U.S. Department of Justice

Immigration and Naturalization Service

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

H3

[redacted]

FILE: [redacted] Office: Nebraska Service Center Date: OCT 3 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of the Foreign Residence Requirement under § 212(e) of the Immigration and Nationality Act, 8 U.S.C. 1182(e)

Public Copy

IN BEHALF OF APPLICANT:

[redacted]

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained, and the matter will be remanded to the director to request a § 212(e) waiver recommendation from the United States Information Agency (USIA).

The applicant is a native and citizen of the Colombia who is subject to the two-year foreign residence requirement of § 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because she participated in graduate medical education or training. The applicant is also subject to the foreign residence requirement because the Director, USIA, has designated Colombia as clearly requiring the services of persons with the applicant's specialized knowledge or skill.

The applicant was admitted to the United States as a nonimmigrant exchange visitor on August 14, 1993. The applicant married a United States citizen on December 12, 1997. The record is silent regarding the presence of a petition for alien relative. The applicant is now seeking the above waiver after alleging that her departure from the United States would impose exceptional hardship on her U.S. citizen spouse, baby son and two stepchildren.

The director determined that the record failed to establish that the applicant's departure from the United States would impose exceptional hardship upon her spouse (hereafter referred to as [redacted] The director also determined that the applicant would not be subject to persecution on account or race, religion, or political opinion. The director then denied the application accordingly.

On appeal, counsel states that [redacted] and child would suffer exceptional hardship due to [redacted] mental health problem, including alcoholism and psychiatric disorders; the dangers of a U.S. citizen being kidnapped and murdered in Colombia; the mental anguish [redacted] and his two children from a prior marriage would suffer from a two-year separation; the threat of financial ruin to the applicant and [redacted] because of the certainty of unemployment in Colombia due to [redacted] inability to speak Spanish; and the health, safety and emotional development risks to their infant child.

Section 212(e) EDUCATIONAL VISITOR STATUS: FOREIGN RESIDENCE REQUIREMENT; WAIVER.-No person admitted under § 101(a)(15)(J) of the Act or acquiring such status after admission-

> (i) whose participation in a 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 residence,
>
> (ii) who at the time of admission or acquisition of status under § 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 §§ 101(a)(15)(H) or 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or last residence for an aggregate of at 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 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 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 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 § 214(k): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General 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.

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that 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 does not represent exceptional hardship as contemplated by § 212(e) of the Act. See Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

In Keh Tong Chen v. Attorney General, 546 F. Supp. 1060 (D.D.C. 1982), the court addressed the issue of the waiver of the two-year foreign residence requirement. In a discussion of the term "exceptional hardship," the court specifically referred to the standards established in H.R. Rep. No. 721, 87th Cong., 1st Sess. 121 (1961), as follows:

> Courts deciding § 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 this 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 anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad. See Mendez v. Major, 340 F.2d 128, 132 (8th Cir. 1965); Talavera v. Pederson, 334 F.2d 52, 58 (6th Cir. 1964).

The court noted additionally that the significance traditionally accorded the family in American life warrants that where the applicant alleges that denial of a waiver will result in separation from both a citizen-spouse and a citizen-child, a finding of "no exceptional hardship" should not be affirmed unless the reasons for this finding are made clear. The court's insistence upon clear articulation of reasons in cases involving a citizen-spouse and a citizen-child is consistent also with Congressional policy.

Section 212(e) of the Act attempts to balance the interests of resident alien or citizen relatives of the applicant in maintaining family stability against the interests of the government in promoting the exchange program. See Gras v. Beechie, F. Supp 422 (S.D. Texas 1963). The government's interest in furthering the exchange program's goals remains constant regardless of the number of resident alien or citizen relatives the applicant has in this country. But the more relatives the applicant has who are citizens,

the more the balance tips in favor of granting the applicant a waiver.

The record contains a physician's report dated April 6, 2000 which reflects that suffers from alcohol dependence and psychiatric disorders which would be exacerbated by a two-year separation from his wife. The physician concludes that would suffer psychiatric distress leading to a relapse and increased difficulty with his alcoholism. The physician also concludes that would be unable to obtain ongoing treatment if he accompanied the applicant to Colombia. The medical evaluation concludes that would be unable to care for his newly born son and two older children if he remained in the United States while the applicant returns to Colombia alone. If he chose to accompany his wife and child to Colombia, he would have to quit his present job and would be unable to find employment in Colombia.

Matter of Savetamal, 13 I&N Dec. 249 (Reg. Comm. 1969), held that a permanent resident spouse would be forced to give up an established career and start over again upon his return to the United States after a two-year absence, should he accompany his wife abroad; should he stay in the United States, he would be faced with the unusual hardship of maintaining two households and their citizen child, two years old, would be deprived of the affection, emotional security and direction of its father, which is most important during its formative years.

In Matter of Arabian, 11 I&N Dec. 496 (D.D. 1966), a waiver was granted to a citizen of Turkey because the applicant's spouse could not find a job in the field of work in which he has been trained and there was a showing of exceptional hardship to his extended family members, including his two adopted children.

The record contains specific documentation which reflects that has certain ongoing medical and psychiatric problems, present and potential, which go beyond the normal. The record also reflects that also would be financially unable to provide child support for the two older children as well as maintain an additional household or to support his wife and baby in Colombia. As evidenced by the recent newspaper articles in the record, the economic situation in Colombia is in serious trouble and the lawless climate creates an unsafe environment for the baby.

Therefore, it is concluded that the applicant has established that exceptional hardship would be imposed upon and the baby whether they accompany the applicant to Colombia or remain in the United States while the applicant returns temporarily to Colombia alone or with the baby.

In this proceeding, it is the applicant alone who bears the full burden of proving his or her eligibility. Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957), and Matter of Y--, 7 I&N Dec. 697 (BIA 1958). In this case, the burden of proof has been met, and the appeal will be sustained.

It must be noted that a waiver under § 212(e) of the Act may not be approved without the favorable recommendation of the USIA. Accordingly, this matter will be remanded to the acting district director to file a Request For USIA Recommendation Section 212(e) Waiver (Form I-613) together with the waiver application in this case (Form I-612). If the USIA recommends that the application be approved, the application must be approved. On the other hand, if the USIA recommends that the application not be approved, then the application must be re-denied without appeal.

ORDER: The appeal is sustained. The director's decision is withdrawn. The record of proceeding is remanded to the director for action consistent with the foregoing.