



U.S. Citizenship
and Immigration
Services

[Redacted]

FILE: [Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: DEC 21 2004

IN RE: Applicant: [Redacted]

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

ON BEHALF OF APPLICANT:

[Redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to
prevent identity unwarranted
invasion of personal privacy

H-3

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Canada. She was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on July 30, 1980 to participate in graduate medical training at San Francisco General Hospital's Emergency Medicine Residency Program. The applicant is subject to the two-year foreign-residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant's J1 nonimmigrant visa status expired June 30, 1981. The record reflects that the applicant married [REDACTED] (hereinafter, Dr. [REDACTED]) a United States citizen (USC), on February 20, 1982. The applicant and Dr. [REDACTED] have two USC children, twin sons Tucker and Coulter, who were born on February 11, 1992. The applicant was granted humanitarian parole on January 13, 2004, with an expiration date of January 12, 2005. The applicant seeks a waiver of her two-year residence requirement in Canada, based on the claim that her husband and children would suffer exceptional hardship if Dr. [REDACTED] and the children moved to Canada with the applicant for the two years she is required to live there, or if Dr. [REDACTED] and the children remained in the United States during the two-year period.

The director found that the applicant had failed to provide evidence establishing that Dr. [REDACTED] and/or the children would suffer exceptional hardship if they moved to Canada with the applicant. Additionally, the director found that the evidence failed to establish that Dr. [REDACTED] and/or the children would suffer exceptional hardship if they remained in the United States while the applicant fulfilled her two-year foreign-residence requirement in Canada. The application was denied accordingly.

On appeal, counsel asserts that the director:

1. Erred in imputing a "modest degree of emotional anguish" to Dr. [REDACTED] if he is separated from the applicant;
2. Did not adequately consider the effect of separation on the children;
3. Failed to consider all the factors relevant to exceptional hardship;
4. Failed to consider the cumulative effect of the factors relevant to extreme hardship;
5. Abused his discretion in failing to consider the positive equities;
6. Erred in giving weight to unfounded assumptions.

Section 212(e) of the Act states in pertinent part 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 last residence,
- (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

(iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of the Immigration and Naturalization [now, the Director of Citizenship and Immigration Services (CIS)] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Homeland Security, "Secretary"] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General [Secretary] to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General [Secretary] may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "[E]ven though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e)."

In *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety,

loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad." (Quotations and citations omitted.)

I. Potential Hardship if Dr. [REDACTED] and Coulter Remain in the United States

The AAO will first examine the effect on the family if the applicant were to relocate to Canada for the required two years, leaving her husband and children behind in the United States.

Counsel contends that Dr. [REDACTED] mood disorder will likely become unmanageable if he and the children do not accompany the applicant to Canada. Counsel submitted a letter from Dr. [REDACTED] a psychiatrist who treats Dr. [REDACTED]. Dr. [REDACTED] stated:

Dr. [REDACTED] has a long-standing history of both depressive and obsessive-compulsive symptoms. His periods of intermittent depression can be debilitating without antidepressant medication. He currently takes Prozac which has been increased from 20 to 40 milligrams a day for control of symptoms. On this dosage both his depressive and obsessive-compulsive disorders are within reasonable control.

There is a family history of depression. His father was intermittently depressed. Paternal grandmother and paternal aunt committed suicide. Paternal grandfather with [sic] alcoholic.

On his current medication Dr. [REDACTED] functions adequately. However, he remains particularly vulnerable to significant intercurrent stressors. He receives considerable emotional support from his wife and children, to whom he is exceptionally devoted. Were he to be involuntarily separated from his family for an extended period of time Dr. [REDACTED] emotional health would be at significant risk including a potential for recurrence of major depressive symptoms that could both interfere with and even preclude his functioning as a physician and require intensive psychiatric management including psychiatric hospitalization.

Dr. [REDACTED] has been admonished not to spend more than brief periods—a day or two at most—separated from his family. Dr. [REDACTED] stated that the Prozac is working but that Dr. [REDACTED] would be at risk of major depressive symptoms if he is separated from his family for an extended period of time.

The AAO concludes that Dr. [REDACTED] will experience exceptional hardship if he remains in the United States while the applicant resides in Canada for the required two-year period.

Counsel asserted that if the applicant moves to Canada and the twins stay in the United States, it is likely that Tucker's fragile psychological state, his borderline mood disorder, and Coulter's empathic reaction will seriously impact their emotional health.

Counsel submitted a psychological evaluation of Tucker performed by Dr. [REDACTED] a psychologist. Dr. [REDACTED] stated that "Tucker appeared to blur the lines between his mother and his family, using these concepts interchangeably when speaking about his concerns for the future." Dr. [REDACTED] further stated that "[I]t is quite clear that Tucker is focused on the predicament of his mother. He worries about her and the outcome for

himself. He equates his mother with his family and his greatest fear is that he won't have his family." Tucker told Dr. [REDACTED] that "it would be okay if we moved to Canada. I like it there." Tucker said that he would not hurt himself if he moved to Canada. Dr. [REDACTED] concludes the evaluation with a recommendation that "[T]his child appears to have a vulnerable psychological makeup, and it is strongly recommended that Tucker's family remain intact."

Counsel also submitted letters from two staff members at Town School for Boys (the Twins' school): [REDACTED] Director of Counseling, and Cathleen Brennan, fifth grade humanities teacher. Both Ms. [REDACTED] and Ms. [REDACTED] indicated that [REDACTED] and [REDACTED] are excellent students, but that [REDACTED] is more emotionally fragile and has spoken of suicide when his mother was away. Ms. [REDACTED] stated that [REDACTED] is a vulnerable, rather fragile young man who strongly relies on his mother for encouragement and support In my position as Director of Counseling, I am concerned about a future for this delicate child that might not have his mother's daily presence and input." Ms. [REDACTED] stated that "[I]f [REDACTED] were to lose the support of his mother, I believe his emotional stability, self-esteem, and academic success would plummet."

Given [REDACTED] fragile psychological makeup and dependence on his mother, the AAO finds that [REDACTED] will experience exceptional hardship if he is separated from his mother for the two years that the applicant would live in Canada.

Counsel maintains that the applicant's move to Canada will cause serious harm to the family's economic security and well-being. The AAO analyzed the family's financial situation below and concluded that exceptional hardship would not result from the entire family relocating to Canada for two years. If Dr. [REDACTED] remains in the United States, the financial effects would be less than if he moved to Canada. Of the \$370,000 family income reported for 2002, Dr. [REDACTED] contributed approximately \$210,000. Also, as discussed below, Counsel offered no specific analysis of the family's assets beyond their salaries, nor does counsel address other financial arrangements such as renting one of the residences for the two years the applicant is in Canada.

II. Potential Hardship if Dr. [REDACTED] and Coulter Move to Canada

Next analyzed is the potential hardship Dr. [REDACTED] and the twins will experience if Dr. [REDACTED] relocates to Canada with the applicant for the two years she is required to live there. Counsel contends that if Dr. [REDACTED] accompanies the applicant to Canada, Dr. [REDACTED] career will be destroyed and his reputation and position of trust will evaporate.

Dr. [REDACTED] serves as Managing Partner (the applicant is a partner) of Marin Emergency Physicians (hereinafter, the Partnership), the sole contracting medical group providing emergency medical care for Novato Community Hospital in Marin County, California. Dr. [REDACTED] was formerly Chief of Medical Staff at the hospital (1987-1989, 1997-1999) and serves as a Trustee on the hospital's Board of Directors. The record contains letters from Dr. [REDACTED] Dr. [REDACTED] Chief of Medical Staff at the hospital, and Dr. [REDACTED] Bradshaw, a colleague of Dr. [REDACTED] in the Partnership. Each letter addresses the possible effect of Dr. [REDACTED] separation from the Partnership and the hospital.

Dr. [REDACTED] summarized his approximately 25 years of service to the Partnership and the hospital. Dr. [REDACTED] stated that "[T]he doctors in Marin Emergency Physicians are all Board Certified Emergency Medicine specialists and our group has built a close and cherished relationship with our community. . . . We have, in

fact, and continue to be instrumental in building a new hospital and maintaining state-of-the-art medicine in a small community-based hospital." Regarding the Partnership, Dr. [REDACTED] further explained that:

I believe I am the leader and managing partner most involved in maintaining our contract, our relationship with the medical staff, administrators and community. I believe we changed the standard of emergency care in Marin County by requiring Board Certified Emergency Physicians and eliminating those untrained and moonlighting resident physicians that preceded us. We, a partnership of 8, maintain only a single contract (that with Novato Community Hospital) in a field of corporations and partnerships that run multiple emergency departments. We have survived the competition from the larger groups by value added services and hospital administrative involvement and community involvement.

Regarding his experience with the hospital, Dr. [REDACTED] further stated:

As a member of the Board of Trustees, I have been one of many civic leaders to work hard to keep Novato Community Hospital viable and ready to serve the growing community. . . . The Emergency Department, and I as the E.D. Director, feel the success was not possible without our group. We have been continually rated in the 90th percentile of Emergency Departments in spite of being small and local The community supports the hospital primarily because of the reputation and experience at the E.D. and my group.

Regarding the effects of his possible move to Canada with the applicant, Dr. [REDACTED] stated:

If I move to Canada with [REDACTED] I will loose [sic] my partnership interest in the medical group (as will [REDACTED] and my association with Novato Community Hospital. I will also loose [sic] my professional standing and any prestige that I have gained in almost a quarter of a century in the field of medicine and involvement in Community Health Care Policies.

Dr. [REDACTED] does not explain how living in Canada for two years could destroy his professional standing, which is based on 25 years of distinguished service to the hospital, the Partnership, and the community. The opposite conclusion—that it is in the interest of the hospital, the Partnership, and the community to ensure that Dr. [REDACTED] returns to his current positions—could be reasonably drawn. Dr. [REDACTED] does not say whether he has engaged in serious discussions with the hospital administration regarding his employment options if he returned to the United States after a two-year absence. Nor does Dr. [REDACTED] explain why he would lose his position in the Partnership, which is comprised of highly regarded physicians with whom he has a long-standing association.

Dr. [REDACTED] stated that Dr. [REDACTED] has practiced at the hospital for 23 years and that he plays a critical role in managing the Emergency Department and the hospital generally. Dr. [REDACTED] also stated that if Dr. [REDACTED] leaves, the Partnership would have major problems maintaining a stable work environment. Dr. [REDACTED] does not explain why he believes this would happen. Dr. [REDACTED] makes no mention of the contract with the hospital, nor does he suggest that the other doctors in the Partnership are providing inadequate care. Given that Dr. [REDACTED] is one of eight partners working for the Partnership, which has had a highly successful contract with the

hospital for nearly 25 years, as well as an outstanding relationship with the community, it is not clear why his absence for two years would prevent the other partners from temporarily fulfilling his duties.

Dr. [REDACTED] a partner of Dr. [REDACTED] for 11 years, stated that Dr. [REDACTED] service to the hospital has been integral to its success. Dr. [REDACTED] further stated that Dr. [REDACTED] loss would place the Partnership in danger of losing their contract with the hospital. Dr. [REDACTED] does not explain why Dr. [REDACTED] two-year absence would cause a longstanding and much praised (by the hospital and the community) medical partnership to lose its contract, nor does she explain why another doctor (such as herself, who has 11 years of experience with the partnership) would be unable to fill in for Dr. [REDACTED] in his absence.

It is evident from the record that Dr. [REDACTED] and the Partnership are highly regarded by the hospital and by the community at large. Dr. [REDACTED] value to the hospital suggests that it is in their interest to maintain a contract with the Partnership, rather than eliminate it and start over with an untried group of physicians. Indeed, while Dr. [REDACTED] role in the Partnership has been integral, it is unclear why the emergency department, which is comprised of top-rated doctors, could not function during Dr. [REDACTED] temporary absence. Additionally, counsel makes no mention of the possibility of Dr. [REDACTED] approaching the hospital to discuss the status of the contract during Dr. [REDACTED] potential absence.

The AAO notes that counsel submitted information dated August 11, 2003 from the hospital's website. The information states:

Marin General and Novato Community Hospital have invested more than \$2.4 million over the past two years to bring 11 new physicians to Marin in an effort to deal with the growing shortage of doctors in the county. MGH/NCO CEO Margaret Sabin said, "Our recruitment effort is off to a great start. Our top priority continues to be primary care physicians because Marin needs more than 30 within the next few years to care for the county's aging population."

"We owe it to the community to deal with this problem. Good hospitals partner with their medical staffs. This is our responsibility to our physician staff and to the community."

"More and more patients are losing their doctors or having to wait weeks or even months for routine physicals," she said. Patients are unhappy, physicians are unhappy and this is causing increasing difficulties for our Emergency Department because more and more people are turning to our ED for help."

Given the shortage of doctors in Marin County and the hospital's commitment to maintaining a quality emergency department, counsel does not explain why the hospital would be inclined to cancel or otherwise jeopardize their contract with the Partnership, whose doctors have provided outstanding emergency care for nearly 25 years. Margaret Sabin, the hospital CEO, stated that "[G]ood hospitals partner with their medical staffs. This is our responsibility to our physician staff and to the community." Dr. [REDACTED] assertion that he would lose his association with the hospital is inconsistent with the hospital's commitment to retaining quality physicians. Dr. [REDACTED] is one of eight doctors, and his absence would be temporary. Also, given the outstanding reputations of Dr. [REDACTED] and the applicant, the record does not establish that, upon their return to the United States, they would be unable to resume their work in Marin county.

The record does not support counsel's contention that Dr. [REDACTED] career will be destroyed and his reputation and position of trust will evaporate because of a two-year absence from the United States.

Counsel maintains that Dr. [REDACTED] would be unable to obtain "suitable" employment in Canada. Counsel submitted various documents addressing the difficulty Dr. [REDACTED] would face in securing work as a doctor in Canada. These documents describe the requirements for practicing medicine in Canada, but they do not establish that Dr. [REDACTED] would be unable to work as a doctor anywhere in Canada.

Counsel stated that if Dr. [REDACTED] and the twins move to Canada with the applicant, the family income will diminish significantly. Dr. [REDACTED] and the applicant earned a combined income of \$370,000 in 2002. Moving to Canada will greatly reduce that income during the two years the family lives in Canada. Dr. [REDACTED] stated that the family would have to liquidate assets to survive. The record contains tax forms and mortgage statements, but no evidence of family assets beyond home ownership. Dr. [REDACTED] has practiced medicine for over 25 years, and the applicant for over 20 years. The family owns a house in Napa county and a condominium in San Francisco. [REDACTED] and [REDACTED] attend a private school and have a nanny. Given the family lifestyle, which Dr. [REDACTED] described as having "all the trappings and paraphernalia of what is clearly a well-advantaged family situation," it is reasonable to assume that they have substantial assets. Aside from general references such as "tapping their pension plans and occasioning penalties" and "the equity from the sale of one residence would not generate a sufficient sum to meet the family's needs," counsel offers no specific analysis of all available assets, nor does he explore other possible financial arrangements, e.g. renting one of the residences. Counsel stated that selling assets "will infringe on the family's accustomed standard of living," but the law does not require that a family retain its standard of living. Finally, counsel failed to mention that the family would not be paying \$32,000 to send [REDACTED] and [REDACTED] to a private school, that they would not have the expense of a nanny, and that living expenses in Canada are far lower than in California.

Counsel asserted that when the family returns to the United States, they will have great difficulty in reestablishing comparable earnings and their accustomed lifestyle. As discussed earlier, the record does not establish that a two-year absence will destroy Dr. [REDACTED] ability to return to the United States and resume his position as a successful, highly regarded physician. Additionally, counsel has not established that the applicant would be unable to resume her position upon return to the United States.

Counsel contends that Dr. [REDACTED] mood disorder will become unmanageable if he, [REDACTED] and [REDACTED] move to Canada with the applicant. Dr. [REDACTED] (quoted extensively above) stated that Dr. [REDACTED] would be at risk of major depressive symptoms if he is separated from his family for an extended period of time. If Dr. [REDACTED] moves to Canada with his family, they will be together, therefore the specific risk that Dr. [REDACTED] describes will not exist.

Dr. [REDACTED] stated that he is prone to severe depression but provides no details about actual experiences. He stated that he cannot live apart from his wife, but that if he moves to Canada, his career in the United States will be shattered. He believes that either way, "[I] only see serious problems ahead for my mental state and consequently, for my family." As discussed above, the evidence does not establish that Dr. [REDACTED] career will be ruined if he moves to Canada with his family for two years.

Finally, counsel asserts that Tucker will experience exceptional emotional hardship, and that his brother Coulter will react empathically, if the family moves to Canada. In his evaluation of [REDACTED] Dr. [REDACTED] quoted

above) concluded that Tucker was emotionally vulnerable. Dr. [REDACTED] recommended that the family stay together. If Dr. [REDACTED] and the twins accompany the applicant, the family will stay together.

Ms. [REDACTED] and Ms. [REDACTED] were quoted above concerning [REDACTED] fragile emotional state and dependence on his mother. [REDACTED] and [REDACTED] can accompany their mother to Canada, therefore the separation effects contemplated by Ms. [REDACTED] and Ms. [REDACTED] would not occur. Ms. [REDACTED] stated that a move to Canada would be "disorienting" for the boys, however, this effect is normal for such a move and does not constitute exceptional hardship. The family will be together and can support each other during the two years they live in Canada.

III. Conclusion

The AAO finds that the evidence in the record establishes that the applicant's husband and children would suffer exceptional hardship if they remained in the United States while the applicant returned temporarily to Canada. The AAO also finds that the evidence in the record fails to establish that the applicant's husband and children would suffer exceptional hardship if they traveled to Canada with the applicant.

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that in the present case, the applicant has not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.