



U.S. Citizenship
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[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date: MAR 03 2005

IN RE:

[Redacted]

APPLICATION:

Application for Waiver of of the Foreign Residence Requirement under Section 212(c)
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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Brazil. He was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on July 1, 1995 to receive graduate medical training at Nassau County Medical Center in East Meadow, New York. The applicant is subject to the two-year foreign-residence requirement under section 212(c) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The record reflects that the applicant married [REDACTED] (hereinafter, Ms. [REDACTED] a United States citizen (USC), on February 5, 2000. The applicant and Ms. [REDACTED] have two USC children; [REDACTED] was born on July 5, 2000 and [REDACTED] was born on December 10, 2002. The applicant seeks a waiver of his two-year residence requirement in Brazil, based on the claim that his wife and children would experience exceptional hardship if they moved to Brazil with the applicant for the two years he is required to live there, or if they remained in the United States during the two-year period.

The Director determined that Ms. [REDACTED] and the children would experience exceptional hardship if they moved to Brazil with the applicant. Additionally, the Director determined that Ms. [REDACTED] and the children would not experience exceptional hardship if they remained in the United States while the applicant fulfilled his two-year foreign-residence requirement in Brazil. The application was denied accordingly. *Decision of the Director, Vermont Service Center, Saint Albans VT, dated April 7, 2004.*

On appeal, counsel contends that the Director applied an erroneous exceptional hardship standard. In support of the appeal, counsel submitted a brief. The entire record was 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 at 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 the Immigration and Naturalization [now, the Director of 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, "[E]ven 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)."

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.)

I. Potential Hardship to Ms. [REDACTED] and the Children if They Accompany the Applicant to Brazil

First examined is the potential hardship to Ms. [REDACTED] and the children if they move to Brazil with the applicant for the two years he is required to live there. The applicant's son Alexander was seen at the Saint Barnabas Ambulatory Care Center on January 13, 2003 for a speech/language evaluation and a hearing

screening. [REDACTED], a Speech-Language Pathologist, prepared a report dated January 16, 2003 in which she stated:

[REDACTED] is a 2.6 year-old male who exhibits a moderate articulation disorder characterized by inconsistent errors and the phonological processes of backing, final consonant deletion, and syllable deletion. Speech intelligibility ranged from fair to poor in known contexts and was judged to be poor in unknown contexts. A Developmental Verbal Dyspraxia cannot be ruled out at this time. [REDACTED] also exhibited a moderate expressive language disorder. Receptive language skills were judged to be within normal limits.

The report indicated that the prognosis was "good with intervention" and made the following recommendations:

1. Schedule speech therapy 1-2 times per week, for 30 minute sessions;
2. Consult with early intervention service in county to deem if eligible for services;
3. Establish a daily home exercise program for the carryover of goals;
4. Continue to use one language (English) for all communication instead of alternating between different languages.

The evidence in the record indicates that appropriate language therapy would be difficult to obtain in Brazil, where the official language is Portuguese. Accordingly, the AAO finds that Alexander would experience exceptional hardship if he accompanies the applicant to Brazil.

II. Potential Hardship to Ms. [REDACTED] and the Children if they Remain in the United States While the Applicant Lives in Brazil

Next examined is the potential hardship Ms. [REDACTED] and the children will experience if they remain in the United States while the applicant lives in Brazil for two years. Counsel contends that the absence of the applicant from the United States will have a dramatic negative impact on Alexander's ability to overcome his speech language deficit. According to counsel, the experts who evaluated Alexander indicated that effective treatment of his speech language deficit **requires** the presence of the applicant. (emphasis added)

In the speech/language evaluation of [REDACTED] discussed above, Ms. [REDACTED] stated that parental participation in the therapy program was essential; however, Ms. [REDACTED] did not indicate that the therapy would be unsuccessful without the applicant's participation. In addition to the recommendations listed above, the report included various suggestions to help improve Alexander's speech and language, including specific activities. None of these suggestions are specific to [REDACTED] father. It appears that [REDACTED] mother can establish the daily home exercise program that the report recommended.

Dr. [REDACTED] Clinical Psychologist, prepared two letters addressed to counsel in support of the applicant's waiver application. In her March 7, 2003 letter, Dr. [REDACTED] stated:

It is of the utmost importance that [REDACTED] remain in the United States. It is also important that his father remain in this country with him. When his father is not at home, [REDACTED] becomes frustrated, angry and sometimes difficult to control. His father can speak to him in a way that is immediately soothing and reassuring to him. [REDACTED] identifies with his father

and even at his young age, it is clear that his father is his role model. When he is playing, he often refers to his father, saying, for example, "Daddy working. Fix hearts" or "I work. Fix hearts."

Dr. [REDACTED] continued:

Alexander would miss his father terribly and it is likely that he would become difficult and angry, **and perhaps somewhat depressed**. Without his father's crucial encouragement and support, **his language disorder might worsen even with speech therapy**. (emphasis added)

Dr. [REDACTED] did not indicate any expertise in the treatment of language/speech disorders. Dr. [REDACTED] makes no reference to speaking with the applicant, Alexander, or other family members. It does not appear that she has met with or treated anyone in the family. Dr. [REDACTED] predicted that Alexander would become difficult, angry, and somewhat depressed, but she did not explain how these effects would go beyond the normal emotions expected from such a separation, nor did she suggest a treatment plan or indicate that Alexander could not be treated. These facts suggest that Dr. [REDACTED] may not be in a position to accurately predict Alexander's emotional response or the possible success of Alexander's speech therapy.

In her December 14, 2003 letter, Dr. [REDACTED] predictions concerning Alexander became more definitive and negative, even though she appeared to use the same information that was available to her in March 2003. Instead of stating that Alexander's language disorder "might worsen" without his father's presence, Dr. [REDACTED] now stated that "[W]ithout his father's presence in his life on an everyday basis, **Alexander's speech delay will worsen**." (emphasis added) Instead of Alexander being "somewhat depressed," Dr. [REDACTED] now stated:

A prolonged separation from his father with no understanding on Alexander's part of where his father was or why he was gone **would cause him to become clinically depressed** and, as part of that depression, to feel hopeless and despairing about his life and to be unable to concentrate effectively. These symptoms are indicative of Dysthymic Depression (300.4 DSM IV). They would have a direct and immediate impact on his language disorder. **Rather than recovering from his serious speech deficit, his speech would worsen and he would fall increasingly farther behind other children of his age**. (emphasis added)

Dr. [REDACTED] does not explain why her diagnosis of Alexander changed so substantially between March 2003 and December 2003. Dr. [REDACTED] did not refer to any additional facts, examinations, or test results. As stated above, it does not appear that Dr. [REDACTED] has any expertise in the treatment of speech disorders, or that she has spoken with, or treated anyone, in the family. Dr. [REDACTED] predicted that the applicant's departure would cause Alexander to become clinically depressed, but Dr. Frisch does not explain how she formulated this diagnosis, why the effects would go beyond those normally expected from such a separation, or why Alexander could not be treated. Dr. [REDACTED] letters do not establish that Alexander will experience exceptional hardship if he remains in the United States while the applicant lives in Brazil for two years.

In their affidavits, the applicant and Ms. [REDACTED] assert that Ms. [REDACTED] and the children would be unable to survive financially if the applicant moved to Brazil for two years. Ms. [REDACTED] is a registered nurse and works part-time on nights and weekends. The record contains no evidence indicating that Ms. [REDACTED] cannot work full-time as a registered nurse and support the family.

Ms. [REDACTED] stated that she could work full-time, but that:

With my husband gone, I would be required to work full time and hire a stranger to take care of my children during the day. This would be traumatizing for both Alex and Nicholas who would lose their father for two years and only see me for a few hours in the evening. Their lives would become unstable and they would also see my absence as abandoning them. My children are extremely attached to me and could not face losing both their father and to a certain extent, me. They would be emotionally devastated.

The situation described by Ms. [REDACTED] is normal for such a separation. Ms. [REDACTED] has not established that the potential effect on the children rises to the level of exceptional hardship.

III. Conclusion

The AAO finds that the evidence in the record establishes that the applicant's son Alexander would experience exceptional hardship if he traveled to Brazil with the applicant. The AAO also finds that the evidence in the record fails to establish that the applicant's wife and children would experience exceptional hardship if they remained in the United States while the applicant returned temporarily to Brazil.

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 not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.