



U.S. Citizenship
and Immigration
Services

PUBLIC COPY
identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

H13

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: JAN 25 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.

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 dismissed.

The record reflects that the applicant is a native and citizen of Austria who was admitted to the United States in J1 nonimmigrant exchange status on or about August 3, 2003. She is thus 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 presently seeks a waiver of her two-year residence requirement, based on the claim that her U.S. citizen spouse and child, born on June 5, 2006, would suffer exceptional hardship if they moved to Austria temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Austria.

The director determined that the applicant failed to establish that her spouse and child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Austria. *Director's Decision*, dated March 27, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated May 22, 2007 and a copy of an article entitled The Origins of Attachment Theory: J. [REDACTED] and [REDACTED] authored by [REDACTED]. The entire record was reviewed and 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, 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 and/or child would experience exceptional hardship if they resided in Austria for two years with the applicant. To support this contention, the applicant states the following:

...Due to the demanding nature and extreme competition of pursuing a career in dermatology, my husband will have to effectively abandon this pursuit in order to move to Austria with his family. As mentioned, my husband is currently committing two years of his life to performing clinical research in the Department of Dermatology at Northwestern University Medical School in Chicago with the hope of gaining acceptance into a residency program in dermatology in 2007. Dermatology residencies are extremely competitive, and if he were accepted into a program and opted not to go, he will not be granted the ability to join the program at a later time...

Additionally, my husband does not speak German. In Austria, German is mainly spoken, and English is rarely used. Thus, my husband will be unable to work in Austria...This is clearly a detriment to his career, as he will have to abandon his training program in the United States only to come to Austria, where he will have no way of furthering any career path. When he returns to the United States in two years, he will have utmost difficulty securing a residency in dermatology due to his gap in experience and training...

Moreover, my husband will be unable to contribute to supporting his family. My salary alone will be insufficient to support our family with our astronomical school loans and rising debt...We are not in a financial position that will allow for only one working parent and we will be unable to provide the basic necessities for our son. We will all suffer an extreme economic hardship.

...I feel that the lack of community support for Jewish people and the accompanying social ostracization will be severely detrimental to my son Tobiah. I do not wish for him to be raised in an environment that will treat him as an outsider. It is not uncommon for prejudice against Jews to be expressed explicitly, even amongst young children. For example, while in pre-school, a classmate of my step-brother's proclaimed, 'We do not want Jews at the table.' The boy was barely punished, and his parents were not even consulted about the matter. He was merely sent off to the corner for some quiet time. Additionally, my step-mother, who works at a university for fine arts, came to work one day to find the words 'Judensau' (which translates to 'Jewish Pig') scribbled on her office door. Sadly, such occurrences are all too common in Austria, and they are not taken seriously by authorities. This form of ambivalence and inaction toward anti-Semitic remarks expressed by even a pre-school child is what directly contributes to the high level of anti-Semitism that still exists in Austrian society today. I do not want my young son to be influenced by this deep hatred of his own people...

With respect to the applicant's child, the record does not establish that anti-Semitism in Austria would directly cause him exceptional hardship. While the applicant has provided evidence of incidents of anti-Semitism, in the form of affidavits, said incidents appear to be isolated and do not establish general discrimination towards Jews living in Austria. The AAO notes that the applicant has been able to obtain a higher education while in Austria, and her own step-mother has a teaching position at the Academy of Fine Arts Vienna; discrimination against Jews has not impeded their ability to obtain scholastic and professional acclaim in Austria. In addition, pursuant to the International Religious Freedom Report 2006, released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, anti-Semitism in Austria "...was typically characterized by diffuse and traditional anti-Semitic stereotypes rather than by acts of physical aggression..." and statistically, the attitudes and opinions towards Jews have been improving. *International Religious Freedom Report 2006-Austria, released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, dated September 15, 2006.*

Moreover, while the applicant states that her child would suffer financial hardship were he to reside in Austria for two years, no documentary evidence has been provided regarding the applicant's and/or her spouse's current finances and projected employment income while in Austria, to establish that the applicant's child would suffer exceptional financial hardship. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *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)). As such, despite the director's conclusions to the contrary, it has not been established that the applicant's U.S. citizen child would suffer exceptional hardship were he to reside with the applicant in Austria.

However, based on the career disruption that the applicant's spouse would encounter were he to reside in Austria for a two-year period with the applicant, and the concerns outlined above regarding the language barrier that the applicant's spouse would face, the AAO concurs with the director that the applicant's U.S. citizen spouse would experience exceptional hardship were he to accompany the applicant to Austria for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's spouse and/or child would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Austria. In this case, counsel contends that the applicant's spouse and child will experience emotional, psychological and financial hardship were the applicant to fulfill her two-year home residency requirement in Austria while they remained in the United States. As stated by counsel,

...The record shows that [redacted] [the applicant's child] was evaluated by psychologist [redacted] at age 2 months. [redacted] predicted that [redacted] would develop a Separation Anxiety disorder and depressive symptomology if separated from his mother for two years...In fact, because [redacted] [the applicant] and her husband [redacted] [the applicant's father] live in two distant cities, [redacted] is most likely to develop Separation Anxiety disorder and depressive symptomology due to his heightened attachment to only one parent...

[redacted] [the applicant's spouse] will have to work long hours if he secures a residency, as planned. Because of [redacted] s projected long hours, [redacted] will have to

be placed in the care of others for extended hours. [REDACTED] will essentially lose the parent who is his primary caregiver, and he will also lose his parent who already has limited visits with...

.. [REDACTED] will suffer an exceptional hardship in his separation from his stepson, [REDACTED] (who must leave if [REDACTED] leaves due to his J-2 status).. [REDACTED] will be absent in Austria for two years while entering his teenage years. This is an infamously difficult time for primary-caretaker parents to establish and maintain relationships with their children. It will be exceptionally difficult for [REDACTED] to reconnect after a two-year absence in a relationship that naturally already requires maximum effort as it is...

...With [REDACTED] high level of student loans from [REDACTED] medical...with their current debts, and with the added costs of childcare for [REDACTED], [REDACTED] would be left impoverished. ...Because [REDACTED] will have to accept any residency program he matches for, there is no guarantee that he would be near family for help with childcare, and nor should the Service assume that his family is able to help with childcare...Additionally, it is well-known that medical residencies are exhausting and time-consuming. Residents often work long and unpredictable hours. Arranging for childcare without Dr. [REDACTED]'s support will make it impossible to arrange for childcare every time [REDACTED] would be on-call. This will adversely affect [REDACTED]'s career as well as the care for [REDACTED]. Moreover, [REDACTED] will be responsible for affording an amount of childcare that most families do not have to assume—as a resident, he will have to pay for overnight childcare and childcare at spontaneous times. This will be expensive, unaffordable and undoable for any resident...

Brief in Support of Appeal, dated May 22, 2007.

[REDACTED] corroborates the concerns outlined by counsel with respect to the emotional and psychological hardship that the applicant's spouse and child would experience were the applicant to reside abroad for a two-year period. As [REDACTED] states,

. [REDACTED] [the applicant's spouse] is currently separated during his work week from his wife and young baby who are living in New York City where his wife is completing her training in cardioelectrophysiology. He has experienced both anxiety and depressive based symptomatology based upon his separation from his family. He is very apprehensive about what the impact on him and his son...would be in the event that his wife, [REDACTED] [the applicant], would have to return to Austria...

He told me that it is very hard for him to tolerate separations from his wife and son during the work week, until he is able to join them in New York City...Even now, when separations from his family are only temporary, he has begun to have sleep disturbance, and has difficulty falling asleep at night and wakes up during the

night...His appetite is poor, and he has lost approximately five pounds. There is periodic sadness and prevalent anxiety...

Affidavit of [REDACTED], Licensed Psychologist, dated August 14, 2006.

With respect to the applicant's spouse, the AAO notes that although the input of any mental health professional is respected and valuable, the submitted affidavit is based on a single interview between the applicant's spouse and the psychologist. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the disorders suffered by the applicant's spouse. Moreover, the conclusions reached in the submitted affidavit, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings with respect to the applicant's spouse speculative and diminishing the evaluation's value to a determination of extreme hardship.

In addition, the record indicates that the applicant's spouse already lives apart from his family, and travels to see his spouse and child on weekends only. It has not been established that the applicant's spouse would be unable to travel to Austria on a regular basis to see his family. The AAO thus finds that the applicant's departure to Austria for a two-year period while her spouse remains in the United States would not cause him hardship that would be significantly beyond that normally suffered upon the temporary separation of families. However, the AAO does concur with counsel that the psychological ramifications of separating a young child from his mother for a two-year period would cause the child exceptional hardship.

The record, reviewed in its entirety, does not support a finding that the applicant's spouse and/or child will face exceptional hardship if the applicant's waiver request is denied. While the AAO finds that the applicant has established that her spouse would suffer exceptional hardship were he to relocate to Austria, it has not been established that her spouse would suffer exceptional hardship were he to remain in the United States while the applicant returns to Austria for a two-year period. Alternatively, while the AAO finds that the applicant's child would suffer exceptional hardship were he to remain in the United States for a two-year period while the applicant returns to Austria, it has been not been established that he would suffer exceptional hardship were he to accompany the applicant to Austria.

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. The waiver application is denied.