



U.S. Department of Justice
Immigration and Naturalization Service

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



FILE [REDACTED] Office: Vermont Service Center

Date: OCT 18 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: Self-represented

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, Vermont 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 Macedonia who initially was admitted to the United States as a nonimmigrant exchange visitor on June 10, 1996 and remained until October 1996. He was sponsored by [REDACTED] Program No. [REDACTED] and the consular officer clearly indicated on his Form IAP-66 that he was not 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). He was admitted for the purpose of general orientation of the United States and received a total of \$800.00 in funding.

The applicant was next admitted to the United States on June 9, 1997, as a nonimmigrant exchange visitor. He was sponsored by the same organization with the same funding but this time the same consular officer indicated that he was subject to the two-year foreign residence requirement.

The applicant married a United States citizen on November 5, 1999 and is now seeking the above waiver after alleging that his departure from the United States would impose exceptional hardship on his U.S. citizen spouse and stepson.

The director determined the record failed to establish that the qualifying relatives would suffer exceptional hardship and denied the application accordingly.

On appeal, the applicant wonders why he is subject to the two-year foreign residence requirement when one year earlier he was not subject to it. The applicant states that there have been no changes in his status in his home country, he was still an undergraduate student in mechanical engineering with no special skills that would be valuable to Macedonia. The applicant states that the program involved a work and travel program for students during their summer break. Students had to cover all the financial expenses for travelling to and from the United States, accommodations in the United States and pay a fee to the sponsor who helped them find jobs.

The applicant discusses the health condition of his stepson who has had two surgeries for urethral fistula and has been under constant therapy for asthma. The applicant states on August 9, 2000 that the child's next surgery is scheduled for August 11, 2000 and it would be very difficult for his wife and the child to accompany him to Macedonia. The applicant the discusses the hardship of separation and financial hardship if his family should remain in the United States while he returns temporarily to Macedonia.

Section 212(e) EDUCATIONAL VISITOR STATUS; FOREIGN RESIDENCE REQUIREMENT WAIVER.-No person admitted under § 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 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,...

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 his 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...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),...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....

The determination by the same consular officer that the applicant was not and then was subject to the two year foreign residence requirement has not been clarified for the record. However, in Slyper v. Attorney General, 576 F. Supp. 559 (D.D.C. 1983), rev'd on other grounds, 827 F.2d 821 (D.C.Cir. 1987), cert. denied, 485 U.S. 941 (1988), the court aptly observed that the "exceptional hardship" standard is stringent so that aliens will not be able to create such hardships themselves in order to evade the purpose of the foreign residence requirement. The court also noted that the alien in Slyper v. Attorney General, supra, was specifically assured by the American Vice Counsel that he would not have to depart from the United States for two years, and that determination was noted on the alien's official exchange visitor document. He then married a United States citizen during his temporary stay. The court determined that the absence of the threat of a possible two-year separation was an important consideration with regard to

the party's marriage plans, and the problems and hardships were not manufactured by the alien and his spouse; they were created, or at least heavily influenced, by an agent of the government.

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.

The record contains specific documentation which reflects that the applicant's stepchild has certain medical problems, present and potential, which go beyond the normal and a third surgery had been scheduled for August 11, 2000. The record also reflects that the applicant appears to have relied on a consular officer's determination that he initially was not subject to the two-year foreign residence requirement but then was subject to the requirement the following year without explanation. It is concluded that the record now contains evidence of hardships which, in their totality, rise to the level of exceptional as envisioned by Congress.

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.