



U.S. Citizenship  
and Immigration  
Services

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**PUBLIC COPY**

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[Redacted]

FILE:

[Redacted]

Office: VERMONT SERVICE CENTER

Date:

SEP 02 2005

IN RE:

[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]

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.

Handwritten signature of Robert P. Wiemann in black ink.

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director to request a section 212(e) waiver recommendation from the Director, United States Department of State Waiver Review Division (WRD).

The record reflects that the applicant is a native of the Philippines. He was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on June 28, 1977 to receive post-graduate medical training. 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 record reflects that the applicant is married to [REDACTED] a United States Citizen (USC), and that they have two USC children (ages 31 and 33). The applicant seeks a waiver of his two-year residence requirement in the Philippines, based on the claim that his wife would suffer exceptional hardship if she accompanies him to the Philippines, or if she remained in the United States.

The director concluded that the evidence submitted by the applicant failed to establish that his departure from the United States would impose exceptional hardship upon his wife. The I-612 Application for Waiver of the Foreign Residence Requirement was denied accordingly. *Decision of the Director*, Vermont Service Center, dated February 17, 2005.

On appeal, counsel contends that the decision of the USCIS is arbitrary, capricious and against the vast weight of evidence submitted in support of the waiver application. In support of the appeal, counsel submitted a brief and an affidavit from [REDACTED]. The entire record was considered in rendering this decision.

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 *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 to the Applicant's Wife if She Accompanies Him to the Philippines**

First analyzed is the potential hardship that [REDACTED] will experience if she moves to the Philippines with the applicant while he fulfills the two-year residency requirement. [REDACTED] as diagnosed with breast cancer in 2000 and has received a variety of medical treatments, including surgery and radiation therapy. Her condition continues to be closely monitored. The director concluded:

It is acknowledged that your wife could not return with you to the Philippines for the two-year period because she is being monitored for a recurrence of her illness. In addition, your wife has her own career as a physician as well as family that resides in the United States.

The AAO finds that the evidence in the record establishes that the applicant's wife would experience exceptional hardship if she accompanied him to the Philippines for two years.

## II. Potential Hardship to the Applicant's Wife if She Remains in the United States

Next analyzed is the potential hardship that [REDACTED] will experience if she stays in the United States while the applicant lives in the Philippines for two years. In support of the original waiver application, counsel submitted a September 2, 2004 letter from [REDACTED] an oncologist at Roswell Park Cancer Institute in Buffalo, New York. [REDACTED] stated:

I have been [REDACTED]'s primary oncologist since her diagnosis of breast cancer in July 2000. As such, I am fully familiar with [REDACTED] medical situation as well as her emotional crisis resulting from both her diagnosis and treatment of breast cancer and her husband's immigration issues.

[REDACTED] described [REDACTED]'s medical treatment and emphasized the importance of closely monitoring her condition to detect a possible recurrence of the cancer. [REDACTED] concluded:

I have already become aware of the emotional strain [REDACTED] has been undergoing regarding her husband's immigration status. I am sure that the stress being felt by [REDACTED] will possibly show up in a deterioration of her medical condition. This could be of a life-threatening nature if she was to develop a recurrence of breast cancer.

In support of the original waiver application, counsel also submitted an August 26, 2004 letter from [REDACTED] a psychiatrist who has treated [REDACTED] since August 2000. [REDACTED] stated:

[REDACTED] was advised to see me in consultation by her primary Gynecologist in July 2000. The reasons were that she was devastated by her breast biopsy diagnosis, was getting very depressed, was constantly crying and was having difficulty making decisions. She has been my patient since August 2000 to the present time. I diagnosed her with Depression, which started after she was diagnosed with Breast Cancer in June 2000. She underwent partial right mastectomy/ lumpectomy with sentinel lymph node biopsy followed by 7 weeks of daily Radiation Therapy. She is presently taking Tamoxifen daily which in itself can cause depression as a side effect. She has been on Paxil, Ambien and occasional Valium for medications. She has had regular Psychotherapy sessions which are now on as needed basis.

[REDACTED] concluded that separating [REDACTED] from her husband for two years would have devastating effects:

Having no blood relatives in the area, her husband is the only one providing her with a much-needed emotional, psychological and moral support so that she is able to function. She needs him to help her physically with daily living chores as her right arm hurts from time to time as a result of the surgery and she cannot lift heavy things. She definitely would face very serious difficulties if she were to live alone. This is on top of her daily unavoidable fears and anxieties of a possible recurrence of the breast cancer and the real risk

of extreme stress predisposing someone to have a recurrence, as recent studies and literatures have shown. If her husband is forced to go back to the Philippines, it is my opinion that Aurora would be unable to work and function as she is doing now. Worse, she could go into Severe Depression and may risk triggering a recurrence of her breast cancer.

In her April 4, 2005 affidavit, [REDACTED] indicated that the applicant assists her with essential daily activities and provides tremendous emotional, moral and psychological support as only a husband can. She stated that without her husband, she would be forced to consider abandoning her pediatric medical practice, which would be detrimental to her and to her patients.

The AAO concludes that [REDACTED] medical condition will cause her to experience exceptional hardship if she remains in the United States while the applicant lives in the Philippines.

### **III. Conclusion**

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 met her burden. The appeal will therefore be sustained. The AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the Director, U.S. Department of State WRD. Accordingly, this matter will be remanded to the director so that he may request a United States Department of State WRD recommendation under 22 C.F.R. § 41.63. If the United States Department of State WRD recommends that the application be approved, the application must be approved. If, however, the United States Department of State WRD recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** The record of proceedings is remanded to the director for further action consistent with this decision.