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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: OCT 30 2007

IN RE:

[REDACTED]

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:

[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, California 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 citizen of South Africa 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 J2 nonimmigrant exchange status on February 26, 2003. The applicant's spouse is a U.S. citizen. The applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse.

The director determined that the applicant failed to establish her spouse would experience exceptional hardship if she fulfilled the two-year foreign residence requirement and the application was denied accordingly. *Director's Decision*, dated March 7, 2007.

On appeal, counsel asserts that the applicant's spouse will experience exceptional hardship due to the potential pregnancy risks of a delayed pregnancy, financial hardship and the loss of his strongest source of emotional support. *Brief in Support of Appeal*, at 1-2, dated April 2, 2007.

The record includes, but is not limited to, counsel's brief, a letter from the applicant's physician, the applicant's spouse's statement, the applicant's statement, information on Down's Syndrome and Caesarean deliveries, an unemployment stub for the applicant's spouse and letters from the South African and Colombian consulates. 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, Department of Homeland Security (DHS), "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.

Counsel states that the director did not address the fact that South Africa and Colombia have expressed no objection to the applicant being granted a waiver of the two-year requirement. *Brief in Support of Appeal*, at 2. The record includes a letter of no objection from the South African consulate and a letter from the Colombian embassy stating that the applicant needs a visa to enter Colombia. The applicant's visa indicates that the applicant would have to fulfill the two-year requirement in Colombia, which appears to be her country of last residence. The AAO also notes that the applicant was in J-2 status, she is subject to the J-1's country of last residence (i.e. her ex-spouse who is from Colombia) and divorce does not remove this requirement. However, there is no evidence of a no objection letter from the Colombian government having been sent to the Director of the U.S. Department of State Waiver Review Division as required by 22 C.F.R. § 41.63(d) and that the Director has favorably recommended a waiver based on the no objection letter.

22 C.F.R. § 41.63(d) states in pertinent part that:

Applications for waiver of the two-year home-country physical presence requirement may be supported by a statement of no objection by the exchange visitor's country of nationality or last legal permanent residence. The statement of no objection shall be directed to the Director through diplomatic channels; i.e., from the country's Foreign Office to the Agency through the U.S. Mission in the foreign country concerned, or through the foreign country's head of mission or duly appointed designee in the United States to the Director in the form of a diplomatic note. This note shall include applicant's full name, date and place of birth, and present address. Upon receipt of the no objection statement, the Waiver Review Branch shall instruct the applicant to complete a data sheet and to provide all Forms IAP-66 and the data sheet to the Waiver Review Branch. If deemed appropriate, the Agency may request the views of each of the exchange visitor's sponsors concerning the waiver application.

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*. (Quotations and citations omitted).

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).

As mentioned previously, the applicant's visa indicates that the applicant would have to fulfill the two-year requirement in Colombia. The first step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to Colombia for two years. The record includes a letter from the Colombian embassy stating that as the applicant is a citizen of South Africa, she needs a visa to enter Colombia; however, there is no evidence that the applicant's spouse would be unable to obtain a visa that would allow him to remain in Colombia for two years. The director found that the applicant's spouse would suffer exceptional hardship if he accompanied the applicant abroad, although it appears that the director was referring to South Africa as the qualifying country. *Director's Decision*, at 3. As this is a *de novo* review, the AAO will address this prong of the analysis. The applicant's spouse states that he was born in Chicago and he has lived in the United States his whole life. *Applicant's Spouse's Statement*, at 1, dated October 3, 2006. The record does not include substantiating evidence of the impact that relocation would have on the applicant's spouse's career, the financial hardship that the applicant claims her spouse would suffer, the supporting role that the applicant's spouse indicates he plays in his father's and brother's lives or any other type of relevant hardship he would suffer as a result of relocation. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The record does not demonstrate that exceptional hardship will be imposed on the applicant's spouse upon relocation to Colombia for two years.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship by remaining in the United States during the two-year period. Counsel contends that the two-year delay in child bearing will cause extreme hardship to the applicant's spouse as the applicant is 34 years old and pregnancy risks increase after the age of 35 years. *Brief in Support of Appeal*, at 1. Counsel asserts that the chances of a child being born with Down's Syndrome will increase from 1 in 1000 to 1 in 400. *Id.* Counsel states that the applicant's spouse recently lost his mother to cancer and the applicant has been his strongest source of support. *Id.* at 2. The applicant's spouse states that he has relied on the applicant for emotional support in the aftermath of his loss and long-term separation would cause him a great deal of stress. *Applicant's Spouse's Statement*, at 1. The applicant's spouse states that he is extremely close to the applicant and they share a love of music, the English language and teaching. *Id.* The AAO notes that separation commonly creates emotional stress, and financial and logistical problems and finds that the record does not distinguish the hardships facing the applicant's spouse from those confronting other individuals who have been separated from family members.

A thorough review of the record reflects that the applicant's spouse will face difficulties without the applicant. It does not, however, demonstrate that exceptional hardship will be imposed on him 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 her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.