

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

U.S. Department of Homeland Security  
20 Massachusetts Ave., N.W., Rm. 3000  
Washington, DC 20529



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**

713

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: DEC 12 2007

IN RE:

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:

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, and is now before the Administrative Appeals Office (AAO) 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, U.S. Department of State, Waiver Review Division (WRD).

The record reflects that the applicant is a citizen of the Philippines 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 in J1 nonimmigrant exchange status on July 26, 2003. The applicant's spouse is a U.S. citizen. The applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse.

The director determined that the applicant failed to establish that her spouse would experience exceptional hardship if she fulfilled the two-year foreign residence requirement in the Philippines and the application was denied accordingly. *Director's Decision*, dated February 28, 2007.

On appeal, counsel asserts that the director erred in holding that exceptional financial, emotional and physical hardship would not be imposed on the applicant's spouse. *Form I-290B*, received April 2, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's statement, a therapist's letter for the applicant's spouse and letters from the applicant's spouse's physicians. 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 the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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, Department of Homeland Security (DHS), "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. (Quotations and citations omitted).

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).

The first step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to the Philippines for two years. Counsel states that the applicant's spouse is 60 years old and has lived in the United States his whole life, his family and community ties are exclusively in the United States, he only speaks English, he would have difficulty securing employment due to his poor health and his business contacts and equipment being in the United States, he volunteers in the Concord, California community and he is self-employed. *Brief in Support of Appeal*, at 3-4, dated April 30, 2007.

The applicant quotes a U.S. Department of State Consular Information Sheet (without providing the actual information sheet or a citation for the quote), which states that Americans who choose to travel to the Philippines should observe vigilant personal safety, they should remain aware of the potential for terrorist attacks against U.S. citizens and no area of the Philippines is immune from terrorist attack. *Applicant's Statement*, at 3, dated January 17, 2007. Counsel states that quality medical care is harder to obtain in the Philippines than in the United States and the cost of medical care is exorbitant as health insurance is not available. *Brief in Support of Appeal*, at 4. The AAO notes that the record does not include substantiating evidence of the quality and cost of health care in the Philippines or the availability of health insurance. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. See *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Counsel asserts that the applicant's spouse would lose access to all of his primary care physicians and medical care present in the United States. *Brief in Support of Appeal*, at 7. The record reflects that the applicant's spouse has diabetic neuropathy and type II diabetes, he is taking medicine for the neuropathic pain and he still has pain that limits his ability to function. *Letter from Richard L. Weinstein, M.D.*, dated November 14, 2006. The applicant's spouse's ophthalmologist states that he has diabetic retinopathy which requires follow-up visits every three to six months. *Letter from Sam Yang, M.D.*, dated January 4, 2007. The applicant's spouse's chiropractor states that the applicant's spouse is receiving treatment for an ongoing lower back condition, he has difficulty walking and he is to continue treatment to manage the condition. *Letter from Thomas R. Donovan, D.C.*, dated November 17, 2006.

The record reflects that the applicant's spouse has established relationships with several physicians and a chiropractor. Although the applicant has not established that her spouse cannot obtain treatment in the Philippines, the applicant's spouse will be severing established medical relationships, which in itself is a hardship factor due to the loss of the inherent bond and benefits derived from these relationships. Furthermore, the applicant's spouse will have to sever his enrollment in a diabetic neuropathy study in which he has been given study medication resulting in pain relief. See *Letter from Richard L. Weinstein, M.D.* The AAO also notes that even if the applicant's spouse obtained health care in the Philippines, he would be dealing with his medical problems in a completely foreign environment.

Considering the applicant's spouse's ties to the United States, his complete lack of ties to the Philippines, safety issues, the loss of established medical relationships, the loss of participation in a medical study which has provided pain relief, and handling medical problems in a foreign environment, the AAO finds that exceptional hardship would be imposed on the applicant's spouse upon relocation to the Philippines for two years.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship by remaining in the United States during the two-year period. In regard to financial

hardship, counsel states that the applicant's spouse's adjusted gross income in 2006 was negative \$4,516, he would have to send money to support the applicant in the Philippines, there is no way he could afford a part-time caretaker and he needs the applicant's care due to the high cost of living in the San Francisco area. *Brief in Support of Appeal*, at 5. The AAO notes that there is no evidence that the applicant cannot obtain employment in the Philippines in order to support herself. In addition, there is no evidence of the high cost of living in Concord, California, which is 29 miles from San Francisco. The record reflects that in 2006 the applicant's spouse's business income was negative \$4,516. *Applicant's Spouse's 2006 Form 1040*, at 1, undated. However, the record does not include the applicant's spouse's Schedule C, which would help establish his income and whether he could support the applicant in the Philippines and pay for his health care.

In regard to the applicant's spouse's health issues, the director states:

The applicant . . . has supplied several letters from doctors stating that he suffers from various diabetic related illnesses that require the applicant's assistance in day-to-day activities. The applicant has also supplied a letter from a doctor stating her spouse has an ongoing back problem. The spouse has suffered from diabetes since 1992. The applicant married the spouse less than six months ago. The applicant has supplied no proof that her spouse needed any specific assistance or support in performing these regular activities as recently as October. He survived for almost fifteen years without the aid of his recent spouse. As such there is no reason to believe that he could not do so now. In addition, the applicant has provided no evidence to substantiate her claim that her citizen spouse could not afford a caretaker to assist him (if he did need assistance in performing daily activities). (Quotations and citations omitted).

In regard to the applicant's spouse's health problems, one of the applicant's spouse's physicians states that he has been diagnosed with type II diabetes since 1992 and with diabetic neuropathy since 2002, he has been enrolled in a diabetic neuropathy study since October 2004, he is currently taking 400 mg of lacosamide daily for neuropathic pain, his pain limits his ability to function in his daily activities and his health has improved recently with the applicant taking care of him. *Letter from Richard L. Weinstein, M.D.* Another of the applicant's spouse's physicians states that the applicant's spouse has diabetic peripheral neuropathy and rheumatoid arthritis, and he gets significant assistance from the applicant in managing his medical conditions. *Letter from Paul C. Korn, M.D.*, dated January 4, 2006. A third physician states that the applicant's spouse has diabetic retinopathy which requires follow-up visits every three to six months. *Letter from Sam Yang, M.D.* The applicant's spouse's chiropractor states that the applicant's spouse is receiving treatment for an ongoing lower back condition, he has difficulty walking and he is to continue treatment to manage the condition. *Letter from Thomas R. Donovan, D.C.*, dated November 17, 2006.

The record does not reflect whether the applicant's spouse previously dealt with his medical problems alone or with the assistance and support of another. However, the applicant's spouse's current situation reflects that his health has improved specifically with the applicant taking care of him. As such, the record indicates that separation for two years from the applicant would adversely effect the applicant's spouse's medical situation.

In addition, the applicant states that her spouse would face emotional and psychological hardship due to the loss of personal and familial support. *Applicant's Statement*, at 1-2. The applicant's spouse was seen by a therapist who states that the applicant's spouse has been feeling anxious and worried, he is not sleeping, he is

experiencing depressive symptoms that could worsen and cause his physical health to further deteriorate. *Therapist's Letter*, at 2, dated April 19, 2007.

Considering the applicant's age, his medical problems and the role the applicant plays in his medical care, the AAO finds that exceptional hardship would be imposed on him during a two-year period of separation.

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 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 appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.