



U.S. Citizenship  
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FILE: EAC 07 045 50315 Office: CALIFORNIA SERVICE CENTER Date: **SEP 09 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:  


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 record reflects that the applicant is a native and citizen of Canada who was granted J1 nonimmigrant exchange status in June 1998 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 spouse and children, born in May 2003 and June 2006, would suffer exceptional hardship if they moved to Canada 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 Canada.

The director determined that the applicant failed to establish that her U.S. citizen spouse and/or children would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Canada. *Director's Decision*, dated November 8, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated January 2, 2008. 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 U.S. citizen spouse and/or children would experience exceptional hardship if they resided in Canada for two years with the applicant. To support this contention, the applicant's spouse states the following:

...I am unable to move to Canada...since I will be unable to practice as a medical doctor in Canada according to the rules of the College of Physicians and Surgeons of Ontario. Without even going into the additional training and examinations I would need to undergo (a process of at least two years), I first would need to become a Canadian citizen or landed immigrant. Accordingly, I would be completely unable to practice my medical profession in Canada. Since my wife did not attend medical school or her residency in Canada, she would be treated as an International Medical Graduate and have to undertake additional examination and training. This would mean that we would have a family of two physicians, with neither of us able to work in our profession in Canada for up to two years. I would be sacrificing the practice that I have been building for the past couple of years.... Upon our return to the area, I would have to start all over and rebuild my practice from the beginning again....

I have been advised by my immigration lawyer that, although my wife can sponsor me for landed immigrant status in Canada, this process takes approximately one year to complete.

If [the applicant] moves to Canada and takes our two children, this will be devastating to me and the children for several reasons. In order to continue to support my family and maintain our home in Buffalo, I would likely need to work longer hours than I do now. Depending on where [redacted] were to end up being placed in Canada, visitation would be quite difficult and minimal since she would not be allowed to come to the U.S. and my time would be limited for travel to Canada. Currently, I share the tasks involved in caring for our children. I help in getting our daughter to school in the mornings. In the evenings we have dinner together as a family. I spend time with [redacted] in the evening reading to her and playing games with her before bed. I help to bathe the children and get them ready for bed. When [redacted] is on call in the evenings at the hospital, I perform all of the evening rituals.... My family is all here in Buffalo. We are very close and spend a lot of time together. My children would be separated from their extended family. We spend many weekends together with my parents and brothers. All holidays and birthdays are spent together. We go on fishing trips together in the summers....

Statement of [redacted] MD, dated September 18, 2006.

The applicant further details the hardship her U.S. citizen spouse and children would encounter were they to relocate abroad for a two-year period. As the applicant states,

...If I return to Canada, I will be unable to practice as a physician or surgeon in Canada for at least one to two years....

...their [the applicant's children's] separation from a parent would be significantly worsened due to the unique family structure of the [redacted] family. All of my in-laws live in the Buffalo, New York area. All holidays...are spent with the entire family together at my in-laws home. This includes all of my children's

aunts, uncles, cousins and grandparents, even great aunts and uncles and their great-grandmother. Every single grandchild's birthday (there are nine of them) is attended by the entire family in the same manner. My daughter, [REDACTED] particularly would be adversely impacted by being taken away from the current family and broader family structure. This is all she has known for over three years; being taken away from that would be particularly devastating to her. Our new son would be deprived of this extended family bonding.

My daughter, [REDACTED], has just begun attending Nardin Academy. This is a private school that she will be able to stay in until she completes high school. **Being able to stay in one school will give her a sense of stability....** Being relocated to Canada may mean several moves to different towns or cities in order for me to complete the above mentioned training requirements. This would mean my children would have to change schools and disrupt their education. They may also have a negative impact on their social development as well....

*Statement of [REDACTED] M.D., dated September 18, 2006.*

As the record indicates, were the applicant's U.S. citizen spouse to relocate to Canada for a two-year period, he would be unable to practice medicine for an extended period of time, causing him professional hardship and career disruption. The applicant's spouse would also be separated from his close-knit family, including his parents, grandmother, aunts, uncles, siblings, nieces and nephew, who provide him and his children with emotional support. In addition, due to the applicant's own inability to practice medicine for a lengthy period, the applicant's spouse and their children will suffer financial hardship in Canada. As such, it has been established that the applicant's spouse would encounter exceptional hardship were he to relocate to Canada for a two-year period.

In regards to the applicant's U.S. citizen children, as the AAO has determined that the applicant's spouse would suffer exceptional hardship were he to relocate to Canada for a two-year period, the AAO concludes that the applicant's U.S. citizen children would also suffer exceptional hardship were they to relocate to Canada with the applicant, due to their long-term separation from their father and their extended family members, who provide the children with emotional support. To uproot the applicant's children and relocate them to Canada, away from their father, extended relatives and friends, would be a significant disruption that would constitute exceptional hardship. As such, based on a totality of the circumstances, the AAO concludes that that the applicant's U.S. citizen spouse and children would encounter exceptional hardship were they to relocate to Canada.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Canada. As stated by the applicant's spouse,

...The third scenario is the worst of all—the children remaining with me while [REDACTED] [the applicant] lives alone in Canada. First, this would necessitate hiring a full-time sitter for the children, since I would need to work longer hours in order to maintain two households. This would mean the children would probably see me even less and would be raised by a third party. The most significant aspect of this

option would be two children being raised without their mother. For three year old [REDACTED] this would be devastating. For our infant son [REDACTED], I cannot imagine any child living their first two years of life without the daily interaction with his mother....

*Supra* at 3.

Counsel has provided extensive documentation about the emotional and psychological ramifications of **separating a child** from their mother, including articles and a psychological evaluation. As stated by [REDACTED], Ph.D.,

...Children between the ages of birth and age 4 have a special and unique attachment to this mother. They need their mom to be close and available to them. Divorced parents with very young children run into this problem when they attempt to develop a plan for sharing their children. At this young age, the visits with the father have to be brief and frequent rather than lasting days or a week for the children to not be stressed. The children remaining in this country with their father would cause them significant emotional consequences. Brief visits with their mother followed by repeated long separations would impose an incredible emotional hardship on [REDACTED] and [REDACTED] [the applicant's children].

I have examined the disruptions described in this report within the context of my clinical experience and in the context of the body of research that exists regarding the role of attachment in the development of children....

It is my opinion, with reasonable professional certainty, that the hardships and [REDACTED] will experience from all the disruptions resulting from the deportation of their mother is huge and could easily lead to significant emotional problems extending into their adolescent and young adult years....

*Psychological Evaluation by*

*Ph.D.*, dated August 18, 2006.

Based on the documentation provided, the AAO concurs with counsel that the applicant's young children should not be separated from their mother, the applicant, for a two-year period, due to the exceptional psychological and emotional ramifications of such a separation. Moreover, the AAO finds that it would be exceptional hardship for the applicant's spouse to remain in the United States with his children while his spouse relocates abroad for a two-year period, based on the hardship such a separation would cause on the two young children and by extension, to the applicant's spouse as their primary caregiver.

The AAO thus finds that the applicant has established that her U.S. citizen spouse and children would experience exceptional hardship were they to relocate to Canada and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO concludes that the evidence in the record establishes the hardship the applicant's U.S. citizen spouse and children would suffer if the applicant temporarily departed the U.S. for two years would go significantly beyond that normally suffered upon the temporary separation of families.

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 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 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.