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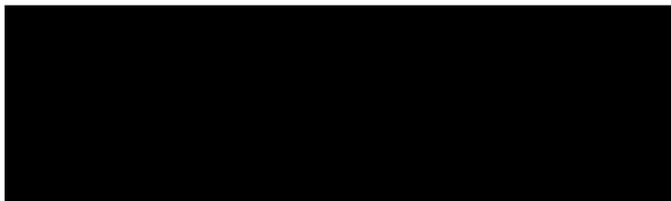
U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: JUN 05 2007

IN RE:



APPLICATION: Application for Waiver of 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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the matter will be remanded to the acting director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division (WRD).

The record reflects that the applicant is a native and citizen of Argentina 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 in J-1 nonimmigrant exchange status on August 27, 1989. The applicant's spouse and two children are U.S. citizens, and he seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to them.

The acting director determined that the applicant had failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled the two-year foreign residence requirement in Argentina. *Acting Director's Decision*, dated November 28, 2006. The application was denied accordingly.

On appeal, counsel asserts that the acting director failed to consider the evidence in the record and that he misapplied the law. *Form I-290B*, received December 29, 2006.

The record includes, but is not limited to, counsel's brief, the applicant's statement, the applicant's spouse's statement, the applicant's children's statements, letters regarding the applicant's employment prospects in Argentina, a psychologist's letter for the applicant's children, documentation on diabetes in children and information related to poverty in the United States. The entire record was considered in rendering this decision.

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 [now the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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 demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to Argentina for two years. The AAO will first analyze hardship to the applicant's children, ages fourteen and twelve. The record reflects that the applicant's ex-spouse has sole custody, care and control of their children. *Judgment of Divorce*, at 2, dated August 21, 2002. The relevant law does not require the applicant's ex-spouse to relocate to Argentina and there is no indication that she intends to reside there for two years. As such, it is not possible for the children to relocate to Argentina for two years. By default, the AAO finds that the applicant has established that his children would suffer exceptional hardship upon relocation to Argentina.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon remaining in the United States during the two-year period. In regard to financial hardship to the applicant's children, counsel states that the applicant has been ordered by a court to pay child support and medical insurance for his children, that the court determined that he should pay \$1,100 per month as his ex-spouse's monthly income is low and this is the amount needed for the children's basic necessities, and that his ex-spouse's monthly expenses exceed her monthly income. *Brief in Support of Appeal*, at 3, dated January 24, 2007. Counsel states that if the applicant does not pay for his children's health insurance and sixty-four percent of their uncovered medical expenses, the children will live below the poverty line and are at risk for being uninsured. *Id.* at 5. The applicant's family law attorney states that because the applicant's ex-spouse makes such a low salary, he has been ordered to pay a high child support amount and to maintain health insurance for their children, and their children would experience exceptional hardship without this money. *Letter from [REDACTED]*, at 2, undated. In regard to medical expenses, the applicant's children's doctor states that they have a very high risk of adolescent diabetes, diabetes introduces a host of health complications, he has insisted that they be put under a rigorous program of aerobic activity and they need to exercise at a facility that hires certified and experienced staff. *Letter from [REDACTED]*, at 2, dated December 21, 2006.

The applicant states that he is an assistant professor at George Washington University, the economy is highly unstable in Argentina, and he cannot guarantee payments the way he can from his current position. *Applicant's Statement*, at 1, 3, dated December 6, 2005. The record includes a letter from an economist in Argentina who details the deteriorating Argentinean economy, the factors hampering the applicant's employment prospects and the high cost of living in Argentina. *Letter from [REDACTED]* at 1-2, dated January 22, 2006. The record includes two other similar letters. The applicant's ex-spouse states that the money that the applicant sends her is essential for her to support the children, she cannot afford to pay the children's insurance or related costs, she is aware of the high cost of living and bleak job prospects in Argentina and the children could not visit the applicant due to financial reasons. *Applicant's Ex-Spouse's Statement*, at 1-2, dated February 10, 2006. Therefore, the record reflects that the applicant's children would experience significant financial hardship should they remain in the United States without the applicant.

In regard to emotional hardship, the applicant's ex-spouse states that the children see the applicant regularly and talk with him every day, and they have had trouble sleeping and are constantly worried that the applicant might leave them. *Id.* at 2. The applicant's son details his relationship with the applicant and the difficult nature of potential separation. *Letter from the Applicant's Son*, dated February 10, 2006. Counsel states that the applicant's children will face mental anguish, especially after the toll that their parents' divorce had on their emotional state. *Brief in Support of Appeal*, at 10. The record includes a psychological evaluation which details the applicant's spouse's concern for his children, the negative effects of divorce, the importance of having the active support of both parents in cases of divorce, and the negative emotional toll on the

psychological well-being of the children if separated from the applicant. *Psychologist's Letter*, at 1, dated August 1, 2005. The record reflects that the applicant's children would experience significant emotional hardship should they remain in the United States without the applicant.

Based on the unique financial and emotional issues in this application, the AAO finds that the applicant's children would experience exceptional hardship should they remain in the United States without the applicant.

As exceptional hardship has been found for the applicant's children, no purpose would be served in addressing the other qualifying relative.

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 AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the WRD. Accordingly, this matter will be remanded to the acting director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD 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 WRD recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.