

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**

(b)(6)

Date: **FEB 19 2014**

Office: CALIFORNIA SERVICE CENTER [REDACTED]

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:
[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions.

Thank you,

[Handwritten signature: Ron Rosenberg]

Ron Rosenberg
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 Argentina who obtained J-1 nonimmigrant exchange status in August 2007. 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 the Exchange Visitors 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 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 August 16, 2013. The application was denied accordingly.

In support of the appeal, counsel submits the following: a brief; affidavits from the applicant and her spouse; mental health documentation pertaining to the applicant's spouse; biographic documents pertaining to the applicant and her spouse; financial documentation; and academic records for the applicant's spouse. 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 enrolled as a full-time college student at [REDACTED] and were he to relocate abroad, he would suffer academic hardship as he would have to cease his studies. In addition, the applicant's spouse explains that he has numerous financial obligations, including a mortgage and school loans, and were he to relocate abroad, he would not be able to obtain gainful employment due to his lack of education and unfamiliarity with the language. As a result, he would be at risk of defaulting on his many loans and negatively impacting his credit history. Finally, the applicant's spouse contends that he has no ties to Argentina and were he to relocate abroad, he would suffer due to long-term separation from his parents and sibling, his community, his studies, his employment contacts and his country. [REDACTED] dated September 13, 2013.

The applicant has submitted evidence of her spouse's current academic enrollment and past gainful employment with Titan Electric Company. Moreover, the applicant has submitted documentation establishing her spouse's extensive loan obligations, including a mortgage of over \$109,000 and student loans totaling over \$14,000. Were the applicant's spouse to relocate abroad, he would be separated from his parents, his community, his home, and his academic program. Further, he would face hardship as he is unfamiliar with the country, culture and language of Argentina. Based on a totality of the circumstances, the AAO finds that the applicant's U.S. citizen spouse would experience exceptional hardship were he to accompany the applicant to Argentina for two years.

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. He further explains that he recently quit his job to become a full-time student and due to this change, he needs his wife's financial contributions to fulfill his debt obligations and continue the pursuit of his 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 disruption and emotional and financial hardships. *Supra* at 1-2.

The applicant has submitted evidence of her gainful employment, earning over \$39,000 in 2011. In addition, the applicant's spouse has provided evidence establishing that he is currently enrolled in an

academic program. 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 an evaluation of the emotional, psychological and financial distress he would experience if the applicant is unable to reside in the United States. [REDACTED] notes that the distress has led to a diagnosis of Adjustment Disorder with Anxiety and long-term separation from the applicant would cause him significant long-term emotional and psychological trauma which would likely cause him to lose his home, drop out of school and ultimately result in him suffering from a depressive disorder.

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 college 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, her 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.

In application proceedings, it is the applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has been met. 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.