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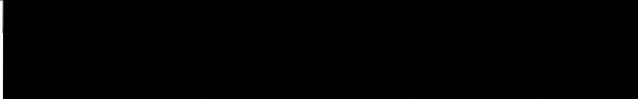
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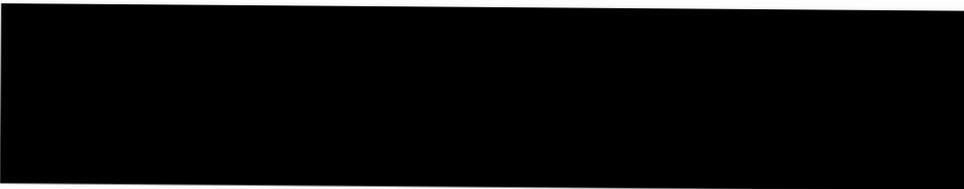
IN RE:



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 dismissed.

The record reflects that the applicant is a native of Croatia and a citizen of Montenegro who entered the United States in J-1 nonimmigrant exchange status in June 2002 to participate in graduate medical training. 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 foreign residence requirement, based on the claim that her U.S. citizen child, born in August 2006, would suffer exceptional hardship if she moved to Montenegro temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Montenegro.

The director determined that the applicant failed to establish that her child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Montenegro. *Director's Decision*, dated August 13, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated October 5, 2007 and evidence that the applicant's spouse has filed an appeal on October 5, 2007, based on a denial of his Form I-612 application. 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 child would experience exceptional hardship if she resided in Montenegro for two years with the applicant. To support this contention, the applicant states the following:

...It is not feasible for my husband and I to fulfill our two-year foreign residency requirements simultaneously. If my husband returned to Syria during the same period of time that I returned to Montenegro, our daughter would face extreme hardship. I am not eligible for employment in Syria, and my husband is not eligible for employment in Montenegro. This, coupled with the fact that both of our projected salaries in each country will be extremely low, will not allow us to afford childcare....

... my daughter would suffer exceptional hardship in Montenegro for a number of reasons. There is increased anti-American sentiment in Montenegro that would negatively impact my daughter and potentially place her at risk of physical harm, psychological harm, and medical hardship. Montenegro has a very poor human rights record as it pertains to the treatment of individuals who are not from Montenegro. My daughter would be subject to physical and psychological risk by living in such an environment. In addition, my daughter would be exposed to risk of physical and medical hardship by the poor environmental conditions and the economic hardship that we would face in Montenegro. Living in Montenegro to fulfill my two-year home residency requirement would also have a detrimental effect on my daughter's educational development upon returning to the United States....

My husband will not be able to find employment as a physician in Montenegro because the Montenegrin Ministry of Health will not recognize his training as a physician. My husband is not a citizen of Montenegro and will thus be unable to secure employment in any field in the country....

...Additionally, my husband does not speak the native language of Montenegro, which will deter him from getting any job there.... Therefore, I am the only one who is even capable of seeking and gaining employment in Montenegro.

I am a hematologist/oncologist by training. There are limited opportunities for hematologists and oncologists in Montenegro.... Even if I am able to secure employment as a general internist in Montenegro, I will be financially unable to provide for my daughter. A general internist makes little money in Montenegro.... Because my husband is ineligible and unable to gain employment in Montenegro, I will be the sole breadwinner for the family....

My family's low income will adversely affect [redacted] [the applicant's child]. An income of \$350 is inadequate to support my daughter. Following rent, I will be left

with \$50 per month for utilities, food and clothing. The electricity bill alone is \$80 per month, which would put our family in deficit. I will not have enough money to buy food to feed [REDACTED], let alone myself or my husband. I will not be able to provide [REDACTED] with proper clothing for the cold winters in Montenegro. She will suffer greatly....

Moreover, health care services in Montenegro are corrupt.... With my family's projected limited income, covering basic health expenses through the necessary bribes will be a real problem.... Also, even though my husband and I are both physicians, we will not have access to the proper medical tools and facilities to treat our daughter should she require treatment....

...Forcing my daughter to return to Montenegro will place her at risk for severe discrimination, both as an U.S. citizen as well as a child with a Middle Eastern background.... The anti-American sentiment that is so prevalent in Montenegro will have a resounding impact on the emotional and psychological development of my daughter....

...If my daughter is forced to move to Montenegro, she be away from the United States during a period in her life that is crucial to language development.... If she is forced to leave the United States, [REDACTED] will be removed from her native country and will miss out on the chance to naturally learn her language....

Affidavit of [REDACTED] dated May 24, 2007.

No documentation has been provided to corroborate the applicant's spouse's statement that the applicant's child would suffer exceptional hardship were she to reside with the applicant in Montenegro while the applicant's spouse returns to Syria to fulfill his residency requirement, thereby allowing each parent to obtain gainful employment in their country and assist in the financial, and if required, medical support of their child. In addition, no evidence has been provided to establish that obtaining a child care provider so that both the applicant and her spouse are able to work in their respective countries would be cost-prohibitive. 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)). Moreover, although counsel for the applicant provides bills for electricity, maintenance, gas and phone for an individual residing in Montenegro, no documentation has been provided that evidences that the amounts shown will relate specifically to the applicant's situation were she to relocate to Montenegro with her daughter. The applicant further contends that with rent and utilities, food and clothing, a deficit will be incurred. The AAO does not find this contention credible, as such contention would mean that all families in Montenegro with a sole breadwinner who practices as a physician are destitute. It has not been established that this is the case.

In addition, no documentation has been provided that corroborates the applicant's statements that the applicant's child would suffer exceptional academic and/or psychological hardship due to the fact that she lives in a non-English speaking country for a two-year period.

Moreover, although counsel for the applicant asserts that medical care in Montenegro is substandard and could lead to health problems for the applicant's child, the AAO notes that [REDACTED] Minister of Health, Labour and Social Welfare of the Republic of Montenegro, states the following:

...I would like to point out that a reform of Montenegro's primary health care has started, followed by a further reform at the secondary and tertiary level.... With an expert support, human and spatial resources at the secondary level are being optimized. The Government is about to adopt a decision concerning the network of health institutions.... The Oncology Clinic belongs to the tertiary level and we plan to build a new facility....

Letter from [REDACTED] Minister of Health, Labour and Social Welfare of the Republic of Montenegro, dated May 3, 2007. As such, it appears that medical care in Montenegro is improving significantly, and as the applicant's child does not have any noted medical issues that require specific attention at this time, it has not been determined that a relocation to Montenegro would cause the applicant's child exceptional medical hardship.

Finally, although the applicant states that there is anti-American sentiment in Montenegro and supports this assertion by providing a letter from an individual who states she was discriminated against as a Serbian, the U.S. Department of State, in their Country Specific Information for Montenegro, posted by the Bureau of Consular Affairs, states that "Threats to American interests are rare. Any demonstrations due to work conditions or sports events have been peaceful or have experienced low levels of violence...." *Country Specific Information, Bureau of Consular Affairs, U.S. Department of State, posted August 14, 2007.* It has thus not been established that the applicant's child will suffer from anti-American sentiment while residing in Montenegro. The AAO thus concludes that based on the totality of the circumstances, the applicant's child would not experience exceptional hardship were she to accompany the applicant to Montenegro for two years.

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 during the two-year period that the applicant resides in Montenegro. The applicant asserts that it would be impossible for the applicant's child to remain in the United States for two years while the applicant returned to Montenegro because no one would be available to care for her child. As stated by the applicant,

I obtained a J-1 visa in 2002 in order to pursue graduate medical training in the United States.... I am subject to the two-year foreign residency requirement.... My husband, Samer, is on a J-1 visa. He is currently working as a Pulmonary Fellow at Memorial Sloan-Kettering Cancer Center. He is also subject to the two-year foreign residency requirement and is making an application for waiver of that

requirement based upon the exceptional hardship returning to Syria would impose on our U.S. citizen child....

Supra at 1.

As the record indicates, both the applicant and her husband are J visa holders subject to the two-year foreign residency requirement; neither one has had the requirement waived at this time. As such, the AAO concurs with counsel that the foreign-residency requirement that both the applicant and her spouse must comply with would leave their young child in the United States without her parents. This situation would constitute exceptional hardship to the applicant's child if she remained in the United States.

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. The AAO finds that although the applicant has established that her child would suffer exceptional hardship were she to remain in the United States while the applicant relocates to Montenegro for the requisite two-year term, the applicant has failed to establish that her child would suffer exceptional hardship if she relocated to Montenegro with 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 not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.