



H 113

U.S. Department of Justice
Immigration and Naturalization Service

**Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

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



FILE: 

Office: Nebraska Service Center

Date: NOV 18 2002

IN RE: Applicant:



APPLICATION:

Application for Waiver of the Foreign Residence Requirement
under Section 212(e) of the Immigration and Nationality Act, 8
U.S.C. 1182(e)

IN BEHALF OF APPLICANT:



PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The application was denied by the Director, Nebraska Service Center and is now before the Associate Commissioner for Examinations on appeal. The appeal will be sustained, and the matter will be remanded to the director to request a section 212(e) waiver recommendation from the Director, Waiver Review Division (WRD), U.S. State Department Visa Office.

The applicant is a native and citizen of the Philippines who is subject to the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e), because she entered the United States to participate in graduate medical education or training. The applicant was admitted to the United States as a nonimmigrant exchange visitor on May 13, 2001. The applicant married a native of the Philippines and naturalized U.S. citizen, in the Philippines, on February 12, 2000. The applicant is now seeking the above waiver after alleging that her departure from the United States would impose exceptional hardship on her U.S. citizen spouse.

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

On appeal, counsel submits a letter from the Department of Ophthalmology, University of California, San Diego, which states that the applicant only completed two months of the two-year fellowship program and withdrew for personal reasons. The letter states that she was self-supported. Counsel indicates that the applicant could not earn an income in the Philippines as an Ophthalmologist because she is not licensed to work at a hospital as she is non-fellowship trained and non-diplomatic board certified. Counsel also submits the medical history of the applicant's spouse which reflects that he has suffered from psychological problems and various physical ailments including chronic back pains, severe stomach pain, shooting pain on his left leg and pin pressure on his heels.

Section 212(e) of the Act states that:

No person admitted under section 101(a)(15)(J) or acquiring such status after admission-

- (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his residence,
- (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by

him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

- (iii) who came to the United States or acquired such status in order to receive graduate medical education or training,

shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of...the Commissioner of Immigration and Naturalization after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), may waive the requirement of such two-year foreign residence abroad,...the Attorney General may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General to be in the public interest....

Matter of Mansour, 11 I&N Dec. 306 (D.D. 1965), held that even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and does not represent exceptional hardship as contemplated by section 212(e) of the Act. See Matter of Bridges, 11 I&N Dec. 506 (D.D. 1965).

Adjudication of a given application for a waiver of the foreign residence requirement is divided into two segments. Consideration must be given to the effects of the requirement if the qualifying spouse and/or child were to accompany the applicant abroad for the stipulated two-year term. Consideration must separately be given to the effects of the requirement should the party or parties choose to remain in the United States while the applicant is abroad.

An applicant must establish that exceptional hardship would be imposed on a citizen or lawful permanent resident spouse or child by the foreign residence requirement in both circumstances and not merely in one or the other. Hardship to the applicant is not a consideration in this matter.

The record contains evidence that the applicant's spouse could not return to the Philippines and find employment due to his mental and physical ailments. The ailments occur whenever he is under stress.

Matter of Savetamal, 13 I&N Dec. 249 (Reg. Comm. 1969), held that a permanent resident spouse would be forced to give up an established career and start over again upon his return to the United States after a two-year absence, should he accompany his wife abroad; should he stay in the United States, he would be faced with the unusual hardship of maintaining two households and their citizen child, two years old, would be deprived of the affection, emotional security and direction of its father, which is most important during its formative years. The applicant's spouse could not maintain two households if his wife returned to the Philippines where she would be unable to obtain employment in her field.

The record contains specific documentation which reflects that the applicant's husband has certain medical problems, present and potential, which go beyond the normal. The record also reflects that the applicant's husband has extensive financial obligations. It is concluded that the record now contains evidence of hardships which, in their totality, rise to the level of exceptional as envisioned by Congress.

In this proceeding, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. 1361. In this case, the burden of proof has been met, and the appeal will be sustained.

It must be noted that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the WRD. Accordingly, this matter will be remanded to the acting district director to file a Request For WRD Recommendation Section 212(e) Waiver (Form I-613) together with the waiver application in this case (Form I-612). If the WRD recommends that the application be approved, the application must be approved. On the other hand, if the WRD recommends that the application not be approved, then the application must be re-denied without appeal.

ORDER: The appeal is sustained. The director's decision is withdrawn. The record of proceeding is remanded to the director for action consistent with the foregoing.