



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

In Re: 28334448

Date: NOV. 15, 2023

**Appeal of California Service Center Decision**

Form I-612, Application for Waiver of the Foreign Residence Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended)

The Applicant seeks a waiver of the two-year foreign residence requirement for certain J nonimmigrant visa holders. Immigration and Nationality Act (the Act) section 212(e), 8 U.S.C. § 1182(e).

The Director of the California Service Center denied the Form I-612, Application for Waiver of the Foreign Residence Requirement (waiver application), concluding that the record did not establish, as required, that the Applicant has a U.S. citizen or lawful permanent resident qualifying relative. On appeal, the Applicant submits additional evidence and asserts that she is eligible for the benefit sought by virtue of her marriage to a U.S. citizen who is now deceased.

The Applicant bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, as explained below, we will remand the matter to the Director for the entry of a new decision.

A noncitizen admitted under section 101(a)(15)(J) of the Act who is subject to a two-year foreign residency requirement is not eligible to apply for an immigrant visa, permanent residence, or an H or L nonimmigrant visa until it is established that the noncitizen has resided and been physically present in the country of their nationality or last residence for an aggregate of at least two years following departure from the United States. Section 212(e) of the Act. The statute provides for waiver of this requirement, however, when it is determined that departure from the United States would impose exceptional hardship upon the noncitizen's U.S. citizen or lawful permanent resident spouse or child, and approval of the waiver is in the public interest. *Id.*

The record establishes that the Applicant is subject to the two-year foreign residence requirement under section 212(e) of the Act. In September 2017, the Applicant submitted the waiver application, seeking a waiver of the two-year foreign residence requirement based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to Kenya temporarily with the Applicant and, in the alternative, if he remained in the United States while the Applicant fulfilled the two-year foreign residence requirement in Kenya.

In November 2022, the Director issued a Notice of Intent to Deny (NOID). The Director noted that the record established that the Applicant's U.S. citizen spouse had passed away in May 2020 and as such, she needed to submit documentation of a qualifying relative that would experience exceptional hardship if she were to relocate abroad for a two-year period. In response to the NOID, the Applicant asserted that she remains eligible for a waiver of the two-year foreign residence requirement, despite the death of her U.S. citizen spouse, pursuant to the surviving relative provisions set forth in section 204(l) of the Act. In support on her assertion, she noted that she was residing in the United States when her U.S. citizen spouse died, she continues to reside in the United States at this time, and she is the beneficiary of an approved family-based visa petition.<sup>1</sup> The Director denied the application, finding that the Applicant had not established that she had a qualifying relative for purposes of a waiver of the two-year foreign residence requirement.<sup>2</sup>

On appeal, the Applicant asserts that the Director erred in denying the waiver application because despite not having a qualifying relative at the time, the death of her U.S. citizen spouse should be deemed the functional equivalent of a finding of exceptional hardship pursuant to the surviving relative provisions of section 204(l) of the Act.

Based on the Applicant's assertions on appeal and the supporting documentation in the record, we find it appropriate to remand the matter for the Director to determine whether the Applicant has established eligibility for a waiver of the two-year foreign residence requirement.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

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<sup>1</sup> A copy of the Applicant's U.S. citizen's spouse death certificate is in the record; his date of death is listed as May 11, 2020. The record also contains documentation establishing that the Form I-130, Petition for Alien Relative, filed by the Applicant's U.S. citizen spouse on her behalf was approved in November 2020.

<sup>2</sup> We note that in the decision to deny the waiver application, the Director did not address the Applicant's assertions in response to the NOID that she remains eligible for a section 212(e) waiver based on the surviving relative provisions of section 204(l) of the Act.