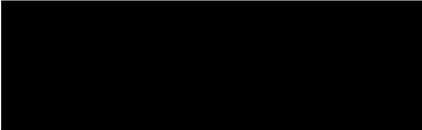


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U.S. Citizenship
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Services

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HM

FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **AUG 29 2006**

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 "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reconsider. The motion will be granted and the previous decisions of the director and the AAO will be affirmed. The application is denied.

The record reflects that the applicant is a native of India who 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). The applicant was admitted to the United States as a J1 nonimmigrant exchange visitor on November 2, 2000. The applicant has a U.S. citizen spouse, child and stepchild. He presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his child.

The director determined that the applicant failed to establish exceptional hardship to a qualifying relative and denied the case accordingly. *Decision of the Director*, dated March 18, 2004. The AAO found exceptional hardship to the applicant's daughter in the event she returned to India, but not if she remained in the United States without him. *Decision of the AAO*, dated March 23, 2005.

On motion, counsel asserts that the AAO's decision was based on an incorrect application of the regulations and precedent case law. *Motion to Reconsider*, dated April 20, 2005.

The record includes, but is not limited to, counsel's motion, the applicant's declarations, affidavits in support of the applicant and court documents. The entire record was reviewed and considered in arriving at a decision on the appeal.

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

- (e) 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(I): 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 demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to India for two years. The AAO found that the applicant's daughter met this prong of the waiver analysis. *Decision of the AAO*, at 4.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon residing in the United States during the two-year period. Counsel notes that the applicant and his spouse have a court-ordered temporary parenting plan which gives the applicant custody of their daughter during the week and gives the applicant's spouse custody on the weekend. *Motion to Reconsider*, at 1. Counsel states that the AAO noted the applicant's alleged abuse from his spouse without providing evidence aside from his own statement. *Id.* at 2. Counsel asserts that absent a finding that the applicant's allegations of abuse are not credible, his statement must be considered by the AAO. *Id.* The record includes statements by the applicant which detail physical, mental and emotional abuse from his spouse and his I-360 self-petition as an abused spouse of a U.S. citizen was approved on March 13, 2006.

The AAO notes that the statute does not consider hardship to the applicant, rather it requires exceptional hardship to the applicant's daughter. Absent a few statements regarding the negative lifestyle of the applicant's spouse as it relates directly to the daughter, the record does not indicate that the applicant's daughter will face hardship in the company of her mother. In addition, the AAO reiterates that the temporary parenting plan does not mention the suitability of either parent. Counsel asserts that the applicant's statements that his daughter will not be properly cared for and may be in a dangerous situation should have been afforded greater significance. *Motion to Reconsider*, at 3. If the applicant's daughter is subject to danger, it is unclear as to why the court granted partial custody to the applicant's spouse or why the applicant has not sought full-custody of the child. Therefore, a review of the record does not indicate that the applicant's daughter would suffer exceptional hardship upon remaining in the United States without the applicant during the two-year period.

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 previous decisions of the director and the AAO will be affirmed.