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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

H2

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

**19 2010**

IN RE:

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:

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.

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 citizen of Jamaica who obtained J-1 nonimmigrant exchange status in June 2006 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 U.S. citizen children, born in 2004 and 2008, would suffer exceptional hardship if they moved to Jamaica 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 Jamaica.

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 Jamaica. *Director's Decision*, dated June 19, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated July 2, 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 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 children would experience exceptional hardship if they resided in Jamaica for two years with the applicant. In a declaration, the applicant contends that his U.S. citizen children would suffer emotional, physical and financial hardship were they to relocate to Jamaica to reside with the applicant for a two-year period. He notes the poor environmental conditions, the exposure to diseases and the unavailability of quality health care, the extremely high rate of violent crime and the inherent risk that his children would be in danger of becoming victims, and the economic instability of the country. He further references that his child, [REDACTED], would suffer a setback in his English language acquisition and educational development were he to relocate to Jamaica, due to his need for continued therapy for his language delays by experts familiar with his conditions and the substandard academics in Jamaica. *Affidavit of [REDACTED]* dated October 27, 2008.

In support, counsel has submitted extensive documentation regarding the problematic country conditions in Jamaica, including articles and letters from individuals in Jamaica that attest to the high crime and violence in Jamaica, especially against physicians. In addition, letters have been provided from [REDACTED] pediatricians, in Jamaica and the United States, attesting to the substandard health care in Jamaica, and confirming that [REDACTED] has suffered medically and physically while in Jamaica, including experiencing an exacerbation of asthma, acute gastroenteritis, dehydration and loss of weight. *Letter from [REDACTED]* dated September 13, 2008 and *Letter from [REDACTED]*, dated September 9, 2008. Moreover, documentation has been provided establishing the difficulties the applicant would face in obtaining gainful employment in Jamaica to maintain his children’s quality of living, due to discrimination against non-Jamaican trained physicians and low-paying salaries. *Letters from [REDACTED] Jamaica*, dated September 25, 2008 and [REDACTED] dated September 14, 2008.

Furthermore, evidence has been provided confirming [REDACTED]'s need for continued language therapy due to moderate-severe receptive and expressive language delays, through intensive home practice with both parents' participation. *Letter from [REDACTED]*, dated September 18, 2008. Finally, the AAO notes that the U.S. Department of State confirms that crime is a serious problem in Jamaica, and corroborates the applicant's statements regarding substandard health care in Jamaica. *Country Specific Information-Jamaica, U.S. Department of State*, dated October 13, 2009.

Based on the problematic country conditions in Jamaica, [REDACTED] documented medical hardships while in Jamaica as evidenced by his previous visits to Jamaica, substandard health care, [REDACTED] developmental delays and his need for continued therapy by individuals familiar with his condition, unfamiliarity with the country and financial hardship due to the applicant's inability to find gainful employment to support his children, the AAO concurs with the director that the applicant's U.S. citizen children would experience exceptional hardship were they to accompany the applicant to Jamaica for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Jamaica. As documented by counsel, the applicant's spouse is currently working in the United States under an H-1B classification. As counsel notes, an H-1B holder "is not entitled to remain in the country indefinitely, and that any number of situations could arise when the foreign national would lose her non-immigrant status. For example, she could be prevented from working because of an injury or her sponsoring employer could go out of business. The temporary and revocable nature of an H-1B holder's non-immigrant status distinguishes her from a legal permanent resident or US citizen...." *Brief in Support of Appeal*, dated July 2, 2009.

The AAO concurs with counsel that due to the applicant's spouse's nonimmigrant status and its temporary and revocable nature, it has not been established that the children would be able to remain in the United States during the two-year period that the applicant has to return to Jamaica. As such, were the applicant's spouse required to depart the United States at some point in the future, such a predicament would leave the young children in the United States without their parents. This situation would constitute exceptional hardship to the applicant's U.S. citizen children.

The AAO finds that the applicant has established that his U.S. citizen children would experience exceptional hardship were they to relocate to Jamaica and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's children 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 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.