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**THE HARDSHIP WAIVER OF THE TWO-  
YEAR FOREIGN RESIDENCY REQUIREMENT  
UNDER SECTION 212(E) OF THE INA:  
THE NEED FOR A CHANGE**

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## INTRODUCTION

Under the Immigration and Nationality Act ("INA"),<sup>1</sup> aliens who wish to be admitted to the United States must avoid any determination of inadmissibility.<sup>2</sup> This Comment addresses one specific ground of inadmissibility, the two-year foreign residency requirement imposed on former exchange visitors.<sup>3</sup> Section 212(e) of the INA, as currently in force, prohibits certain exchange program participants<sup>4</sup> from applying for permanent resident status,<sup>5</sup> temporary worker visas,<sup>6</sup> or business visas<sup>7</sup> after completion of an exchange program, unless the exchange students first return to their home countries and reside there for at least two years.<sup>8</sup>

This two-year foreign residency requirement is often a "significant life hurdle"<sup>9</sup> for exchange students.<sup>10</sup> For example, after coming to

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1. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1524 (1994 & Supp. III 1997)).

2. The INA contains various grounds of inadmissibility, exclusion, or reasons why classes of aliens are "ineligible to receive visas and ineligible to be admitted to the United States" unless they qualify for a waiver. *See id.* § 212(a). Aliens may be considered ineligible for admission based on the following grounds: (1) health-related grounds; (2) criminal grounds; (3) security grounds; (4) the likelihood of becoming a public charge, i.e., receiving financial support from the government; (5) labor certification grounds; and (6) illegal entry. *See id.* In addition, an alien must fit into one of the "statutory categories of immigrant or nonimmigrant." *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 290 (2d ed. 1997) (providing examples of the types of immigrants and nonimmigrants that fall under these statutory categories); *see also* Immigration and Nationality Act § 101(a)(15) (defining the classes of nonimmigrant aliens and the term "immigrant"). An immigrant, or a permanent resident, or green card holder, is an alien who is admitted lawfully to the United States permanently. *See id.* § 101(a)(15) (defining the term "immigrant" as all aliens who do not fall into any of the nonimmigrant categories). Nonimmigrants, on the other hand, enter the United States for a limited purpose and for a limited period of time. *See id.* With a few limited exceptions, *see, e.g., id.* § 101(a)(15)(L), nonimmigrant status requires that the alien maintain "a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily." *See id.* § 101(a)(15)(B) (defining temporary business and pleasure nonimmigrant visitor status).

3. Section 212(e) of the Immigration and Nationality Act applies to this ground of inadmissibility and is titled "Educational Visitor Status; Foreign Residence Requirement; Waiver." *See* Immigration and Nationality Act § 212(e).

4. *See infra* notes 45-48 and accompanying text (specifying the classes of exchange students that are inadmissible).

5. *See supra* note 2 (defining permanent resident, or immigrant, status).

6. *See* Immigration and Nationality Act § 101(a)(15)(H) (providing for a category of nonimmigrant aliens who come to the United States to work temporarily, or as temporary trainees, and conditioning the granting of H visas to aliens on a finding that "unemployed persons capable of performing such services or labor cannot be found in this country . . . for some applicants").

7. *See id.* § 101(a)(15)(L) (allowing entry of aliens who come to the United States to continue rendering services to the same employer for which they worked in a managerial position provided that the aliens have been employed by their employers or affiliates for a certain time).

8. *See id.* § 212(e).

9. Bruce A. Hake, *Hardship Waivers for J-1 Physicians*, IMMIGR. BRIEFINGS, Feb.

the United States as exchange visitors,<sup>11</sup> some exchange students marry U.S. citizens or permanent residents and have children, especially when the students continue their studies in the United States after completion of the exchange program.<sup>12</sup> Requiring departure from the United States for two years can result in: the separation of exchange students from their U.S. citizen or permanent resident spouses, children, or other relatives; a disruption of the exchange students' and spouses' careers; and financial difficulties for the exchange students and their spouses.<sup>13</sup>

The INA provides an exception to the two-year foreign residency requirement, however, if the exchange visitors can demonstrate that their departure will cause exceptional hardship upon their U.S. citizen or permanent resident spouses or children.<sup>14</sup> Courts and administrative agencies apply this hardship exception in a narrow fashion.<sup>15</sup> Moreover, even if the former exchange student demonstrates exceptional hardship, the United States Information Agency ("USIA")<sup>16</sup> still may refuse to grant a waiver on the grounds of

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1994, at 1, 8 (noting, for example, that physicians often face the most hardship because of the requirement due to their long periods of medical training which result in close ties with the United States).

10. The exact number of exchange visitors subject to the two-year foreign residency requirement is unknown, but it is estimated to be over 100,000. *See* United States Information Agency, *Exchange Visitor Program* (visited Oct. 18, 1998) <[http://www.usia.gov/abtusia/legal/gc-ducs/j\\_exchange/register/jselect9.htm](http://www.usia.gov/abtusia/legal/gc-ducs/j_exchange/register/jselect9.htm)> [hereinafter *Exchange Visitor Program*] (providing information about the Exchange Visitor Program).

11. Exchange visitors enter the United States after receiving J-1 visas. *See* Immigration and Nationality Act § 101(a)(15)(J) (defining J visa visitor as an alien who maintains his residence abroad with no intent of abandoning it and who is entering the country as a student, scholar, trainee, teacher, professor, research assistant, or specialist, with the purposes of studying, teaching, receiving training, or other similar purposes).

12. One of the reasons why exchange visitors stay after completion of the funding from the government is to continue their education. After completion of their exchange programs, former exchange students are allowed to stay in the United States for further studies towards a degree using personal finances, and without using government funding, in which case they have an F-1 status. *See* Immigration and Nationality Act § 101(a)(15)(F)(i) (designating the F-visa category for aliens who enter the United States temporarily as bona fide students for pursuing studies and not prohibiting former exchange students from acquiring such status); *id.* § 212(e) (not prohibiting former exchange students from applying for an F-1 visa). Still, even after possessing a visa other than a J-1 visa, former exchange students remain subject to the two-year foreign residency requirement. *See id.*

13. *See* Hake, *supra* note 9, at 1 (noting that the requirement results in financial and other difficulties having serious social and personal ramifications).

14. *See* Immigration and Nationality Act § 212(e) (granting the Attorney General authority to issue waivers based on "exceptional hardship"). The exceptional hardship standard is discussed *infra* in Part I.B.

15. *See infra* Part I.B (explaining that the section 212(e) hardship waiver provision is harshly enforced).

16. The USIA is an independent foreign affairs agency, with posts in 147

program and policy considerations.<sup>17</sup>

Part I of this Comment briefly reviews the underlying purposes for launching exchange programs, and examines the legislative intent of the two-year foreign residency requirement for exchange students and the manner in which courts and federal agencies have interpreted the exceptional hardship provision. Part II.A demonstrates how the foreign residency requirement infringes upon the constitutional rights of U.S. citizens and permanent residents, and suggests that when balancing the competing interests of students and their families against governmental interests, governmental interests should not receive undue deference. Part II.B argues that section 212(e) of the INA contradicts the numerous concessions granted to bona fide marriages by other provisions of the INA. Part II.B suggests that the process of adjudicating hardship waivers under 212(e) requires consent of an additional agency, USIA, and now its successor, which is not required for other waivers. Part III recommends that Congress create a bona fide marriage exception to the two-year foreign residency requirement imposed on exchange students.

## I. BACKGROUND

### A. *Exchange Programs and the Two-Year Foreign Residency Requirement*

Congress piloted exchange programs<sup>18</sup> for foreign students with the enactment of the United States Information and Educational Exchange Act of 1948,<sup>19</sup> which was supplanted later by the Fulbright-

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countries, that conducts a range of informational programs and educational and cultural activities. See Glenn Robert Lawrence, *Are We Exporting Our Legal System?*, 41 FED. B. NEWS & J. 672, 673 (1994). The USIA administers exchange programs and, along with other responsibilities, reviews waivers of the two-year residency requirement. See generally Exchange Visitor Program, 22 C.F.R. § 514 (1999) (detailing provisions and requirements for exchange visitors, including the residency requirement in the nation of origin). As of October 1, 1999, the USIA officially ceased to exist. The functions of the former agency and its staff members were transferred to the Department of State. See Ben Barber, *USIA Officially Disappears As Staffers Go To State*, WASH. TIMES, Oct. 1, 1999, at A12.

17. See *infra* Part I.A (discussing the policy grounds behind the enactment of the two-year foreign residency requirement that might cause the USIA to deny waivers).

18. Exchange Visitor Programs, or exchange programs, are educational and cultural programs in the United States for foreign nationals that also encourage Americans to participate in similar programs in other countries. See 22 C.F.R. § 514.1(b).

19. United States Information and Educational Exchange (Smith-Mundt) Act of 1948, Pub. L. No. 80-402, 1948 U.S.C.A.N. (62 Stat. 6) 4, *amended by* Immigration and Nationality Act § 402(f), Pub. L. No. 82-414, 66 Stat. 163, 276 (codified at 22 U.S.C. § 1446), *and* Exchange Visitors-Immigration Status Act, Pub. L. No. 84-555, 1956 U.S.C.A.N. (70 Stat. 241, 241) 289, 289-90 (codified as amended at 8 U.S.C.

Hays Act of 1961.<sup>20</sup> In addition to the goal of strengthening educational cooperation,<sup>21</sup> the exchange programs were intended to disseminate information about the United States abroad<sup>22</sup> and “interpret the spirit of America to the world.”<sup>23</sup> Exchange students were to assist in this endeavor by sharing their positive impressions of the United States with family and friends upon returning to their home countries.<sup>24</sup> Congress viewed the promotion of these ideas as part of a U.S. foreign policy program that was crucial in light of the “hostile propaganda campaigns directed against democracy, human welfare, freedom, truth, and the United States” that originated in the Soviet Union.<sup>25</sup> Thus, in return for educational funding from the U.S. government,<sup>26</sup> exchange students became tools of U.S. foreign policy.<sup>27</sup>

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§ 1182(e) (1994 & Supp. III 1997)), *repealed in part by* Mutual Educational and Cultural Exchange (Fulbright-Hays) Act of 1961 § 111(a)(2), Pub. L. No. 87-256, 75 Stat. 527, 538, 610 (codified as amended in scattered titles and sections of the U.S.C.).

Foreign exchange programs with Latin American countries existed, however, before 1948 as part of an educational and scientific cooperation. For an overview, see S. REP. NO. 80-811, at 2 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1011, 1012, which reviews pre-1948 programs that were established after Inter-American conferences in Buenos Aires in 1936, and Lima in 1938.

20. Mutual Educational and Cultural Exchange (Fulbright-Hays) Act of 1961, Pub. L. No. 87-256, 75 Stat. 527 (codified as amended in scattered titles and sections of the U.S.C.).

21. *See id.* § 102, 75 Stat. 527-28 (listing the provision of technical and other assistance and exchange of information on education and sciences as the second objective for establishing the programs).

22. *See* S. REP. NO. 80-811, at 1, *reprinted in* 1948 U.S.C.C.A.N. 1011, 1011 (stating that communicating information about the U.S. was the first purpose of the Fulbright-Hays Act which continued exchange programs).

23. *Id.* at 3, *reprinted in* 1948 U.S.C.C.A.N. 1011, 1013 (discussing the political situation after World War II and noting the need for a public relations program in the United States).

24. *See id.* at 4, *reprinted in* 1948 U.S.C.C.A.N. 1011, 1014 (concluding that social communication is an integral part of U.S. foreign policy that can be achieved through foreign student exchange programs).

25. *See id.*, *reprinted in* 1948 U.S.C.C.A.N. 1011, 1014.

26. In 1999, the U.S. government was planning to spend approximately \$199,024,000 on educational and cultural exchange programs that are conducted through the USIA. *See* United States Information Agency, *USIA Performance Plan Fiscal Year 1999* (visited Dec. 19, 1998) <<http://www.usia.gov/agency/pp99.htm>>. Over 175,000 students from foreign countries visited the United States in 1998 under the auspices of such programs. *See Exchange Visitor Program*, *supra* note 10; *see also* United States Information Agency, Letter from Les Jin, General Counsel of the USIA, to Amy M. Nice, Esq., Chair of the USIA Liaison & Advocacy Committee, American Immigration Lawyers Association (May 20, 1996) (visited Oct. 29, 1998) <<http://www.usia.gov/abtusia/legal/gc/jexchang/waivers.htm>> [hereinafter Letter from USIA].

27. Mutual Educational and Cultural Exchange (Fulbright-Hays) Act, Pub. L. No. 87-256, 75 Stat. 527 (1961) (codified as amended in scattered titles and sections of the U.S.C.), continued the primary purpose of the exchange programs as a tool of foreign policy: “[i]n the current struggle for minds of men, no other instrument of

In 1956, to further support the underlying foreign relations purpose of the exchange programs, Congress enacted the Exchange Visitors-Immigration Status Act,<sup>28</sup> which prohibited former exchange students from applying for immigrant<sup>29</sup> and H, or temporary worker,<sup>30</sup> visas.<sup>31</sup> Congress introduced this restriction on the admission of former exchange students in response to finding that many exchange students re-entered the United States as immigrants or nonimmigrants immediately after the expiration of their programs.<sup>32</sup> U.S. legislators became concerned that these practices defeated the original purpose of the exchange programs<sup>33</sup> and that the money

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foreign policy has such great potential." H.R. REP. NO. 87-1094, at 2 (1961), *reprinted in* 1961 U.S.C.C.A.N. 2759, 2759; *see also* 107 CONG. REC. 11,401 (1961) (statement of Sen. Fulbright) (pointing out that it was a well established fact that exchange programs were an important part of U.S. foreign policy). In addition to stating the foreign policy objectives, the legislative history of the Fulbright-Hays Act stressed cultural cooperation and praised exchange programs for breaking stereotypes about cultures. *See* H.R. REP. NO. 87-1094, at 2, *reprinted in* 1961 U.S.C.C.A.N. 2759, 2759-60 (noting that continuing programs of educational and cultural cooperation is crucial to the social welfare of the United States and the American people); 107 CONG. REC. 11,400 (1961) (statement of Sen. Fulbright) (expressing the sentiment that exchange programs reduce the "dangers that come from the bad habit of creating stereotyped inaccurate images of other countries and their peoples"); *see also* 105 CONG. REC. 1952 (1959) (statement of Rep. Walter) (noting the importance of exchange programs to the advancement of educational cooperation).

28. Exchange Visitors-Immigration Status Act, Pub. L. No. 84-555, 70 Stat. 241 (1956) (codified as amended at 8 U.S.C. § 1182(e) (1994 & Supp. III 1997)).

29. An immigrant is a person who is seeking to enter the United States as a permanent resident, or green-card holder, *see supra* note 2, as opposed to a nonimmigrant who is entering the country for a limited purpose and for a limited period of time. *See* Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1994).

30. *See* Immigration and Nationality Act § 101(a)(15)(H) (covering nurses, agriculture workers, and non-permanent employees except graduate students); *see also supra* note 6 and accompanying text (discussing persons covered by temporary worker visas).

31. *See* Exchange Visitors-Immigration Status Act § 201 (b).

32. *See* S. REP. NO. 84-1608, at 4 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2662, 2665. Prior to the 1956 legislation, exchange students merely were required to depart from the United States when their exchange programs expired. *See id.*, *reprinted in* 1956 U.S.C.C.A.N. 2662, 2665. After their departure, however, some former students who were interested in returning to the United States immediately applied for an immigrant or another nonimmigrant visa. *See id.*, *reprinted in* 1956 U.S.C.C.A.N. 2662, 2665 (noting that according to unofficial sources, five to ten percent of government-sponsored exchange visitors admitted to the United States in 1955 failed to return home); *see also* 102 CONG. REC. 5019 (1956) (statement of Sen. Fulbright) (commenting that from the very beginning of the program "increasing numbers of exchange visitors have sought to remain here at the expiration of their authorized stay, by obtaining immigrant status through one device or another").

33. *See supra* notes 22-27 and accompanying text (noting that the congressional intent was to have exchange students return to their home country and promote American ideology); *see also* S. REP. NO. 84-1608, at 4, *reprinted in* 1956 U.S.C.C.A.N. 2662, 2665 (pointing out that the United States is interested in having exchange students return to their home countries and promote U.S. understanding abroad by sharing with their friends and family their favorable impressions of the United States).

allocated for exchange students' U.S. education went to waste.<sup>34</sup> In 1961, Congress passed the Fulbright-Hays Act,<sup>35</sup> which modified the requirement by mandating that exchange visitors return to their country of nationality, last residence, or other permitted foreign country upon completion of the exchange program.<sup>36</sup> In 1970, Congress eliminated the third-country choice,<sup>37</sup> and the restriction became known as the two-year foreign residency requirement.<sup>38</sup>

The two-year foreign residency requirement under section 212(e) of the INA<sup>39</sup> prohibits certain exchange visitors holding J visas<sup>40</sup> from

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34. See 102 CONG. REC. 8563 (1956) (statement of Rep. Judd) ("My children do not get educated at public expense . . . . Why should we bring a lad from another country and train him at public expense and then take him back in . . . without his having rendered the service to his own country for which he was given the training?").

35. Mutual Educational and Cultural Exchange (Fulbright-Hays) Act, Pub. L. No. 87-256, 75 Stat. 527 (1961) (codified as amended in scattered titles and sections of the U.S.C.).

36. See *id.* § 109(c). The purpose of this limitation was to prevent visitors from developing countries from fulfilling the two-year requirement in Canada and not in the needy country. See H.R. REP. NO. 87-1094, at 16 (1961), reprinted in 1961 U.S.C.C.A.N. at 2759, 2774 (stating that the purpose of the two-year requirement is to prevent an exchange alien from spending his two years in an area other than his home country).

37. See Immigration and Nationality Act—Entry of Non-immigrants, Pub. L. No. 91-225, § 2, 84 Stat. 116, 116-17 (1970) (codified at 8 U.S.C. § 1182(e) (1994 & Supp. III 1997)) (amending section 212(e) of the INA to eliminate the existing provision whereby exchange visitors could fulfill the two-year residency requirement in a permitted foreign country other than that of their nationality or last residence).

38. For a comprehensive review of the legislative and administrative history of the two-year foreign residency requirement, see generally Scott F. Cooper et al., *Exchange Visitors*, IMMIGR. BRIEFINGS, Oct. 1993, at 2-4. Also, for a discussion of the two-year foreign residency requirement, see generally Russell G. Donaldson, Annotation, *Foreign Residence Requirement for Educational (Exchange) Visitors Under § 212(e) of Immigration and Nationality Act (8 U.S.C.S. § 1182(e))*, 48 A.L.R. FED. 509 (1980 & Supp. 1997).

39. Immigration and Nationality Act § 212(e) states:

*Provided*, that upon the favorable recommendation of the Director [of the United States Information Agency], pursuant to the request of an interested U.S. government agency . . . , 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), . . . the Attorney General may waive the requirement of such two-year foreign residence abroad . . . .

Immigration and Nationality Act § 212(e). The Code of Federal Regulations delegates the functions of the Attorney General, with regard to the provisions of section 212(e) of the INA, to the Commissioner of Immigration and Naturalization, who, in turn, delegates those functions to the District Directors of Immigration and Naturalization. See 8 C.F.R. §§ 2.1, 1031 (1999).

40. Congress established the J visa category exclusively for exchange students with the Fulbright-Hays Act of 1961. See Fulbright-Hays Act of 1961 § 109(b) (creating the new J visa as a nonimmigrant exchange program visa, which further simplified the administration of the two year foreign residence requirement).

applying for H,<sup>41</sup> L,<sup>42</sup> and immigrant visas,<sup>43</sup> unless the exchange visitors reside in their home country for a minimum of two years after completing an exchange program in the United States.<sup>44</sup> This requirement is applicable to three groups of exchange visitors: (1) those whose exchange visit is financed either by the U.S. or the student's home government;<sup>45</sup> (2) those whose skills appear on the "skills list" compiled by the USIA;<sup>47</sup> and (3) those who are foreign doctors attending graduate medical training in the United States.<sup>48</sup>

Section 212(e) of the INA provides that exchange students may obtain a waiver of the two-year foreign residency requirement on one of four grounds: (1) upon the request of an interested government agency in the United States; (2) upon a showing of exceptional hardship to the exchange visitor's U.S. citizen or permanent resident spouse or child; (3) when an exchange visitor faces persecution in her home country; or (4) when the home country of the exchange visitor does not object to the waiver.<sup>49</sup>

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41. See Immigration and Nationality Act § 101(a)(15)(H); *supra* note 6 (explaining H class of nonimmigrant visas).

42. See Immigration and Nationality Act § 101(a)(15)(L); *supra* note 7 (describing L class of nonimmigrants).

43. See *supra* note 2.

44. See Immigration and Nationality Act § 212(e). An exchange student who neither fulfills the two-year residency requirement nor obtains a waiver also is precluded from applying for a K, or fiancée, visa under section 101(a)(15)(K) of INA. See *Friedberger v. Schultz*, 616 F. Supp. 1315, 1319 (E.D. Pa. 1985) (upholding State Department interpretation that former J visa holders may not apply for K visas on the grounds that the purpose of the K visa is eventually to procure permanent residence following marriage to a U.S. citizen or permanent resident, whereas the legislative intent behind section 212(e) of the INA is to preclude former exchange students from remaining in the United States).

45. This requirement applies regardless of whether the program is fully or partially, directly or indirectly, financed by either the United States or the government of the country of the student's nationality or last residence. See Immigration and Nationality Act § 212(e); see also 22 C.F.R. § 514.2 (1999) (defining "financed indirectly" as financing of the program by an organization or institution to which the United States or the exchange visitor's government contributes funds).

46. The Exchange Visitor Skills List outlines the fields of knowledge and skills that are in short supply in countries that send exchange visitors to the United States. See 22 C.F.R. § 514.44(a)(1)(ii) (citing Exchange Visitor Skills List, 49 Fed. Reg. 24,194 *et seq.* (1984) (as revised)). The list of both the countries and professions is updated periodically.

47. See *id.*

48. See Immigration and Nationality Act § 212(e) (laying out the three groups described).

49. See *id.* When Congress introduced the two-year foreign residency requirement in 1956, see *supra* notes 28-34, the law provided only for a waiver on public interest grounds. See S. REP. NO. 84-1608, at 5 (1956), *reprinted in* 1956 U.S.C.A.N. 2662, 2664 ("[T]he purpose of the [public interest waiver] is to permit the Attorney General to waive the 2-year absence requirement in special cases affecting the public interest, such as those relating to the defense and security of the United States."). Nevertheless, private relief bills on the grounds of exceptional hardship were available, see *id.*, despite the congressional approach to oppose such

The focus of this Comment is on hardship waivers. The process of obtaining a hardship waiver of the two-year foreign residency requirement is expensive and time consuming,<sup>50</sup> and the outcome is always uncertain.<sup>51</sup> The procedure for obtaining a hardship waiver of the foreign residency requirement for exchange visitors<sup>52</sup> begins with the filing of an application with the Immigration and Naturalization Service (“INS”) regional processing center, including supporting documentation.<sup>53</sup> If the INS finds the claimed hardship exceptional, it forwards the file to the USIA Exchange Visitor Waiver Review Board<sup>54</sup> because the INS cannot grant a waiver without USIA concurrence.<sup>55</sup> The USIA, in turn, may consult with the program

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bills except in “very good” cases. *See id.* (“[O]ur general policy now is to oppose all special bills of this kind, with the exception of those cases involving the humanities where we know there is a very good case.”). In 1970, Congress provided two additional grounds for waivers: fear of persecution and a no-objection statement from the exchange student’s home government. *See* Immigration and Nationality Act—Entry of Nonimmigrants, Pub. L. No. 91-225, 84 Stat. 116, 117 (1970) (codified as amended at 8 U.S.C. § 1182(e) (1994 & Supp. III 1997)). Medical students, however, have not been eligible for a “no objection” waiver since 1976. *See* Health Professions Educational Associations Act of 1976, Pub. L. No. 94-484, § 601(c), 90 Stat. 2243, 2301 (codified as amended at 8 U.S.C. § 1182(e) (1994 & Supp. III 1997)).

50. *See* Michael Maggio, *Understanding J-1 Visas: When and Why Employers Should Avoid Them*, in 27<sup>TH</sup> ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE, at 97, 102 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5198, 1994), available in WESTLAW, 515 PLI/Lit 97 (asserting that all waivers of the two-year foreign residency requirement are time consuming and costly).

51. *Cf.* Letter from USIA, *supra* note 26, at 9, 10 (giving examples of how and why applications are reviewed on a case-by-case basis). According to the USIA, the outcomes of individual cases are difficult to predict because although the fact patterns of some cases may appear identical, the programs, policies, and foreign relations considerations may differ. *See id.* *Compare* Al-Khayyal v. INS, 630 F. Supp. 1162, 1165-67 (N.D. Ga. 1986) (refusing to find exceptional hardship for a U.S. citizen wife despite the fact that her legal education and career would be interrupted if she followed her former exchange student husband to Saudi Arabia), *aff’d*, 818 F.2d 827 (11th Cir. 1987), *with In re Hersh*, 11 I. & N. Dec. 142, 143 (B.I.A. 1965) (finding exceptional hardship and granting a waiver of the two-year foreign residency requirement with the decisive factor being that U.S. citizen husband’s education and medical career would be interrupted should he follow his exchange student spouse to France).

52. For procedural details on how to obtain a hardship waiver, see generally 22 C.F.R. § 514.44 (1999) and Hake, *supra* note 9, at 16-27.

53. Applicants commonly submit to the USIA information on the following: the amount and source of funding received from the U.S. or foreign government; the general conditions of the applicant’s home country; and the presence of a medical condition in the U.S. citizen, permanent resident, spouse, or child, coupled with the lack of adequate medical treatment for that condition in the applicant’s home country. *See* Letter from USIA, *supra* note 26, at 7-8.

54. *See* 22 C.F.R. § 514.44(b), (g) (specifying procedures through which the INS forwards files to the USIA Exchange Visitor Waiver Review Board).

55. In *Silverman v. Rogers*, 437 F.2d 102 (1st Cir. 1970), the court considered whether the language of section 212(e) of the INA should be read to require a favorable recommendation of the Director of the USIA when the INS has determined that the hardship is exceptional, or, alternatively, whether the USIA

sponsor.<sup>56</sup> The USIA often denies a waiver, even if the demonstrated hardship is exceptional, on the grounds of program and policy concerns.<sup>57</sup> The following section argues that in denying waivers, the agencies focus on the legislative intent behind establishing exchange programs.

*B. How "Exceptional" Must the Hardship Be to Qualify for a Waiver Under Section 212(e) of the INA?*

*1. Legislative intent is to interpret hardship stringently, even in cases of marriages*

To obtain a waiver on the grounds of exceptional hardship to a U.S. citizen or permanent resident spouse or child, an exchange student, of course, must be married to a U.S. citizen or permanent resident, or have a U.S. citizen or permanent resident child, as the language of the statute commands.<sup>58</sup> Many individuals assume that marrying a U.S. citizen resolves all immigration problems,<sup>59</sup> but it does not. If a U.S. citizen falls in love with and marries an exchange visitor or former exchange visitor subject to the foreign residency requirement, the INS and USIA still strictly enforce the residency

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concurrency is required only when the waiver is based upon the request of an interested government agency. *See id.* at 106. The court held that in light of the legislative history favoring fewer waivers, it is logical to give more agencies a veto power, and, therefore, the USIA concurrency is required in both cases. *See id.* at 106-07. Thus, if the INS finds sufficient hardship, it first consults with the USIA and then grants a waiver only if the USIA concurs. *See id.* (concluding that both the House and the Senate intended to include the Secretary of State in the hardship waiver process).

56. *See* 22 C.F.R. § 514.44(b)(2)(ii) ("If it deems it appropriate, the Agency may request the views of each of the exchange visitors' sponsors concerning the waiver application."). A program sponsor is a legal entity designated by the USIA to conduct an exchange program. *See id.* § 514.2.

57. *See, e.g.,* *Dina v. Attorney Gen.*, 616 F. Supp. 718 (N.D.N.Y. 1985) (stating that the INS granted a waiver but USIA vetoed it), *aff'd*, 793 F.2d 473, 477 (2d Cir. 1986) (per curiam); *see also* Letter from USIA, *supra* note 26 (describing policies that USIA followed in denying waivers).

58. *See* Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1994 & Supp. III 1997) (stating that the two-year requirement may be waived upon a showing of exceptional hardship to the alien's U.S. citizen or permanent resident spouse or child). *See, e.g.,* Michael Ungar, *Circumventing the Two-Year Foreign Residency Requirement: A Primer*, in 27TH ANNUAL IMMIGRATION AND NATURALIZATION INSTITUTE, at 127 (PLI Litig. & Admin. Practice Course Handbook Series No. H4-5198, 1998), available in WESTLAW, 515 PLI/Lit 117 (noting that only hardship to the U.S. citizen or permanent resident spouse is considered, and that hardship to the alien herself is irrelevant).

59. *Cf.* David Moyce, Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CAL. L. REV. 1747, 1749 (1986) (summarizing how marriage to a U.S. citizen or permanent resident assists an alien seeking admission to the United States); *infra* Part II.B.1 (reviewing various concessions in immigration law intended to preserve family unity).

requirement and deny waiver of the requirement.<sup>60</sup> The legislative intent behind the exchange programs and the two-year foreign residency requirement is the main reason why agencies and some courts refuse to allow exchange students to remain in the United States with their families.<sup>61</sup>

When Congress imposed the two-year foreign residency requirement on exchange program participants in 1956,<sup>62</sup> it intended for the requirement to be implemented stringently, and that marriage to a U.S. citizen or permanent resident would not by itself constitute an automatic waiver.<sup>63</sup> The related legislative hearings demonstrate the congressional view at that time: if aliens accept participation in exchange programs, they must fulfill their “missionary”<sup>64</sup> work by returning home and spreading good word about the United States.<sup>65</sup> Consequently, despite marriage to a U.S. citizen or permanent resident, exchange students should honor their obligations created by their participation in an exchange program and return home for a minimum of two years.<sup>66</sup>

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60. See *infra* Part I.B.2 (discussing the harsh interpretation of exceptional hardship standard); *infra* Part II.B.2 (discussing routine denials by the USIA even if hardship is present).

61. See *Chong v. USIA*, 821 F.2d 171, 177 (3d Cir. 1987) (relying on the legislative history of the two-year foreign residency requirement in denying a hardship waiver); *Silverman v. Rogers*, 437 F.2d 102, 106 (1st Cir. 1970) (examining the legislative history of the requirement and upholding the denial of a waiver); Letter from USIA, *supra* note 26, at 9 (citing H.R. REP. NO. 87-721, at 121-22 (1961) to support the contention that separation from the spouse and child is not by itself sufficient to grant a hardship waiver and stating that the Waiver Review Branch is guided by the House report in adjudicating waivers).

62. See Exchange Visitors-Immigration Status Act, Pub. L. No. 84-555, 70 Stat. 241 (1956) (codified as amended at 8 U.S.C. § 1182(e) (1994 & Supp. III 1997)) (amending Smith-Mundt Act § 201 and imposing a two-year foreign residency requirement).

63. See *Exchange Visitors-Immigration Status: Hearings on S. 2562 Before the Comm. on Foreign Relations*, 84th Cong. 16 (1956) [hereinafter *1956 Hearings*] (statement of Russell L. Riley, Director of the Department of State's International Educational Exchange Service) (urging Congress to enact the two-year foreign residency requirement with exceptions only in extremely appealing cases of marriages).

64. See *id.* at 11 (statement of Russell L. Riley, Director of the Department of State's International Educational Exchange) (stating that a two-year period is sufficient enough time for exchange students to fulfill their “missionary” work in their home country and for the United States to derive benefits from their experiences here).

65. See *supra* notes 22-25 and accompanying text (discussing the purposes for establishing exchange visitor programs).

66. See *1956 Hearings*, *supra* note 63, at 5 (statement of Sen. Fulbright) (commenting that exchange visitors accept their appointments freely, understanding their situation, rather than entering with the intent to stay as immigrants). A few senators on the Committee on Foreign Relations opposed enforcement of this requirement in cases involving bona fide marriages of exchange students to U.S. citizens and permanent residents. See *id.* at 5 (statement of Sen. Aiken); *id.* at 15-16 (Remarks of Sen. Wiley).

When Congress later introduced hardship waivers in 1961,<sup>67</sup> it still intended for the term “exceptional hardship” to cover only the most

First, the senators expressed concern that the law would result in discrimination. *See id.* at 5 (statement of Sen. Aiken). Aliens who established ties with the United States, during and after their exchange programs, by starting families in the United States would have to wait two years before applying for immigrant and some nonimmigrant visas, whereas aliens having no ties to the United States would be eligible to apply for visas. *See id.* at 5 (statement of Sen. Aiken) (opposing application of the two-year foreign residency requirement to aliens married to U.S. citizens or permanent residents). The concern over discrimination proved itself later: a mail-order bride, for example, can immigrate to the United States quickly, whereas former exchange students with U.S. citizen or permanent resident spouses or children must leave the United States to help Congress pursue foreign policy interests. *Compare, e.g.,* Christine S.Y. Chun, Comment, *The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes*, 17 U. PA. J. INT'L ECON. L. 1155, 1166-67 (1996) (describing how foreign women obtain fiancée visas to travel to the United States after being selected by American consumer-husbands from a bridal agency catalogue and after the prospective husbands meet the selected women once), and Eddy Meng, Note, *Mail-Order Brides: Gilded Prostitution and the Legal Response*, 28 U. MICH. J.L. REFORM 197, 205-09 (1994) (illustrating a typical mail-order bride transaction), with Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1994 & Supp. III 1997) (requiring a former exchange student married to a U.S. citizen or permanent resident to show exceptional hardship to the spouse and obtain the concurrence by the USIA before being able to stay in the United States with her family).

Second, the senators were concerned that the two-year foreign residency requirement would cause the undesirable effect of “brain drain” from the United States. *See 1956 Hearings, supra* note 63, at 18 (statement of Sen. Aiken) (expressing concern that educated visitors may opt to live in another country because the U.S. forces them to leave). Section 212(e) of the INA forces highly qualified and carefully selected exchange students to leave the U.S., whereas the immigration system often welcomes less qualified immigrants. *Cf.* Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 539 (1995) (citing to a study suggesting that the current preference of the U.S. immigration system for family immigration has caused immigrants' skill levels to decline). Exchange students subject to the two-year foreign residency requirement may choose Canada or another developed country as their permanent place of residence if they do not wish to return home, causing the United States to lose the benefit of their training. *See 1956 Hearings, supra* note 63, at 19 (statement of Sen. Aiken) (“We gave them the training and Canada gets them as citizens.”).

Third, the senators expressed concern that through the foreign residency requirement, the United States pronounces that foreign policy interests are more important than family unity. *See id.* at 17 (statement of Sen. Wiley) (condemning the “missionary” policy for its effect of splitting up families). This foreign policy, in turn, results in negative publicity for the country, *see id.* (anticipating the negative perception of the United States likely to arise in parents of a girl who married in this country but was still deported), and defeats the program's goal to “interpret the spirit of America to the world.” *Id.* (stating that the “missionary” policy creates “bad blood” between the United States and other countries, rather than creating a good reputation for the United States); *supra* notes 22-23 and accompanying text (describing the programs' goals). For a further discussion on how the two-year foreign residency requirement dishonors family unity, see *infra* Part II.A.1, which discusses the constitutional right to family unity and how the two-year foreign residency requirement dishonors it.

67. *See* Mutual Educational and Cultural Exchange (Fulbright-Hays) Act of 1961, Pub. L. No. 87-256, § 109, 75 Stat. 527, 535 (codified as amended in scattered titles and sections of U.S.C.) (authorizing the Attorney General to waive the two-year requirement upon a showing of exceptional hardship).

extreme hardship cases.<sup>68</sup> As the House Report notes:

It is believed to be 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 . . . would cause personal hardship.*<sup>69</sup>

*2. Case law and administrative decisions interpreting the "exceptional hardship" standard*

Complying with the congressional intent to minimize the number of waivers granted,<sup>70</sup> courts and administrative agencies<sup>71</sup> usually apply the hardship test using two prongs, both of which the applicant must satisfy even though section 212(e) on its face does not command the two-prong application.<sup>72</sup> First, the applicant must show that exceptional hardship will result if the U.S. citizen or permanent resident spouse or child remains in the United States during the two years that the exchange student spends in her home country fulfilling the foreign residency requirement.<sup>73</sup> Second, the applicant must show that exceptional hardship will result if the U.S. citizen or permanent resident spouse or child follows the exchange student and moves to the foreign country for two years.<sup>74</sup> Courts and

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68. See H.R. REP. NO. 87-721, at 121 (1961) (suggesting new waiver provisions but emphasizing diligent and strict enforcement of the foreign residency requirement and a no-leniency policy).

69. *Id.*

70. *Cf. Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (concluding that USIA concurrence is required because to hold otherwise would increase the number of waivers granted, and thus, violate legislative intent).

71. See *supra* text accompanying notes 52-57 (reviewing the procedures for obtaining a hardship waiver). An examination of extreme hardship cases reveals that few cases are reported. Waiver denials by the USIA Exchange Visitor Waiver Review Board, the major impediment to the waiver adjudication process, are not published. *Cf.* Letter from USIA, *supra* note 26, at 10 (commenting on the efforts of the American Immigration Lawyers Association to establish a databank of exchange visitors' waiver information).

72. See, e.g., *Al-Khayyal v. INS*, 818 F.2d 827, 830 (11th Cir. 1987) (finding under the two-prong analysis that the U.S. citizen spouse would suffer financial hardship if she remained in the United States, and her career would be disrupted if she moved to Saudi Arabia for two years); *In re Duchneskie*, 11 I. & N. Dec. 583 (B.I.A. 1966) (using a two-prong test to analyze the hardship waiver, first considering whether hardship would exist if the U.S. citizen husband and three U.S. citizen children remained in the U.S., and second, determining whether hardship would result if they moved to the Philippines while the former exchange student fulfilled the two-year foreign residency requirement).

73. See *Duchneskie*, 11 I. & N. Dec. at 583 (analyzing whether the exchange visitor demonstrated that her U.S. citizen spouse would suffer exceptional hardship if she left the United States for two years).

74. See *id.* (examining whether an exchange visitor showed that exceptional hardship would result to her U.S. citizen children and U.S. citizen husband if they

administrative agencies find that the stringent interpretation of the statute assures that waivers are granted only when hardship is truly exceptional and heartbreaking.<sup>75</sup>

Applying the first prong of the hardship test, the court in *Gras v. Beechie*<sup>76</sup> relied on the 1961 House Report<sup>77</sup> and held that separation from a U.S. citizen spouse and two children is insufficient hardship to qualify an exchange student for a waiver under the statute.<sup>78</sup> In *Gras*, the plaintiff's U.S. citizen wife and two U.S. citizen children could not

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followed her abroad for two years).

75. *See id.* (finding hardship and granting a waiver when the exchange student's U.S. citizen spouse and their children would otherwise face a range of difficulties). In *Chen v. Attorney Gen.*, 546 F. Supp. 1060 (D.D.C. 1982), however, the court found the two-prong test to be inconsistent with the legislative history of the statute. *See id.* at 1067. The court in *Chen* pointed out that section 212(e) of the INA is unclear as to whether it is the departure of the alien alone, or with his family, that must be examined to determine whether a level of hardship sufficient to justify a waiver will result. *See id.* Specifically, the court cited to the House report which stated that it would be detrimental "to apply a lenient [waiver] policy . . . including cases where marriage . . . is used to support the contention that *the exchange alien's departure from this country would cause personal hardship.*" *Id.* at 1067 (emphasis in original in part and added in part) (quoting H.R. REP. NO. 87-721, at 121 (1961)). Thus, stressing the words "exchange alien's departure," the court in *Chen* concluded that Congress intended to take into account only an alien's, and not a U.S. citizen's, departure, and further found irrelevant that hardship would not result if the U.S. citizen remains in the United States. *See id.* at 1068. The two-prong application of the statute potentially violates the constitutional right of U.S. citizens to reside in the United States. *See infra* Part II.A.2 (discussing U.S. citizens' right to reside in the United States and how it is infringed upon by interpreting the statute as requiring application of the two-prong test).

76. 221 F. Supp. 422 (S.D. Tex. 1963).

77. *See id.* at 424 (citing H.R. REP. NO. 87-721, at 121 (1961)).

78. *See id.*; accord *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (stating that mere separation of spouses is not a source of hardship); *Mendez v. Major*, 340 F.2d 128, 131-32 (8th Cir. 1965) (stating that Congress has the power to determine the conditions under which an alien may be admitted to the United States, even though the conditions may impose a certain amount of hardship on the alien's family); *Talavera v. Pederson*, 334 F.2d 52, 58 (6th Cir. 1964) (finding that exceptional hardship standard entails more than normal personal hardship); *In re Bridges*, 11 I. & N. Dec. 506, 507 (B.I.A. 1965) ("Temporary separation is a problem many families face in life and, in and of itself does not represent exceptional hardship . . .") (citation omitted); *In re Mansour*, 11 I. & N. Dec. 306, 307 (B.I.A. 1965) (same). *But see Chen*, 546 F. Supp. at 1064 (stressing that courts find hardship when it is imposed upon both the U.S. citizen spouse and child); *In re Nassiri*, 12 I. & N. Dec. 756, 757 (B.I.A. 1968) (granting a waiver on the ground that separation from both spouse and child is sufficient hardship due to difficulties that the child would experience from the separation or in the foreign culture). In denying hardship waivers, courts and agencies have used the language of the 1961 House Report indicating that a lenient policy of granting hardship waivers in cases of marriages is detrimental to the purposes of the exchange programs. *See, e.g., Nayak v. Vance*, 463 F. Supp. 244 (D.S.C. 1978) (holding that a lenient waiver policy is not intended under the statute). Courts are not sympathetic to waiver applications that are based on hardship claims resulting from spouse separation because to hold otherwise would constitute lenient application of the statute and violate legislative intent. *See, e.g., Talavera*, 334 F.2d at 58 (stressing the House Report's emphasis on the need for "a most diligent and stringent enforcement" of the foreign residency requirement).

follow him to Argentina for two years because of the children's medical conditions.<sup>79</sup> In evaluating what hardships would result if the plaintiff were required to comply with the requirement, the court found that the plaintiff's family would not encounter any financial difficulties by maintaining two households during the two-year separation because the plaintiff and his wife both earned high salaries.<sup>80</sup> Therefore, the difficulty of living apart for two years constituted a mere separation, not a ground for an exceptional hardship waiver.<sup>81</sup> The court also noted that because the more seriously ill of the two children already had undergone the required operation a year earlier, the continued presence of the father was not necessary.<sup>82</sup> Thus, the court upheld the INS' order of deportation of the former exchange student because he had not yet fulfilled his "missionary"<sup>83</sup> two-year foreign residency requirement.<sup>84</sup>

In the application of the first prong of the hardship waiver test, other adjudicators have held similarly, finding that the separation of families by itself never will qualify as exceptional hardship because temporary separation from a spouse is a problem that many families face.<sup>85</sup> Consequently, the hardship waiver applicant must demonstrate additional factors beyond family separation to prove that exceptional hardship to her U.S. citizen or permanent resident spouse or child will result if that spouse or child remains in the United States during the two-year separation.<sup>86</sup> For example, courts usually consider insufficiency of funds to support two households as a significant factor in finding hardship for a U.S. citizen or permanent resident spouse or child.<sup>87</sup> Among other factors, courts also have

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79. See *Gras*, 221 F. Supp. at 424 (discussing that the alien's children's physical condition called for expert medical attention which was not available elsewhere).

80. See *id.* (stating that because the alien's wife, a biochemist, could find employment readily in the United States and the alien, an anesthetist, probably could obtain a high salary in Argentina, no financial hardship would result from maintaining two households).

81. See *id.* (explaining that the alleged hardship is a forced separation of the exchange visitor from his family and is not grounds for a waiver).

82. See *id.*

83. See *1956 Hearings*, *supra* note 63, at 5 (statement of Sen. Fulbright).

84. See *Gras*, 221 F. Supp. at 424.

85. See, e.g., *In re Bridges*, 11 I. & N. Dec. 506, 507 (B.I.A. 1965) (stating that many families face temporary separation in life, which means separation alone is not an exceptional hardship); *In re Mansour*, 11 I. & N. Dec. 306, 307 (B.I.A. 1965) (noting that the decision of the U.S. citizen spouse to remain in the United States while the alien fulfills the two-year foreign residency requirement is self-imposed and does not constitute hardship).

86. See *supra* note 78 (citing cases finding that mere separation of family members does not constitute sufficient hardship).

87. See, e.g., *In re Nassiri*, 12 I. & N. Dec. 756, 757 (B.I.A. 1968) (concluding that hardship exists when a former exchange student, forced to return to Iran for two

found that the well-documented weak physical or emotional health of the U.S. citizen or permanent resident spouse, or relative of that spouse satisfies the first prong of the hardship waiver test.<sup>88</sup>

After the waiver applicant demonstrates that exceptional hardship will result if the U.S. citizen or permanent resident spouse or child remains in the United States, he also must meet the second prong of the test by showing that extreme hardship will result if the spouse follows the alien spouse and moves to his home country for two years.<sup>89</sup> In general, the following factors support a finding of exceptional hardship under the second prong: a disruption in career;<sup>90</sup> danger to the physical health of the spouse or child;<sup>91</sup> the presence of a medical condition in the citizen child requiring advanced medical facilities;<sup>92</sup> a lack of educational opportunities;<sup>93</sup> and the existence of particularly inhospitable conditions in the exchange visitor's home country.<sup>94</sup> Under both prongs of the hardship waiver test, however, it is the totality of the circumstances,

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years, would be unable to contribute enough money to support a second household); *In re Duchneskie*, 11 I. & N. Dec. 583, 583-84 (B.I.A. 1966) (finding exceptional hardship on similar facts); *In re Habib*, 11 I. & N. Dec. 464, 464-65 (B.I.A. 1965) (same); *In re Davoudlarian*, 11 I. & N. Dec. 300, 301 (B.I.A. 1965) (same). This approach, however, is disadvantageous for married couples in which both spouses are professionals with high salaries. See, e.g., *Gras*, 221 F. Supp. at 424 (denying a waiver to an alien because the family consisted of an anesthetist and a biochemist, both well-paying jobs, and thus, the family would not face a financial burden in maintaining two households).

88. See *In re Kawasaki*, 12 I. & N. Dec. 864, 864-65 (B.I.A. 1968) (finding exceptional hardship when, among other factors, the departure of the exchange student would cause great mental anguish to the citizen spouse).

89. See, e.g., *Mansour*, 11 I. & N. Dec. at 307 (considering what hardship the U.S. citizen spouse would experience if she moved to Egypt for two years with her exchange student spouse).

90. See *Slyper v. Attorney Gen.*, 576 F. Supp. 559, 560 (D.D.C. 1983) (finding hardship when professional career of a research chemist would be disrupted as a result of her departure abroad); *In re Bass*, 11 I. & N. Dec. 512, 512-13 (B.I.A. 1966) (finding hardship when a recent law school graduate was hired in the United States at the yearly salary of \$5,800 and would be unable to practice law in Brazil).

91. See *In re Ibarra*, 13 I. & N. Dec. 277 (B.I.A. 1969) (granting a waiver when one of the factors was the medical condition of the citizen wife who experienced fevers, allergies, rashes and sore limbs during her prior trip to the alien's country); *In re Ambe*, 13 I. & N. Dec. 3 (B.I.A. 1968) (finding that hardship would result to a U.S. citizen child if she accompanied her parent to India because she would be susceptible to smallpox).

92. See *In re Santillano*, 11 I. & N. Dec. 146, 146 (B.I.A. 1965) (finding hardship when the couple's child had a congenital defect requiring delicate surgery available only in the United States).

93. See *In re Hersh*, 11 I. & N. Dec. 142, 142 (B.I.A. 1965) (considering the disruption to a U.S. citizen spouse's education as a factor among others creating exceptional hardship).

94. See *Younghee Na Huck v. Attorney Gen.*, 676 F. Supp. 10, 13 n.4 (D.D.C. 1987) (finding hardship when the exchange student and U.S. citizen spouse were an interracial couple and would be subject to discrimination and possible violence in the exchange student's home country).

and not one specific factor, that leads to a finding of exceptional hardship.<sup>95</sup>

In applying both prongs of the test for hardship, courts are reluctant to consider hardship to the U.S. citizen child of an exchange visitor if both of the child's parents are aliens.<sup>96</sup> For example, in *Nayak v. Vance*,<sup>97</sup> Dr. Nayak, a medical school graduate, and his alien wife applied for a hardship waiver of the two-year foreign residency requirement upon completion of his fourth year of residency.<sup>98</sup> The plaintiffs argued that they satisfied the first prong of the hardship test because if they left their U.S. citizen child in the United States, the child would have to be put up for adoption.<sup>99</sup> The plaintiffs further argued that they also satisfied the second prong because requiring the U.S. citizen child to move abroad would impose an exceptional hardship upon the child.<sup>100</sup> Dr. Nayak's child had a rare skin disease and his home country was unable to provide the appropriate treatment needed for the disease.<sup>101</sup> Nevertheless, the court denied the parents a hardship waiver, stating that "Congress did not give [a U.S. citizen] child the ability to confer immigration benefits upon his parents."<sup>102</sup> The court further noted that the citizen infant's right to live in the United States is only theoretical, and if the child later chooses to live in the United States, he may do so if he makes the choice after living in the parents' home country.<sup>103</sup> Thus,

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95. See, e.g., *Slyper*, 576 F. Supp. at 560 (reversing the district director's consideration of factors in isolation and not in the totality of the circumstances).

96. See, e.g., *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969) (affirming the denial of a waiver when the application for a waiver was based on hardships to a U.S. citizen child and both parents were aliens). An exchange student can bring his alien spouse to the United States on a J-2 visa. Cf. 8 C.F.R. § 212.7(c)(4) (1999) (providing that a spouse or child accompanying an exchange student is also subject to the two-year foreign residency requirement). If the couple has a child during their stay in the United States, the child is a U.S. citizen by birth. See U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

97. 463 F. Supp. 244 (D.S.C. 1978).

98. See *id.* at 245.

99. See *id.* at 246 (arguing that the couple's child will suffer neglect or be placed for adoption by strangers unless the court grants a waiver).

100. See *id.* (arguing that the plaintiffs satisfied the second prong of the test because deportation would result in extreme hardship to the U.S. citizen child who would be unable to receive treatment for a rare skin disease and because the child needs parents able to understand his heritage).

101. See *id.* at 250 (describing how treatment for the child's rare skin disease is not available in India).

102. *Id.* at 248 (quoting *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969)).

103. See *id.*; see also *Mendez v. Major*, 340 F.2d 128, 132 (8th Cir. 1965) (denying immigration benefits to two Mexican nationals, both J visa holders, who have a U.S. citizen child). Courts have upheld the constitutionality of this practice. See *Acosta v. Gaffney*, 558 F.2d 1153, 1158 (3d Cir. 1977) (holding that the right of an infant citizen to choose his residence is not violated by the parents' deportation because an

the court rendered the language of section 212(e), which allows a waiver on the grounds of exceptional hardship to a U.S. citizen or permanent resident child, virtually meaningless.

Even if the exchange visitor satisfies both prongs of the test, the USIA Waiver Review Branch, whose concurrence is required,<sup>104</sup> routinely denies waivers, and is the major impediment in the process.<sup>105</sup> In denying waivers, the USIA takes the position that program and policy considerations outweigh exceptional hardship to an exchange student's U.S. citizen or permanent resident spouse or children.<sup>106</sup> Furthermore, USIA denials of waivers are not subject to judicial review.<sup>107</sup> The result of the stringent application of the statute is the separation of families and the de facto deportation of a U.S. citizen spouse or child. Such results threaten the constitutionality of section 212(e).

## II. ANALYSIS

### A. *Potential Unconstitutionality of Section 212(e) of the INA*

Consistent with the expressed congressional purpose that exchange students are to "interpret the spirit of America to the world"<sup>108</sup> upon return to their home countries, section 212(e) of the

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infant is not capable of exercising the right). For a review of the constitutional rights of U.S. citizen children born to alien parents who are under deportation proceedings, see generally Edith Z. Friedler, *From Extreme Hardship to Extreme Deference: United States Deportation of Its Own Children*, 22 HASTINGS CONST. L.Q. 491, 492 (1995), which analyzes whether deportation of alien parents violates due process and equal protection rights of U.S. citizen children, and also whether the deportation results in an unconstitutional de facto deportation of the U.S. citizen child.

104. See *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (construing section 212(e) of the INA, which on its face does not require the USIA concurrence in hardship waiver cases, as still giving the agency a veto power).

105. See, e.g., *Singh v. Moyer*, 867 F.2d 1035, 1037 (7th Cir. 1989) (stating that the INS Regional Commissioner found the existence of exceptional hardship, but the USIA nevertheless denied a waiver); *Chong v. USIA*, 821 F.2d 171, 174 (same); *Hake*, *supra* note 9, at 2 (suggesting that even if the case amounts to extreme hardship, the USIA position is not predictable).

106. See *Maggio*, *supra* note 50, at 105 (stating that the USIA concurs in a hardship waiver only if the hardship is truly heartbreaking); *supra* Part I.A (discussing that in establishing exchange programs, Congress was predominantly guided by foreign policy considerations).

107. See *Singh*, 867 F.2d at 1038 (concluding that no meaningful standard exists for courts to review USIA denial of waivers properly); see also *Slyper v. Attorney Gen.*, 827 F.2d 821, 824 (D.C. Cir. 1987) (holding that USIA decisions are subject to review only in cases involving constitutional, statutory, or regulatory violations, fraud, or lack of jurisdiction), *cert. denied sub nom.*, *Slyper v. Meese*, 485 U.S. 941 (1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985) (ruling that USIA's regulations raise no legal issues for judicial review).

108. See S. REP. NO. 80-811, at 3 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1011, 1013 (discussing the importance of the exchange programs in light of increased anti-

INA<sup>109</sup> prohibits all exchange visitors, including those married to U.S. citizens or permanent residents, from remaining in the United States as immigrants or certain nonimmigrants, absent special circumstances.<sup>110</sup> Any constitutional challenge to this requirement by an exchange student will fail because aliens have no right of entry to this country.<sup>111</sup> The two-year foreign residency requirement imposed on exchange students who are married to U.S. citizens or permanent residents, however, does not involve solely the rights of these exchange students, but also involves the rights of their U.S. citizen or permanent resident spouses or children. The requirement leaves only two choices for a U.S. citizen or permanent resident who is married to an exchange student: live separated from the spouse for two years or move to a foreign country.

This Part argues that section 212(e) of the INA fails to satisfy the constitutional protections for family unity pronounced by the United States Supreme Court. In addition, the two-year foreign residency requirement intrudes upon a U.S. citizen's constitutional right to reside in the United States. This Part suggests that the foreign policy goals served by exchange programs are outdated, and the foreign residency requirement provision fails the strict scrutiny test. This Part also argues that the foreign residency requirement is inconsistent with immigration law preferences for family unity. Lastly, this Part argues that the USIA waiver adjudication process is inconsistent with the processing of other hardship waivers.

### 1. *A fundamental right to family unity*

The U.S. Supreme Court recognized the importance of family unity in *Moore v. City of East Cleveland*.<sup>112</sup> In *Moore*, the Court extended the substantive due process right to live together as a family not only to the nuclear family, but also to the extended family.<sup>113</sup> The Court

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American propaganda from the Soviet Union).

109. Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1994 & Supp. III 1997)).

110. *See id.* (outlining the two-year foreign residency requirement for J-1 visas and the conditions needed for waiver of that requirement).

111. *See Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (citing to the congressional plenary power to exclude aliens and upholding denial of entry to a Belgian communist). The alien has neither the right to reside in the United States, *see id.* at 765, nor the right to family unity as protected by the United States Constitution. *See* David Moyce, Comment, *Petitioning on Behalf of an Alien Spouse: Due Process Under the Immigration Laws*, 74 CAL. L. REV. 1747, 1759 (1986) (stating that although some court decisions seem to afford more attention to due process rights of aliens, such rights have not been recognized generally).

112. 431 U.S. 494, 505-06 (1977) (plurality opinion) (striking down a zoning ordinance that defined family via limited categories of related individuals).

113. *See id.* at 506 (holding that an ordinance that forced children and adults to

noted that the Constitution protects the institution of the family because it is deeply rooted in American history and tradition.<sup>114</sup> In a later case, *Lyng v. Castillo*,<sup>115</sup> the Court elaborated that to constitute an infringement on the right to keep family together, the statute needs to “directly and substantially interfere with family living arrangements.”<sup>116</sup>

When applied to exchange visitors who are married to U.S. citizens and permanent residents, the foreign residency requirement fails the standards delineated in *Moore* and *Lyng*. The two-year foreign residency requirement is imposed even on exchange students who enter bona fide marriages with U.S. citizens and permanent residents.<sup>117</sup> Despite the Supreme Court’s declaration that family unity is a fundamental right protected by the Constitution,<sup>118</sup> in the context of section 212(e), Congress commands the separation of families<sup>119</sup> to further the government’s interest in having exchange students fulfill their “missionary” foreign policy work.<sup>120</sup> Thus, under the guise of foreign policy, section 212(e) of the INA interferes with the fundamental right to family unity afforded to U.S. citizens and permanent residents. Furthermore, applying the *Lyng* test, section 212(e) directly and substantially interferes with family living arrangements by not allowing the alien spouse to live together with the U.S. citizen or permanent resident spouse. Thus, under *Lyng*, denial of a section 212(e) hardship waiver amounts to an infringement of the right to keep family together.

## 2. U.S. citizens’ right to reside in the United States

In cases that involve an exchange student who seeks a hardship waiver and is married to a U.S. citizen, section 212(e) of the INA potentially infringes upon the U.S. citizen’s right to live in the United

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live in narrowly-defined family patterns violated the Due Process Clause).

114. See *id.* at 503.

115. 477 U.S. 635 (1986).

116. See *id.* at 638 (upholding a federal law that provided food stamps to households rather than to individuals on the ground that the law did not interfere with the family choice whether to live and dine together).

117. See Immigration and Nationality Act § 212(e), 8 U.S.C. § 1182(e) (1994 & Supp. III 1997) (providing for a waiver in cases involving marriage to a U.S. citizen or permanent resident only upon a showing of exceptional hardship to the alien’s U.S. citizen or permanent resident spouse or child).

118. See *Moore*, 431 U.S. at 503.

119. See, e.g., *Gras v. Beechie*, 221 F. Supp. 422 (S.D. Tex. 1963) (highlighting the legislative intent that separation from the spouse and child alone will never satisfy the hardship standard).

120. See 1956 Hearings, *supra* note 63, at 3 (statement of Sen. Fulbright) (stressing the main purpose of the two-year foreign residency requirement is to make foreign exchange students return home in order to promote the American spirit).

States. A U.S. citizen has a constitutional right to reside in this country,<sup>121</sup> and courts have referred to this right as both fundamental<sup>122</sup> and “undisputed.”<sup>123</sup> But in the context of the exceptional hardship waiver, this right is no longer undisputed because courts and agencies now apply the two-prong hardship waiver test.<sup>124</sup> If an agency or court finds under the first prong that exceptional hardship will result to the U.S. citizen spouse if he remains in the United States while the exchange student fulfills the two-year foreign residency requirement, the courts still do not grant the waiver.<sup>125</sup> Instead, the adjudicator further considers under the second prong whether the hardship can be avoided if the U.S. citizen spouse follows the exchange student and moves abroad for two years.<sup>126</sup> By considering what hardships would result to the U.S. citizen spouse or child should he move abroad, the agencies ignore the fundamental right of U.S. citizens to reside in this country. Consequently, the U.S. citizen who wishes to remain with his spouse, and thereby exercise his right to family unity, has to give up his fundamental right to live in the United States.

### 3. *Balancing interests at stake*

Section 212(e) of the INA infringes upon the fundamental right of U.S. citizens and permanent residents to family unity, and the fundamental right of U.S. citizens to reside in the United States. Government regulations that burden fundamental rights must meet the strict scrutiny test,<sup>127</sup> under which the government must present a compelling interest and demonstrate that the law is closely tailored to effectuate only that interest.<sup>128</sup> Thus, the two-year foreign residency

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121. The constitutional right to reside in the United States stems from the concept of citizenship. *See* Friedler, *supra* note 103, at 530-31 & 531 n.280 (stating that U.S. citizens enjoy the right to remain in the country).

122. *See* *Nayak v. Vance*, 463 F. Supp. 244, 247 (D.S.C. 1978) (recognizing the fundamental constitutional right of a U.S. citizen to live in the United States but refusing to allow alien parents of a U.S. citizen child to remain in the country).

123. *See* *Perdido v. INS*, 420 F.2d 1179, 1181 (5th Cir. 1969) (stating that U.S. citizens have an undisputed right to remain in this country, but minor U.S. citizen children cannot confer immigration benefits upon their parents).

124. *See supra* notes 72-75 and accompanying text (discussing that agencies and courts apply the section 212(e) waiver provision under a two-prong test).

125. *See supra* notes 72-73 and accompanying text.

126. *See supra* notes 74-75 and accompanying text; *see also supra* note 75 (discussing that the two-prong test approach to waivers is inconsistent with the legislative history of section 212(e) of the INA).

127. *See* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (establishing that different constitutional claims must be subjected to different levels of scrutiny).

128. *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (“Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be

requirement can be upheld only if the government has a compelling interest to institute and sponsor exchange programs, and if the interest outweighs U.S. citizens' and permanent residents' right to family unity and the right of citizens to reside in the United States.

When the exchange programs were instituted, the government's interests were to promote and interpret the American spirit to the world,<sup>129</sup> in light of the anti-American propaganda that originated in the Soviet Union,<sup>130</sup> with the supplemental purpose of educational cooperation with other countries.<sup>131</sup> The courts that previously found the interests compelling and upheld the constitutionality of section 212(e) did so by examining the legislative history of the statutes, and thus, international political climate of 1956 and 1961 that affected and influenced Congress when it enacted the two-year foreign residency requirement and introduced the hardship waiver.<sup>132</sup> In the late 1980s and early 1990s, however, the international political climate changed.<sup>133</sup> The Soviet Union fell apart<sup>134</sup> and the Cold War ended.<sup>135</sup> Since that time, the changed world order has undermined

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specifically and narrowly tailored to accomplish that purpose."); Note, *The Constitutionality of the INS Sham Marriage Investigation Policy*, 99 HARV. L. REV. 1238, 1244 (1986) (asserting that INS marital investigation procedures are unconstitutional because they are poorly tailored to serve their intended purpose of preventing immigration marriage fraud) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)); cf. *Gras v. Beechie*, 221 F. Supp. 422, 424 (S.D. Tex. 1963) (stating that the term "exceptional hardship" can only be understood in the context of interest balancing).

129. See S. REP. NO. 80-811, at 3 (1948), reprinted in 1948 U.S.C.C.A.N. 1011, 1012; see also *supra* notes 22-25 (discussing the foreign policy objectives behind exchange programs).

130. See *supra* notes 22-25 and accompanying text (describing the legislative intent for instituting exchange programs).

131. See *supra* note 27 (reviewing the supplemental legislative purpose of the Fulbright Act of 1961 to continue cultural and educational cooperation).

132. See *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970); *Nayak v. Vance*, 463 F. Supp. 244, 249 (D.S.C. 1978); *Gras*, 221 F. Supp. at 424 (balancing the competing interests of the permanent resident spouse and U.S. citizen children against those of the government and finding in favor of the government).

133. Mikhail Gorbachev, the Soviet premier, announced that the Soviet Union would no longer force Eastern block countries to remain Communist, resulting in the discreditation of Soviet-style Communism. See 2 JOHN A. GARRATY, *THE AMERICAN NATION, A HISTORY OF THE UNITED STATES SINCE 1865* (Lauren Silverman & Bruce Borland eds., 7th ed. 1991).

134. See COMMONWEALTH OF INDEPENDENT STATES ACCORD, Dec. 8, 1991 (translation by author) (on file with author) ("We, the Republic of Belarus, the Russian Federation (RSFSR), and the Ukraine, in our capacity as the founder-states of the USSR which signed the 1922 Union Treaty, . . . declare that the USSR, as a subject of international law and geopolitical reality, no longer exists.").

135. See GARRATY, *supra* note 133, at 937 ("Soviet attack anywhere on the continent was unthinkable. The cold war was over at last."); see also Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain"*, 65 TUL. L. REV. 849, 854 (1991) (reviewing the events of 1988 when a series of democratic revolutions took place in Eastern Europe).

the importance of U.S. government interests in dispelling Soviet propaganda. Consequently, the government's interest in returning exchange students to their home countries is lessened and is no longer compelling. Thus, section 212(e) of the INA is no longer closely tailored to foreign policy objectives because the objectives themselves are outdated, and the provision fails the strict scrutiny test. Therefore, Congress should reconsider the applicability of the two-year foreign residency requirement, especially to those exchange students who are married to U.S. citizens and permanent residents.<sup>136</sup>

Although the rights of U.S. citizens are involved, the courts might defer to the legislature on this issue because Congress enjoys the absolute power to exclude aliens.<sup>137</sup> For example, in *Kleindienst v. Mandel*,<sup>138</sup> American plaintiffs argued that their First Amendment rights were violated because a Belgian Communist was denied entry as a nonimmigrant when he was invited to speak at universities.<sup>139</sup> The Court employed an extremely deferential standard of review, stating that Congress enjoys the plenary power to legislate on the admission of aliens and the exclusion of aliens who do not meet certain characteristics.<sup>140</sup> The reason for denying admission to the Belgian Communist was the desire to keep certain ideas out of the country.<sup>141</sup> Finding the reason for the statute and visa denial facially legitimate and bona fide, the Court upheld the statute and the visa denial.<sup>142</sup> In the case of the two-year foreign residency requirement, however, the statute fails even the *Kleindienst* standard because the reason for the requirement is outdated, and thus, no longer legitimate.

### B. Inconsistency of Section 212(e) with Immigration Law

An examination of section 212(e) of the INA outside the realm of constitutional rights and within the context of the INA itself reveals two main inconsistencies between section 212(e) and other

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136. See *infra* Part III.A (suggesting introduction of a bona fide marriage exception).

137. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (same) (quoting *Knauff*, 338 U.S. at 544).

138. 408 U.S. 753 (1972).

139. See *id.* at 758 (reciting the facts of the case).

140. See *id.* at 766.

141. See *id.* at 784 (Marshall, J., dissenting).

142. See *id.* at 770. In his dissenting opinion, Justice Marshall argued that despite the congressional plenary power over immigration, the proper standard of review is strict scrutiny because the power to conduct foreign affairs and immigration is limited by the Bill of Rights. See *id.* at 783 (Marshall, J., dissenting).

provisions of the INA. First, section 212(e) defeats the family unity goals of immigration law.<sup>143</sup> Second, unlike the adjudication processes for other hardship waivers under the INA,<sup>144</sup> section 212(e) waivers are reviewed not by one, but by two agencies, one of which, the USIA, vetoes waivers even if hardship is present.<sup>145</sup>

1. *Family unity in the context of immigration law*

Like the Supreme Court,<sup>146</sup> Congress recognizes the importance of family unity, which is a constitutionally protected right.<sup>147</sup> In the immigration context, Congress follows the principle that keeping families united is a fundamental value.<sup>148</sup> Immigration law acknowledges the importance of family unity in the structure of the immigration system itself.<sup>149</sup> For example, immediate relatives, which include spouses, unmarried children under the age of twenty-one, and parents of U.S. citizens,<sup>150</sup> are all exempt from numerical quotas

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143. Compare Hake, *supra* note 9, at 8 (stating that even if exceptional hardship is present, the USIA justifies separation of families because of foreign policy considerations), with E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1789-1965, at 505-20 (1981) (stressing family unity as a consistent goal of immigration law).

144. See *infra* note 165 (listing other opportunities under the INA for waivers based on extreme or exceptional hardship).

145. See, e.g., Singh v. Moyer, 867 F.2d 1035, 1037 (7th Cir. 1989) (stating that the INS Regional Commissioner found that exceptional hardship existed but the USIA nevertheless recommended denial of a waiver); Chong v. USIA, 821 F.2d 171, 174 (3d Cir. 1987) (same).

146. See Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977) (recognizing family unity as a fundamental right).

147. See HUTCHINSON, *supra* note 143, at 505-20 (stressing family unity as a consistent goal of immigrant legislation).

148. Gabor writes that:

The reunification of families serves the national interest not only through the humaneness of the policy itself, but also through the promotion of the public order and well-being of the nation. Psychologically and socially, the reunion of family members with their close relatives promotes the health and welfare of the United States.

Gabor, *supra* note 135, at 868-69 (quoting J. Violet, *Immigration: Numerical Limits and the Preference System* (Jan. 3, 1989) (CRS Issue Brief)). See generally HUTCHINSON, *supra* note 143, at 505-20 (discussing the importance of reunification of family in immigration law); Daniel Levy, *The Family in Immigration and Nationality Law: Part II*, IMMIGR. BRIEFINGS, Oct. 1992, at 1 [hereinafter Levy, *Part II*] (describing ways to obtain permanent residency through family relationships); Daniel Levy, *The Family in Immigration and Nationality Law: Part I*, IMMIGR. BRIEFINGS, Sept. 1992, at 1 [hereinafter Levy, *Part I*] (explaining family-based immigration). Gabor also suggests that the historical objective of the United States of keeping families together coincides with its international obligations, such as the Code of International Declaration of Human Rights and Helsinki Final Act, which established that one of the goals of human rights protection is family reunification. See Gabor, *supra* note 135, at 868.

149. See generally Levy, *Part I*, *supra* note 148, at 1 (reviewing the family-based immigration system); Levy, *Part II*, *supra* note 148, at 1 (same).

150. See Immigration and Nationality Act § 201(b)(2)(A)(i), 8 U.S.C. §

when applying for permanent residency.<sup>151</sup> In addition, the INA establishes first and second preferences<sup>152</sup> for applicants for the numerically limited visas.<sup>153</sup> Congress proclaimed the preference for family immigration on two primary grounds.<sup>154</sup> First, this preferential immigration structure preserves family unity.<sup>155</sup> Second, this structure also promotes family relationships by preventing hardships that would result to family members if the alien family member had to wait to enter into the United States, which non-immediate relatives are required to do.<sup>156</sup>

Furthermore, in numerous grounds of inadmissibility<sup>157</sup> and deportability,<sup>158</sup> i.e., grounds upon which aliens are not admissible for entry into the United States or may be removed from the United States,<sup>159</sup> Congress provides automatic waivers for aliens who are married to U.S. citizens and permanent residents.<sup>160</sup> The underlying

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1151(b)(2)(A)(i) (1994 & Supp. III 1997) (defining “immediate relatives” as the spouses, children, or parents of U.S. citizens).

151. *See id.* § 201(c) (providing that numerical quotas for family-sponsored immigrants exclude immediate relatives of U.S. citizens). For an explanation of family-sponsored immigration and the quota system, see LEGOMSKY, *supra* note 2, at 120-33; and Michael Maggio et al., *Immigration Fundamentals for International Lawyers*, 13 AM. U. INT’L L. REV. 857, 876 (1998).

152. *See* Immigration and Nationality Act § 203(a)(1)-(2) (stating that the first preference of the family immigration system is for unmarried sons and daughters of U.S. citizens, and the second preference is for spouses and unmarried sons and daughters of permanent resident aliens).

153. *See id.* § 201(c) (providing numerical quotas for aliens subject to the worldwide level of family-sponsored immigrants).

154. *See* Meng, *supra* note 66, at 210.

155. *See id.* (discussing family unity as the justification for spousal preferences in immigration law).

156. *See id.* at 210 n.89 (stating that a primary objective of the immigration system is the avoidance of immediate family separation) (citing Joe A. Tucker, *Assimilation to the United States: A Study of the Adjustment of Status and Immigration Marriage Fraud Statutes*, 7 YALE L. & POL’Y REV. 20, 23 (1989)).

157. *See* Immigration and Nationality Act § 212; *supra* note 2 and accompanying text (listing types of grounds for inadmissibility).

158. *See* Immigration and Nationality Act § 237 (mandating deportation of aliens who fall within one of the listed classes).

159. For a general explanation of the grounds for inadmissibility and deportability as well as removal, see generally LEGOMSKY, *supra* note 2, at 290-91, 374-75. “Removal” is a collective term for proceedings that were previously called “deportation” and “exclusion” proceedings of deportable or inadmissible aliens, respectively. *See id.* at 291 (defining removal proceedings).

160. “[The] family-oriented priority . . . manifests itself in the fact that many forms of relief from deportation and exclusion are available only to close relatives of U.S. citizens and permanent residents.” Austin T. Fragomen & Steven C. Bell, *Family Sponsored Immigration*, in BASIC IMMIGRATION LAW, at 59, 61 (PLI Litig. & Admin. Practice Course Handbook Series No. B4-7196, 1997), available in WESTLAW, 1001 PLI/Corp. 59.

In the case of a marriage of an alien to a U.S. citizen or permanent resident, the Attorney General may waive inadmissibility, without any showing of hardship, for the alien who has a communicable disease of public health significance, including HIV. *See* Immigration and Nationality Act § 212(g) (waiving the applicability of §

objective of these automatic waivers is to keep families together,<sup>161</sup> which is consistent with the purposes of the INA.<sup>162</sup>

In the case of exchange students, however, Congress found the notions of "program concern" and "missionary work"<sup>163</sup> more important than preserving family unity interests. This harsh treatment of exchange students is inconsistent with a number of INA provisions that grant concessions to aliens who enter into good faith marriages with U.S. citizens and permanent residents, including those aliens who are otherwise inadmissible or deportable.<sup>164</sup>

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212(a)(1)(A)(i), governing inadmissibility on health-related grounds, in certain circumstances). Second, section 212(a)(3)(D)(iv) of the INA provides for a similar waiver if the alien is otherwise inadmissible as an immigrant because he is or has been a member of or affiliated with the Communist or other totalitarian party. *See id.* § 212(a)(3)(D)(i) (listing membership status in a totalitarian party as grounds for inadmissibility); *id.* § 212(a)(3)(D)(iv) (providing for a waiver of inadmissibility for membership in the Communist Party to assure family unity). Third, an alien who is inadmissible for document fraud, *see id.* § 212(a)(6)(F)(i), can obtain a waiver, subject to certain restrictions, that is available "for humanitarian purposes or to assure family unity." *See id.* § 212(d)(12) (providing for a waiver if certain qualifications are met). Fourth, an alien who is inadmissible for smuggling another alien, *see id.* § 212(a)(6)(E)(i), can be admitted if the alien seeks admission as an immediate relative, and if the person whom the alien helped to enter the United States illegally was his or her spouse, parent, son, or daughter at such time. *See id.* § 212(d)(11) (permitting a waiver to preserve family unity). This last provision emphasizes the importance of family unity in immigration law in two ways: first, it punishes the smuggling of immediate family members less stringently, and second, it provides an exception for those aliens who seek admission as immediate relatives under section 203(a) of the INA. *See id.*

In the context of the grounds of deportability, the INA also grants certain concessions in cases of bona fide marriages of aliens to U.S. citizens and permanent residents. For example, there is a good faith marriage exception for aliens who obtained conditional permanent residency by virtue of marriage to a U.S. citizen or permanent resident, *see id.* § 216(a), and have not removed the condition in the statutorily defined term due to termination of that marriage. *See id.* § 237(a)(1)(G)(i) (waiving deportability if the alien proves to the Attorney General that the marriage was not entered into for the purpose of circumventing any provisions of immigration law); *see also id.* § 237(a)(1)(E)(ii)-(iii) (providing for a waiver of deportability in cases of alien smuggling for instances involving family unification with the purpose of assuring family unity); *id.* § 237(a)(3)(C)(ii) (providing for a waiver of deportability for document fraud if the purpose of the offense was to assist the alien's spouse or child).

161. *See Cerrillo-Perez v. INS*, 809 F.2d 1419, 1423 (9th Cir. 1987) (noting the congressional intent in the INA to preserve family unity between U.S. citizens and immigrant family members); Hake, *supra* note 9, at 7 (arguing that the two-year foreign residency requirement contradicts American history and jurisprudence, which emphasize the importance of family unity).

162. *See Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) (emphasizing the significance of family values in American tradition); *supra* text accompanying notes 154-56 (discussing that preserving family unity is the goal of immigration law).

163. *See 1956 Hearings*, *supra* note 63, at 14-15 (statement of Russell L. Riley, Director of the Department of State's International Educational Exchange Service) (stating that exchange students are to fulfill the "missionary" work upon return to their home countries).

164. *See supra* note 160 (describing waivers of other grounds of inadmissibility and deportability granted in cases of bona fide marriages). Proponents of the

## 2. *Inconsistency in the waiver adjudication process*

The adjudication process governing waivers of the foreign residency requirement for exchange visitors is inconsistent with the other waiver adjudication processes provided for by the INA that also require a showing of hardship to a U.S. citizen or permanent resident spouse as a basis for waiving the alien's inadmissibility or deportability.<sup>165</sup> For example, similar "hardship" language is

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exceptional hardship waiver for exchange students argue that the two-year foreign residency requirement causes a temporary separation which many families face in life, unlike other grounds of inadmissibility. *See* *Chen v. Attorney Gen.*, 546 F. Supp. 1060, 1067 (D.D.C. 1982) (discussing the INS argument that temporary separation, elected by one family member, does not constitute exceptional hardship under section 212(e) of the INA). Proponents of this standard further argue that the inadmissibility is overcome easily by simply residing in the foreign country for two years. *Cf. id.* (criticizing the INS Commissioner's position that hardships can be easily overcome if the family resides abroad for two years). The INA, however, contains a ground for inadmissibility that is quite similar to that found in section 212(e) of the INA, but which, unlike section 212(e), favors family unity in cases of bona fide marriage. Under section 204(g) of the INA, an alien who marries a U.S. citizen or permanent resident during deportation proceedings does not receive immediate relative status, *see* Immigration and Nationality Act § 201(b)(2)(A)(i), "until the alien has resided outside the United States for a 2-year period beginning after the date of marriage." *Id.* § 204(g) (emphasis added in part and original in part). This ground for inadmissibility has a corresponding waiver provision for good faith marriages: section 204(g) can be waived if the alien shows by clear and convincing evidence that "the marriage was entered into in good faith and . . . not entered into for the purpose of procuring the alien's admission as an immigrant and no fee or other consideration was given . . ." *Id.* § 245(e)(3). Section 212(e) of the INA poses a similar hardship of separation for two years for U.S. citizens and permanent residents from their inadmissible spouses. Unlike section 245(e)(3), however, the foreign residency requirement of section 212(e) ignores the interests of family unity by requiring a showing of exceptional hardship to U.S. citizens or permanent resident spouse before the family unity can be preserved. *See id.* § 212(e).

165. There are other extreme or exceptional hardship standards in the INA. First, a showing of "extreme hardship" to a U.S. citizen or permanent resident spouse or child is required before the alien spouse can obtain a waiver of the following grounds of inadmissibility: (1) a crime involving moral turpitude, *see id.* § 212(a)(2)(A)(i)(I), (2) multiple criminal convictions for which the imposed sentence was five years or more, *see id.* § 212(a)(2)(B), (3) prostitution or commercialized vice, *see id.* § 212(a)(2)(D), (4) certain aliens involved in serious criminal offenses, *see id.* § 212(a)(2)(E), and (5) a violation or attempt to violate laws of the United States or another country pertaining to a controlled substance, with certain exceptions, *see id.* § 212(a)(2)(A)(i)(II). The INA requires a showing of extreme hardship to waive these grounds of inadmissibility. *See id.* § 212(h)(1)(B). Second, a showing of "extreme hardship" to a U.S. citizen or permanent resident spouse, son, or daughter is required to waive three and ten-year bars for admission for aliens who have been unlawfully present in the United States for more than 180 days and over a year, respectively. *See id.* § 212(a)(9)(B)(v). Third, aliens who are inadmissible for fraud or willful misrepresentation of a material fact when obtaining a visa for admission into the United States, *see id.* § 212(a)(2)(A)(i)(II), can obtain a waiver on the ground that "extreme hardship" to a U.S. citizen or permanent resident spouse, son, or daughter will result if the alien is not admitted. *See id.* § 212(i). Fourth, as a relief from removal, *see* LEGOMSKY, *supra* note 2, at 291, an alien can obtain cancellation of removal, *see infra* notes 166-68 and accompanying text, if he or she establishes that removal will result in an "exceptional and extremely unusual hardship" to a U.S. citizen or permanent resident spouse or child. *See* Immigration and Nationality Act §

encountered in the cancellation of removal section of the INA.<sup>166</sup> Cancellation of removal, which is a relief from deportation, is similar to the section 212(e) hardship waiver.<sup>167</sup> Under cancellation of removal, however, the alien must prove only to the INS that the hardship is sufficient.<sup>168</sup>

Adjudication of section 212(e) hardship waivers, on the other hand, involves an additional agency, the USIA, that has the power to veto such waivers.<sup>169</sup> In comparison, no additional agency is part of the adjudication process for granting extreme and exceptional hardship waivers in cancellation of removal cases.<sup>170</sup> Requiring the concurrence of an additional agency makes obtaining a waiver harder for exchange students than for other inadmissible aliens.

### III. RECOMMENDATIONS: A BONA FIDE MARRIAGE EXCEPTION

Section 212(e) of the INA leaves U.S. citizen or permanent resident spouses of exchange students with two constitutionally inadequate choices: either remain in the United States and forego the fundamental right to family unity,<sup>171</sup> or move to a foreign country to be with their alien spouses, foregoing the constitutional right to reside in the United States.<sup>172</sup> The progressive changes in the international political climate make the governmental interest in ensuring that exchange students return to their home countries less important.<sup>173</sup> As discussed above,<sup>174</sup> section 212(e) of the INA is no

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240A(b)(1)(D).

166. See Immigration and Nationality Act § 240A(b)(1)(A)-(D) (providing relief from removal proceedings for certain permanent residents upon meeting the threshold showing of hardship and several other requirements).

167. Compare *id.* (allowing deportable aliens to remain in the United States upon a showing of "exceptional and extremely unusual hardship" to a U.S. citizen or permanent resident spouse or child in case of deportation of the alien), with *id.* § 212(e) (allowing inadmissible aliens to remain in the U.S. upon a showing of exceptional hardship).

168. See Immigration and Nationality Act § 240(A)(b)(1)(A)-(D) (listing requirements to qualify for the waiver provision pertaining to removal). For further reading on the cancellation of deportation, or removal, see William C.B. Underwood, Note, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 IND. L.J. 885 (1997), which discusses and analyzes the procedural effects of the cancellation of removal provision.

169. See *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970) (upholding the USIA's veto power in the hardship waiver process).

170. See *supra* note 168 and accompanying text.

171. See *supra* Part II.A.1 (discussing the Supreme Court's recognition of family unity as a fundamental right protected by the Constitution).

172. See *supra* Part II.A.2 (discussing the fundamental right of U.S. citizens to reside in the United States).

173. See *supra* Part II.A.3 (discussing that the collapse of the Soviet Union has diminished the governmental interest in exchange programs).

174. See *supra* Part II.A.3 (suggesting that the foreign residency requirement fails

longer closely tailored to the foreign policy objectives advanced by Congress over two decades ago, and thus, fails the strict scrutiny test.<sup>175</sup> Finally, section 212(e) is inconsistent with the family unity preferences imbedded in immigration law.<sup>176</sup> Therefore, Congress should re-evaluate the two-year foreign residency requirement as it applies to exchange students married to U.S. citizens or permanent residents and create a bona fide marriage exception in such cases.

If exchange students who marry U.S. citizens or permanent residents during their stay are allowed to remain in the United States after expiration of the exchange program, the supplemental interest of promoting educational cooperation already would be met. Further, the proposed bona fide marriage exception in such cases would be narrow since the overwhelming majority of exchange students do not marry U.S. citizens or permanent residents during their participation in exchange programs, or thereafter.<sup>177</sup>

The legislative history of the two-year foreign residency requirement reveals that the proponents of this requirement advanced two principal arguments as to why a bona fide marriage exception should not be adopted. Both contentions are or can be resolved by means other than the current, harsh, exceptional hardship standard imposed in the waiver adjudication process for exchange students.

The first argument is that the creation of a bona fide marriage exception will encourage exchange students simply to marry a U.S. citizen or permanent resident to obtain an immigrant visa.<sup>178</sup> As one legislator commented, he frequently did not see “too much love involved in [those] marriages.”<sup>179</sup> At the time the two-year foreign

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strict scrutiny).

175. *See supra* Part II.A.3 (asserting that the foreign policy objective relevant to section 212(e) of the INA is outdated, thus obviating the governmental interest in returning students to their national countries).

176. *See supra* Part II.B (discussing the preferences of the INA provided for immediate relatives of U.S. citizens and permanent residents to ensure family unity).

177. For example, in 1995, hardship waiver applications constituted only five percent of the total number of waiver applications. *See* Letter from USIA, *supra* note 26, at 6 (discussing exceptional hardship waiver exceptions and relevant statistics for 1995). The low number of waiver applications that are based on extreme hardship to the citizen or permanent resident spouse can be explained by a possibly low number of marriages of exchange students to U.S. citizens and permanent residents.

178. *See 1956 Hearings, supra* note 63, at 25 (statement of Sen. Hickenlooper) (expressing concern over inducements to get married if the requirement is not imposed in cases of marriage).

179. *See id.* (statement of Sen. Hickenlooper) (advancing the proposition that an exchange student might not only get married to avoid the requirement, but also intentionally have a baby specifically to avoid the foreign residency requirement); *id.* at 17 (statement of Sen. Wiley) (expressing concern that an exception will be an inducement for people to get married); *see also* S. REP. NO. 84-1608, at 3 (1956),

residency requirement was debated as well as in later years, this argument was consistent with the INS' long-standing concern that marriage fraud was commonplace.<sup>180</sup> This concern over marriage fraud ultimately led to the enactment of the Marriage Fraud Amendments of 1986<sup>181</sup> ("Amendments"). The Amendments provide certain procedural safeguards to ensure that the marriages between aliens and U.S. citizens or permanent residents are not contracted, such as, the conditional permanent resident status for the alien spouse during the first two years of marriage.<sup>182</sup> This conditional permanent resident status is granted to the alien for two years, but is contingent upon a valid marriage for those two years.<sup>183</sup> The Amendments provide better methods to combat sham marriages without disrupting the bona fide marriages of exchange students to U.S. citizens or permanent residents.

The second argument proffered to support the two-year foreign residency requirement is that participation in the exchange programs requires good faith performance by the exchange students of their obligation, and returning to their home countries is part of that obligation.<sup>184</sup> To view the exchange visitor programs otherwise means ill-spent money.<sup>185</sup> The proponents of the requirement further argue that both spouses know of this requirement at the inception of marriage and, thus, exchange students still should be required to

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reprinted in 1956 U.S.C.C.A.N. 2662, 2664 ("[T]he exchange program is not an immigration program and should not be used to circumvent the operation of the immigration laws.").

180. Cf. Nancy K. Richins, Comment, *The Marriage Viability Requirement: Is it Viable?*, 18 SAN DIEGO L. REV. 89, 93-94 (1980) (discussing legislation and case law that clearly granted the INS significant discretion to reject preference applications that it concluded were premised on sham marriages, i.e., marriages not entered into in good faith).

181. See Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.) (passing these amendments to the INA for the purpose of deterring "immigration-related marriage fraud and other immigration fraud").

182. See Immigration and Nationality Act § 216, 8 U.S.C. § 1186(a) (1994 & Supp. III 1997) (providing that conditional permanent resident status shall be terminated upon a finding of improper marriage).

183. See *id.* For a critical review of the amendments, see generally Charles Gordon, *The Marriage Fraud Act of 1986*, 4 GEO. IMMIGR. L.J. 183 (1990), which criticizes many provisions of the Amendments as unnecessary, but stipulating that the "sham marriage" provision in the amendments is not unreasonable.

184. See 1956 Hearings, *supra* note 63, at 24-25 (statement of Sen. Hickenlooper) ("If a person gets married, there is some responsibility on the contracting parties . . . . They should take into account all the inhibitions and prohibitions and things that they are up against.").

185. See 102 CONG. REC. 8563 (1956) (statement of Rep. Judd) (stating that the exchange student should render the service for which he was brought to the United States before the United States takes him back).

fulfill the exchange visitor mission faithfully.<sup>186</sup> The concern over ill-spent money, however, can be overcome if Congress requires exchange students who enter into good faith marriages to repay the money expended by the United States for their participation in the exchange programs.<sup>187</sup> The possibility of paying a fine would allow the exchange students and their spouses to choose whether to comply with the requirement or to remain in the United States, and would allow the U.S. government to recoup its investment in the foreign policy program.

#### CONCLUSION

This Comment argues that the two-year foreign residency requirement of section 212(e) of the INA should not be imposed on alien exchange students who marry U.S. citizens or permanent residents in good faith. The governmental interest in instituting exchange programs was to send missionaries to developing countries. This governmental interest has become outdated with the change in world politics. Since the governmental interest in returning exchange students to their home countries is no longer compelling, section 212(e) is an infringement upon the fundamental right to keep family together afforded to U.S. citizens and permanent residents and the right to reside in the United States afforded to U.S. citizens. Therefore, the foreign residency requirement fails the strict scrutiny test. This Comment concludes that the foreign residency requirement is inconsistent with numerous privileges afforded to family unity in other contexts of immigration law. Thus, Congress should enact an exception to the foreign residency requirement imposed upon former exchange visitors in cases of bona fide marriages of such visitors to U.S. citizens and permanent residents.

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186. *See id.* (arguing that the two-year foreign residency requirement will discourage those prospective students who wish to use the program as an avenue for gaining permanent U.S. residence “from coming[] in the first instance”); *supra* notes 21-27 and accompanying text (describing that Congress was expecting exchange students to become emissaries of U.S. policy).

187. Charging a “fine” for violation of conditions of status is not a novelty in immigration law. Section 245(i)(1) of the INA, which expired on November 14, 1997, provided that aliens who have stayed in the United States without being admitted (formerly, without inspection), and those who stayed after the expiration of their stay, could, upon the payment of a \$1,000 fine, apply for the adjustment of such status to that of a lawful permanent resident if no other bar existed and an immigrant visa were available. *See* Immigration and Nationality Act § 245(i)(1).