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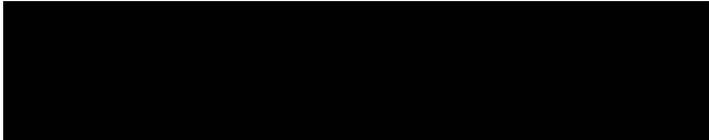
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U.S. Citizenship  
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **APR 22 2008**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The applicant is a native and citizen of Romania who obtained J1 nonimmigrant exchange status on July 15, 2001. She 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) based on the Exchange Visitor Skills List. The applicant presently seeks a waiver of her foreign residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to Romania temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled her foreign residence requirement in Romania.

The director determined that the applicant failed to establish that her spouse would experience exceptional hardship if the applicant fulfilled her foreign residence requirement in Romania. *Director's Decision*, dated September 20, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated October 25, 2007; an affidavit from the applicant's spouse, dated October 7, 2007; an affidavit from the applicant, dated October 10, 2007; evidence of the applicant's J-1 status in the United States; documentation regarding the applicant's J-1 program sponsor; a no objection letter from the Embassy of Romania in Washington, DC, dated May 7, 2004; a copy of the no objection denial letter from the U.S. Department of State, dated June 16, 2004; information about Ankylosing Spondylitis [AS]; medical documentation with respect to the applicant's spouse; affidavits and letters written on behalf of the applicant and her spouse; reference letters and supporting documentation regarding the applicant's past and current employment; copies of certificates issued to the applicant regarding her education and training; photos of the applicant and her spouse; and copies of letters written to the applicant's spouse by courthouse workers. The entire record was reviewed and 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 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).

The first step required to obtain a waiver is to establish that the applicant's spouse would experience exceptional hardship if he resided in Romania for the requisite period with the applicant. To support this contention, the applicant's spouse states the following:

...I was finally diagnosed with Ankylosing Spondylitis [AS]. Because of the progression of the disease process, I had to undergo three hip surgeries. The first one occurred in 1975. The cartilage covering the joint in the left hip had eroded to such an extent that bone was rubbing on bone causing terrible pain. The second replacement occurred approximately ten years later due to the fact that the adhesive attaching the prosthesis to the bone had deteriorated causing the joint to become loose. The most recent hip surgery was necessary because the replacement became infected and had to be completely removed because it threatened my life. As a consequence of this surgery I was left without a hip joint and the left leg is approximately 4 inches shorter than the right one. I am unable to use this leg for walking or standing. There has been no improvement in this leg.

My right hip joint is completely fused, and as the disease process continues it has become increasingly painful. Additionally, the right knee has, within the past 18 months, become increasingly painful. I can only walk on crutches for short distances using the one leg, due to the pain. The fact that my lung capacity is greatly diminished, due to the fusion of the joints of my rib cage, I tire very easily because my breathing is very shallow. In order to continue to get around I would have no choice, in the very near future, but to employ the use of a wheel chair, in which case, I would be relying on my wife's help even more than I am at this present time.

...In spite of my best efforts to combat the effects of the disease, my condition has worsened rapidly the last years because it has progressed to the end stage.

The medical choices for treatments that are presently offered involve the possibility of some very bad side effects. I presently use Indometacin daily, to relieve the inflammation and the pain. The side-effects of this medication are, among others, depression, dizziness, insomnia, anxiety and loss of appetite. When the pain

becomes unbearable, I also take Prednisone. I have been taking the drug Indometacin for more than sixteen years now....

As a consequence of the AS, I suffer from Chronic Recurring Iritis (an inflammatory process of the eye), cataracts and glaucoma. As with the AS, iritis recurs more often with stress. At this moment I am in the middle of an episode of a resurgence of the iritis. The result is that my eyes, without warning, become very irritated and my vision is clouded—so much so that my ability to read regular print is very much compromised....

After a consideration of several alternatives, including the probability of moving with my wife to Romania in order to wait out the J-1 visa time, we determined that this would greatly compound the problems in several foreseeable ways:

- 1) Traveling the long distance in my condition would be a nightmare. I do not speak the Romanian language and my training as a lawyer would not be marketable in that community.
- 2) My wife was forced to retire four years earlier on a small pension because her teaching position was not kept when she returned home, and it would be impossible for us to live on her income.
- 3) Because of the long and severe winters, my arthritic condition will dramatically worsen.
- 4) If I had to consider relocation with my wife, even on a temporary basis, my livelihood would be destroyed. If I should close my office, give up my residence and attempt to relocate at this time, it would be extremely difficult to start over. I would have to abandon my present clients and would have to try to start my law practice all over again. In short, I have no means of supporting myself and my wife in Romania, and upon my return here my means of support would be gone.
- 5) At this time, I am covered under the social security medicare program and this would not be available to me in Romania.
- 6) Should my wife return to her home country, the fact that she is retired does not leave her the possibility of finding a teaching position. She would have great difficulty in making a living in her hometown and it would be my duty to support her as it is my present duty to support her....

Prior to the sudden acceleration of my disease process within the past few years, I had every intention of continuing to build my law practice, manage the disease through a balance of medication, exercise, diet, and a good deal of luck. Now I can clearly see that I was being naïve and deluding myself by thinking I could carry on alone.

*Affidavit of J. [REDACTED], dated October 7, 2007*

The applicant further elaborates on the hardships her spouse would face were he to relocate to Romania for the requisite period:

...When I returned home [to Romania], I found out that the school where I had taught for 21 years (in the School District where I had been considered an outstanding teacher for 28 years) had replaced me. There were no French teaching positions available in the district.

Unfortunately, FACES, my J program sponsor, failed to have an agreement with the Romanian Ministry of Education concerning the maintenance of their teachers' positions. Later they did, but only after I left the program. So it didn't help me. By this agreement, the Romanian Ministry of Education agrees to hold the position of the teachers in the program and to count the 3 years spent in the program in the calculation of their pension. I couldn't benefit from this agreement. Consequently, my position had not been kept and my 3 years in the program were not taken into consideration for my pension, which made it smaller....

I was offered a temporary position at the School District. On March 3, 2005, the Teacher's Counsel had scheduled the French teaching position for elimination. After the presidential elections, in April 2005, the School District staff was replaced by a new one. The only option for me was to take early retirement. Being unable to teach anymore, I didn't see how I could continue to serve the purpose of the Exchange Visitor Program, which was my genuine intention after returning to Romania....

For James [the applicant's spouse] to accompany me to Romania is not at all an option. First, because the climate there is too harsh for his disease and he wouldn't survive the cold winter. His disease requires specialized doctors and advanced medical techniques of investigation and treatment. He couldn't work there as a lawyer or any other profession because he doesn't speak the language. My apartment in Romania is situated on the fourth floor, and the building doesn't have an elevator....

*Affidavit of [REDACTED] dated October 10, 2007*

To corroborate the applicant's spouse's statements regarding his medical condition and its severity, counsel provides documentation regarding AS, and the applicant's spouse's medical records. As stated by [REDACTED], the applicant's spouse's treating physician,

...This is a 65-year-old African-American male well known to me, seen approximately five to seven years ago with long history of ankylosing spondylitis.... He still develops recurrent iritis, mostly affecting his left eye. He is having severe limitation on any rotation of his neck which is impeding his driving ability. He is also having difficulty getting in and out of the car as he has a fused right hip. He had a left hip replaced that became later on infected.... His spine since initial evaluation, is completely ankylosed. He has also obvious restriction in range of motion of his chest. He is having some restriction in range of motion of both index fingers.... He has recently gotten married. This lady [the applicant] has assisted him significantly at home with his limitations and at times also at work....

This is a gentleman with end-stage ankylosing spondylitis and obvious disability from his condition. Although this may not limit his intellectual capacity as a lawyer, he definitely has significant physical disability for which he is going to need in the near future significant assistance in even his basic activities of daily living.....

Letter from [REDACTED] M.D., Carolina Musculoskeletal Institute-Rheumatology, dated January 2, 2007.

Based on the documentation provided by counsel with respect to Ankylosing Spondylitis, its degenerative nature and its incurability with respect to the applicant's spouse, the gravity and unpredictability of the symptoms associated with the illness, the short and long-term ramifications for those afflicted, the need for those suffering from AS to be treated by medical professionals familiar with the disease and its treatment, the language and cultural barriers, financial hardship, and the applicant's spouse's professional career disruption, the AAO concludes that the applicant's spouse would suffer exceptional hardship were he to relocate to Romania.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if he remained in the United States during the period that the applicant resides in Romania. As stated by the applicant's spouse,

...I am able to get around using only my right leg in spite of the fact that it is completely fused at the hip and continues to be very painful. My left leg is without a hip joint and is about 4 inches shorter than the right leg and cannot be used for walking. The pain radiates through my back, neck, hip joint, shoulders, and knee and is worse in the morning. My wife [the applicant] helps me out of bed and helps me to get a shower. I can no longer get into or out of the bathtub without assistance.

I also need her help in getting dressed since my shoulder joints are partially fused and very painful. I experience stabbing pains if I move my shoulders the wrong way, and need help in putting on my shirt, underwear, trousers and socks. Since I

cannot bend my back, due to the fact that it is almost completely fused, it has become dangerous for me to perform these simple tasks on my own without the danger of falling. As a matter of fact, while attempting to put on my underwear and trousers, a couple of times within the past 2 months I fell and could not get to my feet without my wife's help.

As the pain and discomfort subsides during the day, I use this time at work to see clients, and prepare case documents. My wife works with me at the office by typing, bringing me the meals that she prepared, making sure I take my medication, and helping me present as positive a public image as I can. Most of my clients come from referrals by those that I have served successfully over the years. The positive results that I obtain for my clients are a very important factor in influencing them to continue to use my services and to overlook my obvious disability....

I do probate work as well as property transfers and wills for the elderly. There are times when I go to the local hospital and to the homes of the elderly or disabled clients who are unable to come to my office to execute documents.... My wife takes me to these appointments and also serves as the witness to signature. Many of these people call on me to help them because many of the other attorneys are usually too busy or unwilling to help this segment of the community, and I would not be able to render this service without the help of my wife.

The major focus of my law practice consists of Family Law and by necessity I must be in Court a lot, and this is where my wife's help is so invaluable. Without her help in getting me to my hearings on time, I will not be able to continue in the practice of law since my major source of income will be gone....

With my wife taking me to my doctors appointments, preparing and delivering my meals at home and at the office, assisting me in getting dressed and prepared for work during those times of the day when the pain and discomfort resulting from the disease process is at its worse, the kindness and trust of my clients and the Court personnel, the pride that I take in my work and the knowledge that I am still capable of providing a valuable service to the community, give me an incentive to struggle on. I am optimistic that I can survive the ravages of this disease over a long period of time. Without her help, the outlook for myself will be bleak indeed.

Here are some of the foreseeable consequences as well as the hardship that her departure would have on me:

- a) I would be forced to close my practice for the reasons mentioned above;
- b) I have not accumulated any resources in contemplation of retirement;

- c) Without an income, I would be facing very desperate circumstances.... After all my struggles with this disease, I do not wish to become a burden on the government and this appears to be a strong possibility without the assistance of my wife.
- d) Mr [sic] stress level without Stela [the applicant] would dramatically increase. Because of the AS this added stress and mental anguish will certainly cause a deterioration in my health. Stress causes flare-ups of inflammation that lead to more bone fusion and organ disturbance. These in turn increase the pain that I suffer.... At the moment, during the pendency of this review, I am suffering a great deal of emotional stress. The stress has precipitated several very painful flare ups of the disease and I am forced to increase my medication dramatically.
- 7) ...I have come to depend almost exclusively on the help and support that she gives me. My wife is not only my companion who helps me in managing the day to day logistics of survival, her very presence and constant encouragement reinforce the feeling of hope and enthusiasm that I have always tried to have....

*Supra* at 3-7.

The applicant further states,

...My husband is suffering from Ankylosing Spondylitis, a chronic degenerative arthritic disease. His condition has deteriorated lately to the extent that I have to assist him more and more with activities that he used to do by himself. The rigidity in his neck has gotten to the point where he is unable to turn his head. This has caused him great difficulty in driving his car safely. I have been driving him to work for the past six months. Additionally, as a result of the arthritis, my husband suffers from recurring iritis, an inflammatory condition of the iris in the eye. Although he has reasonable vision at this time, flare ups occur without warning, and at this time his vision is greatly impaired, further interfering with his ability to operate a vehicle safely....

I assist him daily without fail, from the moment he gets up in the morning to the moment he goes to bed. I help him to get dressed, because his joints are so stiff and painful, that he cannot do it by himself. He cannot bend to put his shoes or to take them off. I serve him the meals that I prepare every day, because he's on a diet imposed by his condition. I help him with his lawyer's office as his assistant. I type the documents, answer the phone, go to the post office to pick up the mail, and to the Court to file the documents. I go with him to the gym, to help him to exercise in order to maintain the poor mobility he has left.

No affordable or available medical care services could provide him all the services he needs, especially the love, affection and companionship that he needs more than any medicine or medical procedures....

The degree of our emotional anguish cannot truly be measured by anybody other than us. At our age, time spent together is more important than anything else. After living together in harmony for nearly 3 years, it takes a log of anguish to be apart for another at least 2 years or more. We don't have anybody else but each other. The children are far away.... We see them only on holidays.... If I was forced to leave my husband's side and return to Romania, the thoughts of the hardship the deterioration of his condition would cause him are unbearable....

*Supra* at 2-4.

Due to the applicant's spouse's incurable medical diagnosis of Ankylosing Spondylitis, a degenerative disease, the physical, emotional and psychological stress associated with this disease, his inability to care for himself, his continued professional goals as a lawyer, and the fears and anxieties associated with living with a lifelong and incurable illness without his wife's support, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse physical, economic, emotional and psychological hardship that would be significantly beyond that normally suffered upon the temporary separation of families. The applicant's spouse needs his wife's support on a day to day basis to continue living and supporting himself.

Upon review of the totality of the circumstances in the present case, the AAO finds the evidence in the record establishes that the applicant's spouse would experience exceptional hardship were he to relocate to Romania and in the alternative, were he to remain in the United States without the applicant, for the requisite two-year term.

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 DOS. Accordingly, this matter will be remanded to the director so that she may request a DOS recommendation under 22 C.F.R. § 514. If the DOS recommends that the application be approved, the application must be approved. If, however, the DOS recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** 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.