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U.S. Citizenship
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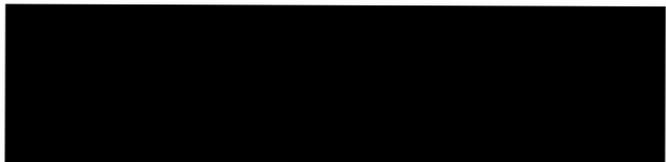
IN RE:



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)

ON BEHALF OF APPLICANT:



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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen and reconsider. The motion will be granted and the previous decision of the AAO will be withdrawn. The matter will be remanded for further action.

The record reflects that the applicant is a native and citizen of Canada who 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 was admitted to the United States as a J1 nonimmigrant exchange visitor on July 30, 1982. The applicant married a U.S. citizen on February 20, 1982 and they have two U.S. citizen children. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her family members.

The director determined that the applicant failed to establish exceptional hardship to a qualifying relative if she fulfilled the two-year foreign residence requirement in Canada. The application was denied accordingly. *Decision of the Director*, dated September 23, 2004.

On motion, counsel asserts that the AAO failed to examine all of the relevant facts in the record and ignored AAO and federal precedents and further, that a more reasonable and thorough analysis allows for a finding of exceptional hardship. *Attorney's Brief*, at 1, dated January 18, 2005.

The record includes, but is not limited to, the applicant's spouse's statement, copy of the applicant's spouse's business contracts, a promissory note, letters from colleagues, a doctor's letter, psychological evaluations for the applicant's spouse and son, letters and information on physician licensing in Canada and medical records for the oldest child. The entire record was considered in rendering this decision.

Section 212(e) of the Act states in pertinent part that:

- (e) 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 [now, Department of State Waiver Review Division] 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 a 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 Immigration and Naturalization [now, 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, "Therefore, it must first be determined whether or not such hardship would occur as the consequence of her accompanying him abroad, which would be the normal course of action to avoid separation. The mere election by the spouse to remain in the United States, absent such determination, is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed. Further, 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, in and of itself, does not represent exceptional hardship as contemplated by section 212(e), supra."

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).

In its initial decision, the AAO found that the applicant's spouse and one of their sons [REDACTED] would face exceptional hardship if separated from the applicant for two years. The AAO will, therefore, only examine hardship if the entire family were to relocate to Canada for two years. On motion, counsel states that the **applicant's spouse has formed two medical service corporations. *Attorney's Brief*, at 2.** One of the corporations (MUC) has a contract with a local hospital in which the applicant's spouse has been specifically appointed as the medical director. *Id.* The other corporation (MEP) has a contract with the same hospital and it requires the appointment of a medical director. *Id.* The applicant's spouse has cosigned a promissory note for \$100,000 to fund start up costs for the hospital clinic. *Id.* The applicant's spouse also states that the funds have been used to set up the clinic. *Statement of Applicant's Spouse*, at 2, dated January 18, 2005. However, there is no indication that the applicant's spouse cannot sell his share of the clinic and/or the purchased assets in order to help pay back the loan, which is in his name and his colleague's name.

Counsel states that the applicant's spouse is financially at risk if MUC is unable to renew the agreement as revenues from the practice are intended to satisfy the loan repayments and if he leaves after the contract is renewed, then he will be in breach of contract. *Attorney's Brief*, at 2-3. Counsel states that the applicant's spouse was the principal force behind the MEP contract, this was due to his established goodwill with the hospital and it would be imprudent to seek assurances of contract renewal in anticipation of his departure. *Id.* at 3. Therefore, it appears that the applicant's spouse may face some difficulties based on the contracts he entered into although the AAO notes that he must have been aware of his spouse's two-year requirement when entering into these contracts and the accompanying risks involved with entering into such contracts.

Counsel contends that the AAO did not properly assess salient facts and failed to apply AAO precedents and federal case law in its analysis. *Id.*, at 4. Counsel states that there was no assessment of the cumulative effects of the various hardships as required by law. *Id.* Counsel states that the AAO failed to recognize that it is quite likely that the applicant's spouse would not be able to qualify to practice medicine during the two year period and the obstacles to practice medicine were not given their proper weight. Counsel details the various credentialing steps in order to practice in Canada. *Id.* The AAO notes that it is unlikely that the applicant's spouse would be able to practice medicine in Canada during the two-year period, however, there is no evidence of financial hardship in the event he could not work as a physician in Canada.

Counsel states that the AAO's decision found, in essence, that a two-year sojourn in Canada would not adversely affect the applicant's spouse's career and reputation because his group practice would be unaffected and he could be restored to his prior position. *Id.* at 6. The record reflects that he has dedicated over twenty-five years developing his professional career in Marin County and he has established many ties to the medical community. Counsel asserts that two precedent cases, *Matter of Bridges*, 11 I&N Dec. 506 (1965) and *Matter of Chong*, 12 I&N Dec. 793 (1968) found that major disruption to a career/education of an applicant's spouse was the basis for an exceptional hardship finding. *Id.* *Matter of Bridges* analyzed the applicant's spouse's case based on the scenario that he remained in the United States, however, it did not include analysis if he left the United States. The AAO notes that these cases involved situations where the Department of State had already recommended granting a waiver whereas the instant case does not include this fact. Counsel also cited *Matter of Savetmal*, 13 I&N Dec. 249 (1969) which involved a lawful permanent resident spouse who was the only urologist in the community and who would be forced to start over again if he returned to the United States. *Id.* at 6. The applicant's spouse case differs in that he would likely not have to start his career over upon return, however, it is persuasive in that he would be forced to give up an established career.

Counsel states that the applicant's spouse is not tenured nor is he employed by the hospital, rather he is an independent contractor. *Id.* at 7. However, counsel also states that the applicant's spouse has dedicated his career to developing his practice and being active in the affairs of the hospital. *Id.* Based on this longstanding relationship, it seems logical that the hospital would be amenable to helping the applicant's spouse transition back into providing at least some of his current services for the hospital upon his return to the United States.

Counsel states that the AAO was dismissive in regard to the mental health issues involved if the applicant's spouse moved to Canada and was unable to engage in his profession. *Id.* at 7-8. The applicant's spouse states that his father and family are prone to severe depression and his depression is tied to his success in a happy family and at work. *Previous Statement of Applicant's Spouse*, at 8-9, dated September 30, 2003. The applicant's spouse's psychiatrist states that if he were to relinquish his practice for two years, the loss of relationships and stability could precipitate a recurrence of his major depressive disorder. *Letter from* [REDACTED] [REDACTED] dated January 18, 2005. Subsequent to this letter, the applicant's spouse was admitted to a psychiatric facility for a month to receive acute treatment for his depression and he has continued weekly outpatient treatment for himself and his family. *Letter from* [REDACTED], at 1, dated April 28, 2006. Considering his severe medical issues in relation to the aforementioned professional issues, the AAO finds that he would face exceptional hardship upon relocation to Canada.

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. Accordingly, the previous decision of the AAO will be withdrawn. The AAO notes, however, 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 director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD recommends that the application be approved, the Secretary may waive the two-year foreign residence requirement if admission of the applicant to the United States is found to be in the public interest. However, if the WRD recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The motion is granted. The decision dismissing the appeal is withdrawn and the matter is remanded for further action consistent with the discussion above.