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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**



[Redacted]

Date: **MAY 05 2014**

Office: CALIFORNIA SERVICE CENTER

FILE: [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,

A handwritten signature in black ink, appearing to read "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 Jamaica who obtained J-1 nonimmigrant exchange status in July 1977 to participate in graduate medical education or training. He is thus 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). The applicant presently seeks a waiver of his two-year foreign residence requirement to remain in the United States with his three U.S. citizen children, born in 1983, 1984 and 1987.

The director determined that the applicant failed to establish that he had a qualifying relative, namely a U.S. citizen or lawful permanent resident spouse and/or minor child. The application was denied accordingly. *See Director's Decision*, dated September 9, 2013.

In support of the appeal, counsel submits a brief and a telecon recap regarding survivor benefits under section 204(l) of the Act. 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).

On appeal, counsel states that the applicant’s U.S. citizen spouse passed away in May 2011, resulting in the automatic revocation of the approved Form I-130 petition filed on behalf of the applicant. However, on December 26, 2012, counsel documents that the USCIS reaffirmed the approval of the Form I-130 petition based on humanitarian reasons. Counsel asserts that section 204(l) of the Act renders the applicant eligible for an I-612 waiver despite the fact that the applicant does not have a qualifying relative at this time as the death of the applicant’s spouse should be deemed to be the equivalent of a finding of exceptional hardship. The AAO concurs with counsel, as discussed in detail below.

With respect to the applicant’s spouse’s death in May 2011 and its impact on the applicant’s Form I-612, the new section 204(l) of the Act, which became effective on October 28, 2009, states as follows:

1) Surviving Relative Consideration for Certain Petitions and Applications-

(1) IN GENERAL- An alien described in paragraph (2) who resided in the United States at the time of the death of the qualifying relative and who continues to reside in the United States shall have such petition described in paragraph (2), or an application for adjustment of status to that of a person admitted for lawful permanent residence based upon the family relationship described in paragraph (2), and any related applications, adjudicated notwithstanding the death of the qualifying relative, unless the Secretary of Homeland Security determines, in the unreviewable discretion of the Secretary, that approval would not be in the public interest.

(2) ALIEN DESCRIBED- An alien described in this paragraph is an alien who, immediately prior to the death of his or her qualifying relative, was--

- (A) the beneficiary of a pending or approved petition for classification as an immediate relative (as described in section 201(b)(2)(A)(i));
- (B) the beneficiary of a pending or approved petition for classification under section 203 (a) or (d);

- (C) a derivative beneficiary of a pending or approved petition for classification under section 203(b) (as described in section 203(d));
- (D) the beneficiary of a pending or approved refugee/asylee relative petition under section 207 or 208;
- (E) an alien admitted in 'T' nonimmigrant status as described in section 101(a)(15)(T)(ii) or in 'U' nonimmigrant status as described in section 101(a)(15)(U)(ii); or
- (F) an asylee (as described in section 208(b)(3)).

As correctly noted by counsel, section 204(l) of the Act is not limited to visa petitions, but also applies to adjustment applications and "any related applications," including the instant I-612 application. The applicant qualifies for relief under section 204(l) of the Act, as the record indicates that he was residing in the United States when his wife died, he continues to reside in the United States at this time and he is the beneficiary of an approved family-based visa petition that was recently reaffirmed by the USCIS. *See Form I-130 Approval Notice*, dated May 23, 1983 and *Form I-130 Reaffirmation Notice*, dated December 26, 2012. Consequently, the applicant is eligible to obtain a Form I-612 waiver based on exceptional hardship to his spouse, the original petitioner of the Form I-130 on behalf of the applicant, who is now deceased.

To implement section 204(l) of the Act, USCIS issued a policy memorandum on December 16, 2010 adding Chapter 10.21 to the Adjudicator's Field Manual (AFM). *See Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act*, USCIS Policy Memorandum, December 16, 2010. Pursuant to AFM Chapter 10.21(c)(5), the fact that the qualifying relative has died will be "deemed to be the functional equivalent of a finding of extreme hardship...." Consequently, a review of the record reflects that the applicant has established exceptional hardship for purposes of a waiver of the two-year foreign residence requirement under section 212(e) of the Act.

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.

**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.