



U.S. Citizenship
and Immigration
Services

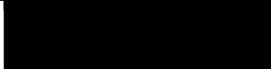
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FILE:



Office: NEBRASKA SERVICE CENTER

Date:

MAY 11 2007

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:

SELF-REPRESENTED

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, Nebraska 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 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 Haiti 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 J-1 nonimmigrant exchange visitor on September 15, 2004. The applicant has two U.S. citizen children and she presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her children.

The director determined that the applicant had failed to establish exceptional hardship to her children if she fulfilled the two-year foreign residence requirement in Haiti. *See Decision of the Director*, dated November 20, 2006. The application was denied accordingly.

On appeal, the applicant asserts that her children's safety will be greatly jeopardized if she returns alone to Haiti due to a lack of family support and her spouse's commitment to work. *Form I-290B*, received December 14, 2006.

The record includes, but is not limited to, the applicant's statements, documents related to the applicant's spouse's professional commitments and country conditions material on Haiti. 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 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 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 Haiti for two years. The director found that the applicant thoroughly and

sufficiently outlined hardships that her children may endure should they return to Haiti with her. *Decision of the Director*, at 1. Therefore, the AAO will not address this prong of the analysis as it has already been met.

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. The applicant states that her two-year old and five-year old children would have to stay in the United States with her husband, who is a physician working long hours in a medically underserved area. *Applicant's Statement*, at 1, dated December 8, 2006. The record reflects that the applicant's spouse is employed as an H-1B nonimmigrant by ██████████ in Deckerville, Michigan. *Form I-797*, dated December 2, 2004, *Letter from ██████████ Administration, Deckerville Community Hospital*, dated September 13, 2006. The applicant states that her spouse's shift ends at 7 P.M., he stays to dictate the notes of the day, he evaluates his elderly patients at a nursing home and he rarely gets home before 11 P.M. *Applicant's Statement*, at 1. The applicant states that her spouse can be called while at home to attend to somebody's care and it would be impossible for him to take care of the children. *Id.* at 1-2. The applicant states that her spouse attends local, state and national conferences to maintain his license and to stay abreast of developments in his field. *Id.* at 3. The record includes documentation related to these conferences.

The applicant states that her children need to be prepared for, taken to and from school, helped with homework and taken to medical appointments. *Id.* at 2. The applicant states that she takes her daughters to and from daycare and preschool, and she stays at home with them when they are sick. *Id.* In regard to family assistance, the applicant states that her mother is in France and she has not seen her father in thirty years. *Id.* The applicant states that they would need a nanny seven days a week for twenty-four hours, this is very difficult to find and she has been unable to find such a commitment from anyone. *Id.* The applicant contends that her spouse would be unable to pay for a nanny and it is not possible to find someone in rural northern Michigan. *Id.* at 3. The AAO notes that the record does not include substantiating evidence of the inability to find or afford a full-time nanny. The applicant states that even if it were possible to find a nanny, she would be absent and the father would see them while they're asleep or under the care of a stranger. *Id.*

The record reflects that the applicant's young children will essentially be without a parent or family member for the vast majority of their day and for the entire day (or period of days) in many instances. As such, the AAO finds that the applicant's children would suffer exceptional hardship upon remaining in the United States 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 met her 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 WRD. Accordingly, this matter will be remanded to the 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.