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U. S. Citizenship and Immigration Services
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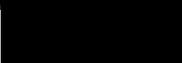
U.S. Citizenship
and Immigration
Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAR 16 2010**

IN RE: Applicant:



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:



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.

Perry Rhew
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 matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The record reflects that the applicant, a native and citizen of Haiti, obtained J-1 nonimmigrant exchange status in August 2003. 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 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 would suffer exceptional hardship if she moved to Haiti temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Haiti. The applicant also seeks a waiver of the two-year foreign residence requirement based on persecution.

The director determined that the applicant failed to establish that his U.S. citizen spouse would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Haiti. The director additionally found that the applicant had failed to establish he would be subject to persecution if he returned to Haiti. The Form I-612, Application for Waiver of the Foreign Residence Requirement (Form I-612) was denied accordingly. *Decision of the Director*, dated September 10, 2009.

On appeal, counsel for the applicant submitted a brief, dated October 9, 2009. In addition, on February 1, 2010, the AAO received a supplemental brief and referenced exhibits from counsel in support of the appeal. The entire record was reviewed and 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, 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. (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).

The first step required to obtain a waiver based on hardship is to demonstrate that exceptional hardship would be imposed on the applicant's U.S. citizen spouse if she moved with the applicant to Haiti for a two-year period. The Department of Homeland Security (DHS) Secretary, Janet Napolitano, has determined that an 18-month designation of Temporary Protected Status (TPS) for Haiti is warranted because of the devastating earthquake and aftershocks which occurred on January 12, 2010. As a result, Haitians in the United States are unable to return safely to their country. Even prior to the current catastrophe, Haiti was subject to years of political and social turmoil and natural disasters. In a travel warning issued on January 28, 2009 the U.S. Department of State noted the extensive damage to the country after four hurricanes struck in August and September 2008 and the chronic danger of violent crime, in particular kidnapping. *U.S. Department of State, Travel Warning – Haiti*, January 28, 2009. Based on the designation of TPS for Haitians and the disastrous conditions which have compounded an already unstable environment, and which will affect the country and people of Haiti for years to come, the AAO finds that requiring the applicant's U.S. citizen spouse to join the applicant in Haiti for a two-year period would result in exceptional hardship.

For the same reasons, the AAO finds that the applicant's U.S. citizen spouse would also experience exceptional hardship were she to remain in the United States without the applicant for a two-year period. This finding is based on the exceptional emotional harm the applicant's spouse will experience due to concern about the applicant's well-being and safety in Haiti, a concern that is beyond the common results of separation due to a foreign residency requirement.

The AAO thus concludes that the applicant has established that his U.S. citizen spouse would experience exceptional hardship were she to relocate to Haiti and in the alternative, were she to remain in the United States without the applicant, for the requisite two-year term. The evidence in

the record establishes the hardship the applicant's spouse would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.

With respect to applicant's waiver request based on persecution, counsel asserts that the director's determination that the applicant had failed to establish he would be subject to persecution were he to return to Haiti is in error, due to the director's application of an incorrect legal standard. As counsel contends,

The adjudicating officer denied the application on the basis that the Applicant has not proven that 'he would be subject to persecution' if he returned to Haiti.... Under the established law applicable to claims of persecution, the applicant is required to prove only that there is a reasonable possibility of persecution....

Brief in Support of Appeal, dated October 9, 2009.

Contrary to counsel's assertion, the statute, as noted correctly by the director, clearly states that the applicant must establish that he or she would be persecuted. Unlike applicants for refugee or asylee status, who must establish persecution or a well-founded fear of persecution on account of five separate grounds including race, religion, nationality, membership in a particular social group, or political opinion, (*See* Section 101(a)(42) of the Act) an applicant for a waiver under section 212(e) of the Act must establish that he or she **would be** persecuted on account of one of three grounds: race, religion or political opinion, a higher standard.

Irrespective of counsel's error with respect to the standard of proof in persecution claims, as the AAO has determined that exceptional hardship exists with respect to the applicant's U.S. citizen spouse were the applicant to relocate to Haiti for a two-year period, it is not necessary to evaluate whether the applicant has also established eligibility for a waiver under section 212(e) of the Act based on persecution.

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 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 DOS. Accordingly, this matter will be remanded to the director so that he may request a DOS recommendation under 22 C.F.R. § 514. If the DOS 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 DOS recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: 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.