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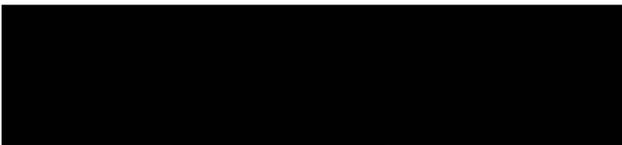
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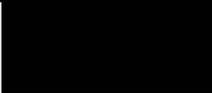
U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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FILE:



Office: VERMONT SERVICE CENTER

Date:

JAN 30 2008

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:

SELF-REPRESENTED

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 Center Director, Vermont 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 India who was admitted to the United States in J-1 nonimmigrant exchange status on June 17, 1994 to participate in graduate medical training. He 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 his two-year residence requirement, based on the claim that his U.S. citizen child, born in June 1999, would suffer exceptional hardship if she moved to India temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled his two-year foreign residence requirement in India.

The center director determined that the applicant failed to establish that his child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in India. *Center Director's Decision*, dated October 10, 2006. The application was denied accordingly.¹

In support of the appeal, the applicant provides a Form I-290B, Notice of Appeal, dated November 5, 2006; a letter, dated November 28, 2006; an Evaluation Plan and Written Notice with respect to the applicant's daughter's speech and language, dated November 3, 2006; and medical documentation with respect to the applicant's spouse.² 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

¹ The record indicates that the applicant filed a Form I-612, Application for Waiver of the Foreign Residence Requirement (Form I-612) on April 11, 2003. Said application was denied on October 15, 2003. The applicant appealed the decision on November 12, 2003, and on August 16, 2005, the AAO dismissed the appeal. The applicant filed a second Form I-612 on November 14, 2005, which was denied on October 10, 2006 and is the basis of the instant appeal.

² The record indicates that the applicant's spouse was previously a J-1 exchange visitor who obtained a waiver of the two-year foreign residency requirement based on exceptional hardship. She now resides in the United States as an H-1B nonimmigrant, valid through June 29, 2008.

(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 U.S. citizen child would experience exceptional hardship if she resided in India for two years with the applicant. To support this contention, the applicant states the following:

... [redacted] s [the applicant's child's] asthma is worsening, she has new medical problems with bed wetting (enuresis), in toeing (medial tibial torsion), obesity and her teacher is concern[ed] again about her speech... [redacted] s teacher is concerned that it is sometimes difficult to understand [redacted] s articulation of sound. This may affect [redacted] self confidence and self esteem in knowing that other[s] may not understand her.... Taking her to India will cause exceptional psychological, medical and economic hardship.

Letter from [redacted], dated November 28, 2006.

In addition to the concerns outlined above, the applicant states that his daughter is completely assimilated to American life. As stated by the applicant,

... [redacted] [the applicant's child] speaks and understands only [the] English language. Moving to India and coping with new languages will affect her language development.

... We are living in this country for more than 11 years now. We currently live in Voorhees, NJ, which is a quaint little all-American town. My family is well-entrenched in the community. We own a five-bedroom, single family house with ample space for my daughters to play around. Both my daughters have their own bedrooms and play room....

We have good friends in our community and [redacted] [the applicant's child] has good playmates. [redacted] is in first grade in local public school and has many friends in her class. [redacted] has to change her school if we sell our house and move to [an]other community. [redacted] will loose [sic] all her friends, and she will have to adjust with new environment. Change in social and environment and family dynamics will adversely affect [redacted] medical, psychological problems and language development.

...She likes swimming, soccer and dance and is also learning ice-skating....

Affidavit from [REDACTED] dated November 9, 2005.

Based on the documentation provided, the AAO finds that the hardship the applicant's child would encounter were she to relocate to India for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year home residency requirement. The record indicates that the applicant's child is integrated into the U.S lifestyle and educational system. She has never lived outside the United States and she would not be able to speak, read or write in the native language. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO finds *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern. To uproot the applicant's child at this stage of her education and social development, bearing in mind that she already suffers from a number of medical issues that require professional attention and is in need of continued speech therapy, as documented in the file, and relocate her to India would be a significant disruption that would constitute exceptional hardship.

The second step required to obtain a waiver is to establish that the applicant's child would suffer exceptional hardship if she remained in the United States with her mother, an H-1B nonimmigrant status holder, during the two-year period that the applicant resides in India. The applicant asserts that the applicant's family would suffer financial, emotional and psychological hardship due to the applicant's two-year absence. As stated by the applicant,

...My wife (S [REDACTED]) was diagnosed with tumor in her abdomen and required major surgery in April 2005. Since then she has been followed very closely by cancer specialist for recurrence of the tumor and possible chemotherapy. She had frequent physician visits and had several CT scans, ultrasounds, MRI and X-rays done since her surgery.... She is currently doing her fellowship, which required 50-70 hours work per week with very unpredictable schedule. If I leave my wife here alone, it is impossible for her to work and take care of her own and [REDACTED] [the applicant's child] medical needs. In such situation [REDACTED] will face exceptional medical and psychological hardship....

Letter from [REDACTED], dated November 28, 2006, at 1.

Although the applicant provides a list of radiological procedures with respect to his spouse, no letter from a medical professional has been provided to detail the applicants' spouse's current medical situation, her short and long-term treatment plans, and the gravity of her situation. Moreover, the record indicates that the applicant's spouse is able to work full-time. As such, it has not been established that the applicant's spouse is unable to properly care for herself and their child while the applicant returns to India for two years.

In addition, no financial documentation has been provided to establish the applicant's and his family's current economic situation, to corroborate that the applicant's spouse would be unable to obtain child care coverage to assist with their child's needs after the applicant returns to India for two years. Nor has it been established that the applicant would not be able to obtain gainful employment in India, thereby assisting with the maintenance of the U.S. household. While the applicant and his spouse may need to make adjustments with respect to the family's financial situation while the applicant resides abroad for two years, it has not been shown that such adjustments would cause the applicant's child exceptional hardship.

Finally, it has not been documented that the applicant's absence for the two-year period would exacerbate his child's medical, psychological and scholastic problems to the point of exceptional hardship. No letters have been provided that document a direct correlation between the applicant's child's medical and scholastic problems and the applicant's pending departure for a two-year term. As for the applicant's child's psychological issues, [REDACTED] Ph.D., PC asserts that the applicant's child has separation anxiety disorder which would be exacerbated were the child to be separated from one of her parents. *Letter from [REDACTED] [REDACTED] dated February 11, 2003.* The record fails to reflect an ongoing relationship between a mental health professional and the applicant's child or any history of treatment for the generalized anxiety disorder suffered by the applicant's child. Moreover, the conclusions reached in the submitted letters do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of exceptional hardship. As such, the applicant's child's hardships, were she to remain in the United States for two years without the applicant, do not go beyond that normally suffered upon the temporary separation of a child from her father.

The record, reviewed in its entirety, does not support a finding that the applicant's child will face exceptional hardship if the applicant's waiver request is denied. Although the AAO finds that the applicant has established that his child would suffer exceptional hardship were she to relocate to India, the AAO finds that the applicant has failed to establish that his child would suffer exceptional hardship if she remained in the United States with her mother 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 not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.