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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090
**U.S. Citizenship
and Immigration
Services**



H3

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 28 2011

IN RE: [REDACTED]

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

fr

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 Argentina, obtained J-1 nonimmigrant exchange status in August 2008. She 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 her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to Argentina temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Argentina.

The director determined that the applicant failed to establish that her U.S. citizen spouse would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Argentina. *Director's Decision*, dated December 7, 2010. The application was denied accordingly.

In support of the appeal, the applicant and her U.S. citizen spouse submit a letter, dated January 3, 2011, and referenced exhibits. The entire record was reviewed and considered in rendering this decision.

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

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 he resided in Argentina for two years with the applicant. In a declaration, the applicant's spouse explains that he is currently employed [REDACTED] while completing two year program in Spanish Literature, and were he to relocate abroad, he would suffer academic and professional hardship as he would have to cease his studies and his employment. In addition, the applicant's spouse explains that he has numerous loan obligations and were he to relocate abroad, he would not be able to obtain gainful employment due to the substandard economy and he would thus be at risk of defaulting on his many loans. Finally, the applicant's spouse explains that he has no ties to Argentina and were he to relocate abroad, he would suffer due to long-term separation from his family, most notably, his younger brother who suffers from chronic depression; his community; his studies; his employment and his country. *Letter from* [REDACTED]

Evidence of the applicant's spouse's academic enrollment and gainful employment [REDACTED] has been provided. In addition, the AAO notes that the U.S. Department of State has confirmed the problematic economic situation in Argentina.¹ Moreover, evidence of the applicant's spouse's brother's disability has been provided. Finally, documentation establishing the applicant's spouse's extensive loan obligations has been submitted. Based on a totality of the circumstances, the AAO concurs with the director that the applicant's U.S. citizen spouse would experience exceptional hardship were he to accompany the applicant to Argentina for a two-year period.

¹ As noted by the U.S. Department of State, in pertinent part:

Government of Argentina statistics showed unemployment was 8.4% in 2009. Poverty dropped in the aftermath of the economic crisis of 2001-2002, after having reached a record high of over 50%. In 2009, the official poverty level was 13.2%. Some unofficial estimates suggest that unemployment and poverty levels may be higher....

The decline in global commodity prices, slower global and domestic growth, and some changes in trade policy in late 2008 and in 2009 had an impact on foreign trade, with imports and exports falling 32% and 20% annually, respectively, in 2009....

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would suffer exceptional hardship if he remained in the United States during the period the applicant resides in Argentina. The applicant's spouse declares that were his spouse to relocate abroad, he would suffer emotional and financial hardship. To begin, he explains that he has become very distressed with the idea of being separated from his wife and in light of the fact that there is a history in his family of depression and anxiety, he has sought psychological help. He further explains that he recently was required to resign from his full-time teaching position in Vermont because he had only a temporary teaching license. He has consequently enrolled in a graduate program and due to the change in his employment, and needs his wife's financial contributions to fulfill his debt obligations and continue the pursuit of his advanced degree. Were his spouse to relocate abroad, the applicant's spouse asserts that he would not have the financial and emotional resources to complete his coursework, thereby causing him significant academic and professional disruption. He notes that his wife would not be able to assist financially while in Argentina due to the country's economic crisis and the low wages paid to teachers. *Supra* at 1-2.

Evidence of the applicant's gainful employment has been provided, establishing the applicant's critical contributions to the finances of the household [REDACTED], and further corroborating the applicant's spouse's assertion that without the applicant's income, he will suffer financial hardship. *Letter from* [REDACTED] [REDACTED] dated April 13, 2010. In addition, evidence establishing that the applicant's spouse is currently enrolled in an academic program has been provided. *Letter from* [REDACTED], dated September 2, 2010 and [REDACTED] dated August 12, 2010 and September 27, 2010. Moreover, extensive documentation with respect to the applicant and her spouse's income and expenses has been provided, including a detailed Monthly Budget, to establish the critical nature of the applicant's continued financial contributions.

Finally, with respect to the emotional hardship referenced, a letter has been provided from [REDACTED], noting that the applicant's spouse is being seen for individual counseling due to suffering symptoms of anxiety regarding his wife's possible need to return to Argentina, including the inability to concentrate at school and work, difficulty sleeping, continual worries, exhaustion, increased agitation and feeling overwhelmed. [REDACTED] concludes that were his wife to relocate abroad for a two-year period, the applicant's spouse would suffer an increase in anxiety and an inability to function normally both professionally and socially. *Letter from* [REDACTED] LCSW-R,

Based on the record, the AAO has determined that the applicant's U.S. citizen spouse would experience exceptional hardship if he remained in the United States while the applicant relocated to Argentina to comply with her two-year foreign residency requirement. The record indicates that the applicant's spouse is integrated into the U.S. lifestyle and educational system and he is currently completing his advanced degree while relying on the applicant's financial and emotional support. The Board of Immigration Appeals (BIA) found that a U.S. citizen spouse who was in pursuit of an advanced degree and was thus completely dependent on her spouse for support would encounter exceptional hardship if her spouse's waiver request was not granted. *Matter of Chong*, 12 I&N Dec.

793, Interim Decision (BIA 1968). The AAO finds *Matter of Chong* to be persuasive in this case due to the similar circumstances. Were the applicant's waiver request denied, his spouse would likely have to cease the pursuit of his studies due to financial and emotional hardship. Such a disruption at this stage of his education would be significant as to constitute exceptional hardship.

The AAO thus concludes that the applicant has established that her U.S. citizen spouse would experience exceptional hardship were he to relocate to Argentina and in the alternative, were he 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.

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 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.