

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

DATE: DEC 31 2012

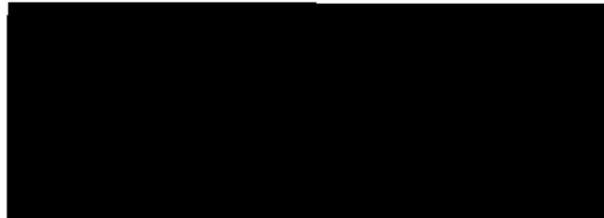
Office: CALIFORNIA SERVICE CENTER

FILE: 

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:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg
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 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 is a native and citizen of the Dominican Republic who entered the United States as a J-1 nonimmigrant in November 1999. The applicant 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 the Exchange Visitor Skills List. 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 the Dominican Republic 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 the Dominican Republic.

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 the Dominican Republic. *Director's Decision*, dated September 7, 2012. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits the following: a letter; an affidavit from the applicant's spouse; a copy of the applicant's spouse's U.S. birth certificate; a psychological evaluation pertaining to the applicant's spouse; support letters from family and friends; medical and mental health documentation in regards to the applicant's spouse; confirmation of the applicant's and her spouse's employment; financial documentation; and information about country conditions in the Dominican Republic. 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).

To begin, on appeal counsel states that the Dominican Republic did not pay any money towards the applicant's international student exchange program and thus, she should not be subject to the two-year foreign residence requirement. *See Letter from* [REDACTED] dated November 1, 2012. The AAO notes that the applicant is subject to the two-year foreign residence requirement based on the Exchange Visitor Skills List, as properly noted by the Director, and not based on government financing as counsel contends on appeal.

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 the Dominican Republic for two years with the applicant. In a declaration, the applicant's spouse first explains that he was born in the United States and has no ties to the Dominican Republic. He references that his siblings, his friends, his church and his home are in the United States. In addition, the applicant's spouse notes that he has been gainfully employed, earning almost \$30,000 and benefits, for over five years and during that time, he has managed to work his way up from Cashier to Accounting Closing Supervisor and were he to relocate abroad, he would suffer professional and financial hardship. The applicant's spouse further asserts that he is unfamiliar with the language, culture and customs in the Dominican Republic and he would not be able to function and support himself. As a result, he would be at risk of defaulting on his many financial obligations. Further, the applicant's spouse references the problematic country conditions in the Dominican Republic, including the high rate of unemployment and crime. Finally, the applicant's spouse details that he had surgery in 2010 and is currently receiving physical therapy but were he to relocate abroad, he would not be able to obtain affordable and effective medical treatment. *Affidavit in Support from* [REDACTED] dated October 23, 2012.

Evidence of the applicant's spouse's long-term gainful employment, with numerous promotions, has been provided. In addition, evidence establishing the strong ties the applicant's spouse has to his siblings, his employment and his church have been provided by counsel. The AAO notes that the U.S. Department of State has confirmed that crime is a problem and medical care is unreliable or inadequate in the Dominican Republic. *See Country Specific Information-Dominican Republic, U.S. Department of State*, dated June 22, 2012. Finally, documentation establishing the applicant's spouse's medical and mental health issues and his extensive financial 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 the Dominican Republic for a two-year period.

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 the Dominican Republic. 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 has consequently sought psychological help. He notes that he is taking an antidepressant to help treat his condition. The applicant's spouse further explains that he had surgery in 2010 to relieve pain in his back and numbness in his arm and to this day, he still has numbness in his left arm, a limited range of motion in his neck, and severe pain, and although he is receiving extensive physical therapy, he contends he needs his wife to assist in his day to day care. Moreover, the applicant's spouse details that his wife financially contributes to the household and were he to relocate abroad, he would not be able to keep up with his medical bills, his car and home payments, credit card payments, cell phone payments and other bills on his income alone. He maintains that he would lose the home they have worked so hard to obtain. *Supra* at 1-4.

To begin, with respect to the emotional hardship referenced, a psychological evaluation has been provided by [REDACTED]. Said evaluation confirms that for a substantial portion of his adult life, the applicant's spouse has suffered from clinical depression and was a drug addict, addicted to cocaine and other serious narcotics. [REDACTED] confirms that the applicant has played a critical role in her husband's happiness and sobriety. [REDACTED] concludes that were the applicant to relocate abroad, her husband may resort back to old behaviors, and possibly abuse substances as a way of coping with extreme sadness and depression. [REDACTED] recommends that the applicant's spouse continue taking Cymbalta, an antidepressant, and contact a psychotherapist for further treatment. *Clinical Interview*, dated September 28, 2012. A letter has also been provided from [REDACTED] confirming that the applicant's spouse is under their care for severe anxiety and major depression and is undergoing treatment for these conditions. *See Letter from* [REDACTED] dated October 19, 2012. In addition, evidence of the applicant's spouse's numerous medical conditions and the need for continued treatment has been submitted by counsel. Further, numerous letters have been provided from the applicant's spouse's siblings, his pastor, co-workers and friends, establishing the hardships the applicant's spouse will experience were his wife to relocate abroad for a two-year period.

As for the financial hardship referenced, evidence of the applicant's gainful employment has been provided, establishing the applicant's critical contributions to the finances of the household and further corroborating the applicant's spouse's assertion that without the applicant's income, he will suffer financial hardship. *See Letter from* [REDACTED] dated August 15, 2012. Evidence of the applicant's and her spouse's financial obligations, including a mortgage, has also been provided. 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 the Dominican Republic to comply with her two-year foreign residency requirement.

The AAO thus concludes that the applicant has established that her U.S. citizen spouse would experience exceptional hardship were he to relocate to the Dominican Republic 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.