the United States while the applicant relocates to France for a two-year period. On motion, counsel has failed to address the concerns raised by the AAO in

its decision with respect to exceptional hardship to the applicant's spouse were she to remain in the United States. The letter cited by counsel from the applicant's spouse's employer, dated January 28, 2009, elaborates on her professional developments since January 2007, but does not establish that she would experience exceptional hardship were she to remain in the United States without the applicant for a two-year period. No other documentation with respect to this criteria has been provided by counsel on motion. As such, it has not been established that the applicant's spouse would suffer exceptional hardship were she to remain in the United States while the applicant relocates abroad for a two-year period.

As for the applicant's child, the AAO, in its decision dated December 30, 2008, concluded that the hardship the applicant's U.S. citizen child would encounter were he to remain in the United States while the applicant relocates abroad for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year foreign residency requirement. *Supra at 8*. As such, this criteria with respect to the applicant's child does not need to be re-addressed at this time.

The AAO thus concludes that with respect to the applicant's spouse, the record does not support a finding that she will face exceptional hardship if the applicant's waiver request is denied. Nevertheless, on motion, the AAO finds that the applicant has established that his U.S. citizen child would experience exceptional hardship were he to relocate to France and in the alternative, were he to remain in the United States without the applicant, for the requisite two-year term. The hardship the applicant's child would suffer if the applicant temporarily departed the U.S. for two years 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 acting center 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 application must be approved. If, however, the DOS recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The matter will be reopened, the June 23, 2009 decision referenced will be withdrawn, and 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).