



U.S. Department of Justice

Immigration and Naturalization Service

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

[REDACTED]

FILE: A74 944 520 Office: Vermont Service Center

Date:

FEB 7 2001

IN RE: Applicant:

[REDACTED]
nee [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)

IN BEHALF OF APPLICANT:

BRUCE A. HAKE
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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

Robert P. Wiemann, Acting 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 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. She is also subject to the two-year foreign residence requirement because the Director, United States Information Agency (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 in June 1994. The applicant married a United States citizen in August 1999. She 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 and child.

The director determined the record failed to establish that her U.S. citizen spouse would suffer exceptional hardship and denied the application accordingly.

On appeal, counsel states that the term "exceptional hardship" in the § 212(e) context means exactly the same thing as "extreme hardship" in other contexts including former suspension of deportation cases. It must be noted that the application of the terms "exceptional hardship" and "extreme hardship" was not exactly the same in those cases because such hardship to the applicant in former suspension of deportation cases was a consideration but it has never been a consideration to an applicant when determining hardship in § 212(e) cases.

On appeal, counsel states that § 212(e) of the Act has not changed since 1976, thus all of the case law remains valid and binding. Counsel states that in Matter of Mangour, 11 I&N Dec. 306 (D.D. 1965), the waiver was granted after it was held that compliance with the foreign residence requirement would result in exceptional hardship to the applicant's citizen spouse not only as a result of accompanying him abroad but also as the result of her having to remain in the United States while he fulfills his obligation since due to an existing emotional problem, and according to medical opinion, she would suffer undue mental anguish at this time if deprived of the companionship of her husband.

Counsel discusses the documentation in the record regarding the hardships posed by the violence in Colombia and the corresponding hardship to the qualifying relatives whether the applicant returns to Colombia herself or whether she is accompanied by her spouse and child.

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, 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 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 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.

The Act of April 7, 1970, Pub.L. No. 91-225, § 2, 84 Stat. 117, removed most exchange visitors from the ambit of the two-year foreign residence requirement. The same amendments expanded the grounds upon which waivers of that requirement could be sought by exchange visitors who are still subject to its terms. The 1976 legislation imposed additional restrictions on foreign doctors.

In its original form in the Act of June 4, 1956, § 212(e) of the statute did not expressly allow a waiver of the two-year foreign residence requirement because of hardship although they were permitted by regulation. In 1961 codification specifically authorized such waivers and this authorization was unchanged by the 1970 and 1976 amendments. Before the 1961 amendments, waivers of the two-year period because of hardship were readily granted. After the 1961 amendments the Service for several years acted quite strictly in passing on claims of alleged exceptional hardship, in line with legislative intent. Most claims of hardship were rejected until 1965. After 1965, under accumulating humanitarian pressures and other reasons, there was a relaxation of the former rigidity in considering hardship claims.

The 1970 amendments significantly narrowed the applicability of the foreign residence requirement and some of the hardship situations previously encountered no longer arise. In 1976, Congress reimposed the foreign residence requirement on physicians coming for graduate medical training. The last case law decisions generated by the Service were in a deportation proceeding in 1985 and a legalization proceeding in 1989. There is one lone case dated 1970 or later which specifically addresses the concept of exceptional hardship; Matter of Gupta, 13 I&N Dec. 322 (Dep. Assoc. Comm. 1970), where both parents were subject to the two-year foreign residence requirements.

Although 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.

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.

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.

The record clearly establishes that the applicant's spouse would suffer exceptional hardship if he abandoned his present career in the United States to accompany his wife and child to Colombia where his life would be at risk as a United States citizen. The record also contains specific documents which reflect that the applicant's husband would be faced with certain additional problems and anxieties, such as fear for the safety of his wife and/or child if she returned to Colombia without him where her personal chance of being kidnapped, tortured or killed is greater than 25%. These anxieties go beyond the normal. It is concluded that the record now also contains evidence of hardships including separation, fear and anxiety which, in their totality, rise to the level of exceptional as envisioned by Congress if the applicant's husband remains in the United States while she returns to Colombia either with or without their child.

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.