U.S. Department of Homeland Security
20 Massachusetts Ave. N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

H3

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 26 2005

IN RE: Applicant: [redacted]

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:

[redacted]

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identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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, Director
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 Uzbekistan. She was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on August 8, 1998 to participate in the 1998-1999 Freedom Support Act undergraduate program sponsored by the American Council of Teachers of Russian with funding provided by the United States Information Agency. The applicant's J1 nonimmigrant visa status expired on July 19, 1999. The applicant 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). The record reflects that the applicant married hereinafter, Mr. a United States citizen (USC), on August 10, 2002. The applicant seeks a waiver of her two-year residence requirement in Uzbekistan, based on the claim that her husband would suffer exceptional hardship if he moved to Uzbekistan with the applicant for the two years she is required to live there, or if he remained in the United States during the two-year period.

The Director found that the applicant established that Mr. would suffer exceptional hardship if he moved to Uzbekistan with the applicant. Additionally, the Director found that the evidence failed to establish that Mr. would suffer exceptional hardship if he remained in the United States while the applicant fulfilled her two-year foreign-residence requirement in Uzbekistan. The application was denied accordingly. *Decision of the Director, California Service Center*, dated February 12, 2004.

On appeal, the applicant asserts that the Director's decision is wrongful and not supported by the facts. In support of the appeal, the applicant submitted a statement from herself; a statement from Mr. a letter from M censed social worker; a letter from Dr ophthalmologist; Curriculum Vitae of Mr and letters of support.

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
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> (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
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> (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 at 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 the Immigration and Naturalization [now, the Director of 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, "[E]ven 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)."

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.)

I. Potential Hardship to Mr. [redacted] if he Accompanies the Applicant to Uzbekistan

First examined is the potential hardship to Mr [redacted] if he moves to Uzbekistan with the applicant for the two years she is required to live there. Mr. [redacted] has a doctorate in mathematics. Since 2002, he has

worked as Assistant Professor of Mathematics at the University of Hawai`i at Hilo, where he teaches and conducts research. Mr position is tenure-track. He is eligible to receive tenure in 2009. Until that time, the University can terminate Mr. he does not perform up to standards. A move to Uzbekistan would put his position, and potentially his career, at risk.

Mr. suffers (his right eye) from Keratoconus, a rare eye disorder which causes progressive thinning of the cornea, resulting in significant visual impairment. The condition is normally treated with expensive, rigid gas permeable contact lenses that must be carefully fitted, and frequent checkups and lens changes may be needed to achieve good vision. If the patient is unable to adjust to the contact lenses, a cornea transplant is required. Dr. the ophthalmologist treating Mr stated in a letter dated February 25, 2004 that "because of the shape of his eye, Mr could not tolerate contact lens wear. Because the contact lenses have failed, his only option now is to undergo surgical intervention." Dr recommended that Mr. remain in the United States because of the advanced nature of the surgical procedures and the importance of optimal follow-up care. Mr. health insurance at the University of Hawaii covers the necessary treatment. A move to Uzbekistan would not only result in the loss of his health insurance, but appropriate medical treatment for this rare eye disorder would be difficult to obtain.

Mr. has suffered from clinical depression since 1991. He has been treated with antidepressant medication and psychotherapy, both of which are covered by his health insurance. This combination of treatment might be unavailable in Uzbekistan, and even if it is available, Mr. could not afford to pay for it.

The AAO finds that the probable damage to Mr. career caused by a two-year absence from the United States, combined with the likely difficulty in obtaining appropriate medical care in Uzbekistan for his two health conditions, would result in exceptional hardship if he accompanies the applicant to Uzbekistan.

II. Potential Hardship to Mr. if he Remains in the United States While the Applicant Lives in Uzbekistan

Next examined is the potential hardship Mr will experience if he remains in the United States while the applicant lives in Uzbekistan for two years. The applicant contends that because of Mr. Figueroa's eye condition, her assistance is an integral part of his ability to perform some of the basic duties of a university professor, therefore her absence would cause him exceptional hardship. In a statement dated October 3, 2003, Mr stated:

> The effect on my ability to do my job was initially almost devastating. As a scholar I read numerous books and articles every year (most of my waking hours were spent reading). Not only I was [sic] not able to do this anymore, but also I had great difficulty in doing one of the integral parts of my job: grading. For example, this semester Lola helped me grade almost every exam and paper that my students turned in. This is not a trivial matter, since student complaints that I do not return homework in a timely manner could very well cost me my job. Lola also reads my copious correspondence from my students, colleagues, co-authors, etc. and alerts me to those things that demand my immediate attention.

Dr. the ophthalmologist treating Mr. stated in his February 25, 2004 letter that:

> Because the contact lenses have failed, his only option now is to undergo surgical intervention. We are currently planning on corneal implant surgery to improve the shape of his cornea so that he may achieve improved vision with glasses. If this approach is not successful, then he may require a corneal transplant.

Dr. describes a surgical procedure that should improve Mr. eyesight. While Dr. stated that the surgical procedures and management of Mr. condition are highly technical, there is nothing in the letter to suggest that the procedure will not be successful.

Mr. does not state whether he has discussed his eye condition, and the required surgery, with his superiors at the university. Further, it has not been shown that the university would be unwilling to assist him during his recovery, or that it would be impossible for Mr. to hire a part-time assistant or to ask a family member to assist him while his spouse is gone.

The applicant contends that Mr. will be unable to cope with his depression while she is in Uzbekistan. The record indicates that Mr. has suffered from clinical depression since 1991. He has been treated with a variety of antidepressant medications and with psychotherapy. He stated that the applicant has helped him manage his condition, and that by the middle of 2001 he was able to function without medication for the first time in 10 years. Mr. asserted that "[T]hanks to I have been in remission from the disease for two years. I don't' believe I am cured though and keeps a watchful eye on my mood and adjusts our lifestyle to compensate for the many stresses in our life."

In a letter dated February 4, 2004 a licensed social worker from the Behavioral Health Services Division of Kaiser Permanente's Hilo clinic, stated:

> Mr. has been under our Behavioral Health Services since May 30, 2003. He reports a long history of instability, depression and anxiety, treated with pharmacotherapy and psychotherapy in the past. Since his marriage to Ms. his condition has improved without use of medication. He continues to receive psychotherapy. However, he credits his wifes' [sic] dedication and attention to detail, from his dietary to physical and emotional lifestyle changes that have greatly contributed to his psychiatric stability.

It appears that the applicant has played an important role in Mr. recovery from depression, however, the applicant has provided no evidence to establish that Mr. would be unable to manage his depression without her. Prior to knowing the applicant, Mr. was successfully treated with medication and psychotherapy. Mr. statement that 'I am one of the few individuals that does not respond well to the most modern drugs available" is not supported by the record. A patient report from the Erie Medical Clinic dated August 1, 1999 indicated that Mr. was taking Celexa and reported that his mood was the best it had been in years. A patient report from the Larette County Medical Center dated September 26, 2000 indicated that Mr. depression was controlled with Celexa.

Mr. could resume taking antidepressant medication while the applicant is in Uzbekistan. Additionally, he could continue with psychotherapy and the lifestyle changes (e.g. diet) implemented by the applicant. His family, friends, and colleagues could offer emotional support.

The applicant further asserts that Mr. will relapse into depression "because of his real fear for my well-being in Uzbekistan." As stated above, Mr. has been successfully treated with medication and psychotherapy, and his concern about the applicant's safety in Uzbekistan does not establish that his depression would become unmanageable.

III. Conclusion

The AAO finds that the evidence in the record establishes that the applicant would suffer exceptional hardship if he traveled to Uzbekistan with the applicant. The AAO also finds that the evidence in the record fails to establish that the applicant would suffer exceptional hardship if he remained in the United States while the applicant returned temporarily to Uzbekistan.

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.