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U.S. Department of Justice

Immigration and Naturalization Service

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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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: JAN 24 2003

IN RE: Applicant: [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)

IN BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that 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 that 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 that originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, 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 section 212(e) waiver recommendation from the Director, Waiver Review Division, U.S. State Department Visa Office (WRD).

The applicant is a native and citizen of Pakistan who is subject to the two-year foreign residency requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant was admitted to the United States as a nonimmigrant exchange visitor on April 6, 1998, to participate in graduate medical education. The applicant seeks the above waiver after alleging that his departure from the United States would impose exceptional hardship on his U.S. citizen child, who was born in November 2000.

In his decision the director noted that the applicant and his spouse are both landed immigrants in Canada, and that the child could receive the same treatment there. The director then determined that the record failed to establish that the applicant's departure from the United States would impose exceptional hardship upon his U.S. citizen child and denied the application accordingly.

On appeal, counsel states that it is his understanding of the regulations at 8 C.F.R. § 212.7(c)(2) that the applicant can only fulfull his two-year foreign residency requirement in Pakistan, not in Canada. Counsel requests that the Service issue a formal decision allowing the applicant to fulfill his two-year residency requirement in Canada in lieu of Pakistan.

The statute at section 212(e) of the Act provides that fulfillment of the residency requirement be in the alien's country of nationality or last residence. In the present case, the applicant's nationality and last residence are both Pakistan. Therefore, the applicant must return to Pakistan in order to fulfill that obligation.

On appeal, counsel states that the applicant's child has been diagnosed with phenylketonuria (PKU), which is a rare metabolic disease that results in severe mental retardation and other neurological problems if not treated properly. Management of this disease includes a special diet, weekly blood tests, bi-weekly hospital visits until age 13, and monthly hospital visits for one's entire life.

Section 212(e) of the Act provides that no person admitted under section 101(a)(15)(J) of the Act or acquiring such status after admission-

> (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 at least two years following departure from the United States:
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> 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),....

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 section 212(e) of the Act. 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 child has medical problems, present and potential, which go beyond the normal and for which treatment is not available in Pakistan. It is concluded that the record now contains sufficient evidence of hardship which rises 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. Section 291 of the Act, 8 U.S.C. § 1361. In this case, the burden of proof has been met, and the appeal will be sustained.

It must be noted that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the WRD. Accordingly, this matter will be remanded to the acting district director to file a Request For WRD Recommendation Section 212(e) Waiver (Form I-613) together with the waiver application in this

case (Form I-612). If the WRD recommends that the application be approved, the application must be approved. On the other hand, if the WRD 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.