

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H3

[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 10 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 applicant is a native and citizen of Cape Verde who was admitted to the United States in J-1 nonimmigrant exchange status in February 2000. He 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) based on U.S. government financing. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse and stepchild would suffer exceptional hardship if they moved to Cape Verde temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Cape Verde.¹

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Cape Verde. *Director's Decision*, dated December 23, 2008. **The application was denied accordingly.**

In support of the appeal, counsel provides a brief, dated February 20, 2009 and referenced exhibits. The entire record was reviewed and considered in rendering this decision.

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

¹ The AAO notes that the applicant did not submit documentation to establish that _____ qualifies as a stepchild under section 101(b)(1)(B) of the Act, which states that a stepchild is defined as a child that had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred. No evidence of the child's birth certificate, to establish citizenship and age, was provided. On August 18, 2008, the USCIS requested such documentation in a Request for Evidence. *See Request for Evidence*, dated August 18, 2008. As the Decision of the Director notes, the requested evidence was not provided by counsel and/or the applicant. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). As such, the AAO concurs with the director that hardship to Taylor F. Costa may not be considered at this time.

Even if counsel had established that _____ qualifies as a stepchild, the AAO notes that said child is not listed as a dependent on the applicant and his spouse's tax return for 2008. *See Form 1040, U.S. Individual Income Tax Return-2008*. Moreover, the applicant admits that the child spends most of his time with his biological father. *Statement of _____*, dated September 7, 2006. Further, the applicant's spouse makes no reference to what, if any, hardships _____ would experience were the applicant to relocate abroad. As such, had it been established that _____ is a stepchild under section 101(b)(1)(B) of the Act, no evidence has been provided to establish that he would suffer exceptional hardship were the applicant to reside abroad for a two-year period.

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(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 establish that the applicant's U.S. citizen spouse would experience exceptional hardship if she resided in Cape Verde for two years with the applicant. This criteria is not addressed by counsel, the applicant and/or the applicant's spouse. As such, it has not been established that the applicant's spouse would suffer exceptional hardship were she to reside in Cape Verde for two years with the applicant.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if she remained in the United States during the two-year period that the applicant resides in Cape Verde. The applicant's spouse contends that she would suffer exceptional emotional hardship due to the long and close relationship they have. *See Letter from* [REDACTED] dated February 5, 2009. The applicant further notes that his spouse is not healthy, has had surgery for cervical cancer, is on medication for stress and is not emotionally stable; a separation would cause her exceptional emotional and physical hardship. Finally, the applicant contends that his

spouse will suffer exceptional financial hardship because she is unemployed “due to her emotional problems and in ability [sic] to deal with stressful situations. I have been her only means of financial support for the past year.... It is likely that my wife [the applicant’s spouse] will not be able to obtain employment should I leave the country and become a ward of the state.... I believe she may resort to drinking excessively and may become alcohol dependent in my absence...” *Supra* at 1.

To corroborate the applicant’s statements regarding his wife’s mental health, a letter had been provided by [REDACTED]; confirming that the applicant’s spouse was last seen by the doctor [REDACTED] in August 2007 and her diagnosis was Major Depression and Panic Disorder. Said letter further confirms that she has not been seen since that time. *See Letter from [REDACTED]*, dated September 22, 2008.

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted statement by an office manager fails to reflect an ongoing relationship between a mental health professional and the applicant’s spouse or any history of treatment for the disorders referenced in the statement. In addition, the letter fails to establish the applicant’s spouse’s current mental health situation, the short and long-term treatment plan, the gravity of the situation, and what specific assistance she needs from the applicant, to establish that his two-year absence will cause his spouse exceptional hardship. Moreover, the applicant’s spouse’s mental health situation does not appear to be exceptional, as she has not been treated by a physician since August 2007, almost a year and a half prior to the appeal filing.²

Furthermore, it has not been established that the applicant’s spouse would be unable to travel to Cape Verde to visit the applicant, and or communicate with him regularly, to further obtain his emotional support during his two-year foreign residence. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). As such, it has not been established that the applicant’s spouse would suffer exceptional emotional hardship due to the applicant’s two-year absence. As for the physical hardships referenced by the applicant with respect to his wife, counsel has not provided any documentation from the applicant’s spouse’s treating physician that explains the severity of the applicant’s spouse’s medical condition, its limitations, both in the home and in the workplace, what specific support the applicant provides at this time, and what ramifications the applicant’s spouse would experience were she to be separated from the applicant for two years.

Regarding the financial hardship referenced by the applicant, as noted above, it has not been established that the applicant’s spouse is unable to obtain gainful employment, as she has done in the past. *See Form G-325A*, dated May 14, 2005. Finally, no documentation has been provided that

² The AAO notes that on appeal, counsel submitted a letter establishing that the applicant's spouse had been sent to the emergency room in February 2009. *See Letter from [REDACTED] HealthFirst Family Care Center, Inc.*, dated February 10, 2009. This letter fails to outline the reason for the visit and/or referral to the emergency room. As such, the AAO is unable to determine the probative value of said document to the instant appeal.

establishes that the applicant would be unable to obtain gainful employment in Cape Verde, thereby assisting in the U.S. household's finances. While the applicant's spouse may need to make adjustments with respect to her emotional, physical and financial situation while the applicant resides abroad due to his foreign-residence requirement, it has not been shown that such adjustments would cause the applicant's spouse exceptional hardship.

The record, reviewed in its entirety, does not support a finding that the applicant's U.S. citizen spouse will face exceptional hardship if the applicant's waiver request is denied. The applicant has failed to establish that his spouse would suffer exceptional hardship if she moved to Cape Verde with the applicant for the requisite two-year period and alternatively, the applicant has failed to establish that his spouse would suffer exceptional hardship were he to relocate to Cape Verde while she remained in the United States. The record demonstrates that the applicant's spouse faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse temporarily relocates abroad based on a foreign residence requirement.

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. The waiver application is denied.