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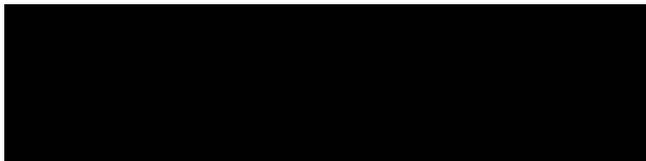
U.S. Department of Homeland Security  
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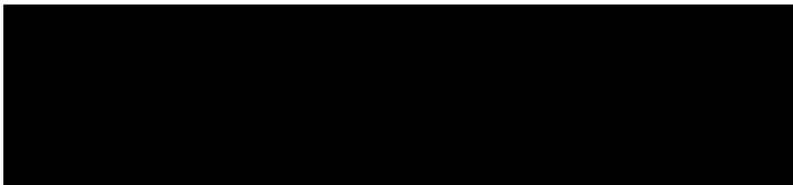


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: APR 03 2008

IN RE: [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:



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 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 Thailand who obtained J-1 status in 1994 and 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 applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to Thailand temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Thailand.

The director determined that the applicant failed to establish that her spouse would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Thailand. *Director's Decision*, dated November 5, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated December 4, 2007; a letter from the applicant and her spouse, dated November 26, 2007; two decisions issued by the AAO; case law with respect to hardship waivers; and an article about hardship waivers. 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(I): 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).

To begin, the record contains references to the hardship that the applicant's U.S. citizen's mother and the applicant's spouse's mother and father would suffer were the applicant's waiver request denied. Section 212(e) of the Act provides that a waiver is applicable solely where the applicant establishes exceptional hardship to his or her citizen or lawfully resident spouse or child. In the present case, the applicant's spouse is the only qualifying relative, and hardship to the applicant, her mother, and her in-laws cannot be considered, except as it may affect the applicant's spouse.

The first step required to obtain a waiver is to establish that the applicant's spouse would experience exceptional hardship if he resided in Thailand for two years with the applicant. To support this contention, the applicant's spouse states the following:

...Early in our relationship, we had discussed the fact that Porsche [the applicant] was expected to return to Thailand. As the relationship further developed, I had intended to accompany her back to Thailand to fulfill at least the two-year foreign residence requirement and then eventually return to the United States....

In 2002, a few months after we married, when it came time for Porsche to renew her passport through the embassy as she had previously done on two prior occasions, her request was denied. It was explained that without the blessing of the president of her university, requests for renewal of her passport would be denied.... With the declining health of our U.S. citizen parents and their increasing dependence on us, we knew that we needed to find an acceptable alternative to fulfill her contractual obligations and re-enable free travel.

Porsche proposed a long-term joint collaboration between Mahidol University [in Thailand] and Harvard, where she would oversee a program to train Thai students in molecular genetics, set up the infrastructure for a world-class genetics research lab there, and in the meantime, make use of the facilities here in the United States to research genetic abnormalities suffered primarily by the Thai population. She would travel to Thailand to give lectures, supervise the setting up of facilities there, as well as provide distance education from here. The university officials expressed great interest in this idea and asked for a formal proposal. Porsche spent the next few months lining up the backing from four different Harvard deans and authorizing the proposal. As was evidenced by further actions by Mahidol University, their enthusiasm was simply a ruse- a delaying tactic to wait for her visa to expire, so that she would be forced to return to Thailand.

Mahidol's handling of the situation included: 1) untruths (inability to remotely renew Porsche's passport despite having done so previously); 2) unreasonable, unfair, and deceptive practices (demanding payment with excessive penalties within 30 days, and prosecuting a case against her and her co-signers for failure to pay after only sending notification of payment due to her address in Thailand

despite all other correspondence being sent to her address in the United States and knowing that she would never receive said notification); and 3) sudden refusal of an opportunity (the joint collaboration) with far greater wide-reaching benefits (the research into maladies—which will remain unresearched—only suffered by Thai people)...

This history indicates that irrespective of the two-year foreign residence requirement, until Porsche fulfills the obligations of her contract—to either work for Mahidol for 21 years (twice as long as she has studied here), or to pay back the principle of the loan plus two times the principle in penalty fines—her passport will never be renewed and she will not be allowed to cross the Thai border again. These unfair requirements pose physical and extreme emotional hardship toward my family and myself.

...Accompanying Porsche to Thailand would result in the termination of my career, as the work I perform requires me to be onsite at my clients' workplaces. The type of work that I perform is mainly in the United States, and travel back and forth on a regular basis is rare due to the expense, and people from overseas working in my field relocate to the United States under work visas. Because of this, I would be forced to take a position locally in Thailand.

...I do not speak Thai, and thus any position I would take would be an entry-level position. With Thai society as insular as it is, and discriminatory towards foreigners, especially Westerners, I would also have little opportunity for advancement.

An entry-level position would prevent me from earning the funds necessary to travel at will back to the United States. This would likely mean that I would not see my father alive again, nor would I see my mother until my father's funeral, nor any of my myriad of friends unless they were to visit me in Thailand. Such an entry-level position would also prevent me from being able to obtain the funds necessary to pay the fees Porsche's university has imposed upon her, forcing her to be unable to travel freely for the duration of the 21 years Mahidol University claims she owes them. This would essentially be asking me to renounce my United States citizenship.

Mahidol University has adamantly stated that the terms to which Porsche agreed to for her education require her to either work for them for 21 years, or to pay them approximately \$900,000 USD (consisting of tuition paid and an assessed opportunity cost for the time she was not present in Thailand, and then that amount multiplied by two as a penalty), which is constantly increasing at a compounding 15% interest rate. Despite the ability to renew her passport remotely (having done so previously) and all the promises of doing so, they have proven this to be a

delaying tactic until her passport and visa had expired. The actions they have taken have demonstrated without a doubt that they have no intention of issuing Porsche a new passport until she has fulfilled 21 years of indentured servitude or paid back their usury lending, if ever....

...My father suffers from diabetes, asthma, hypertension, heart disease, high cholesterol, chronic alcoholism, and Parkinson's disease. My mother was forced to retire early on disability due to multiple sclerosis (for which stress will trigger serious attacks). Porsche's mother, who also is a U.S. citizen, suffers from hypertension, high cholesterol and heart disease....

*Affidavit of* [REDACTED] dated July 20, 2007.

The applicant and her spouse further attest as follows:

...If Porsche [the applicant] returns to Thailand, Mahidol University will not allow her to return to the United States for a period of much longer than two years. As revealed in our supporting evidence, the President of Mahidol University has refused to renew her passport since late 2002...until he feels that she has completely repaid her debt to him, if ever. Our evidence shows that the President believes that her outstanding debt would be repaid only once she has paid approximately \$1.2 million, accruing at an APR of 15%, or 21 (twenty-one) years of service working at her university in Thailand.

We demonstrated in our evidence that the first option (paying \$1.2 million plus interest) is impossible on Thai salaries, even in the best-paying jobs Porsche and [REDACTED] [the applicant's spouse] could obtain. An interest-only loan for \$1.2 million at an APR of 15% requires \$15,000 per month to prevent the principle owed from increasing. As documented in the supplied evidence, (pediatric dentist faculty salaries in Thailand), Porsche would earn approximately \$200 (two-hundred dollars) per month. As for [REDACTED], in the United States, with a very well paying job, he doesn't make a quarter of \$15,000 after taxes—he's certainly not going to find a job in Thailand that would pay anything coming close to actually paying it off in less than 21 years. In addition to limitations on the 'going rate' for IT professionals, [REDACTED] does not know the Thai language or culture intimately, and a native doctor on faculty at a university makes 1 1/3% of the money necessary simply to meet the interest, ignoring all other costs of living.

This leaves only the second option provided by the Thai university. That is, returning to Thailand means returning for 21 years, with no guarantee that Porsche's passport would ever be renewed (thus no guarantee we would ever be able to return to the United States)....

Letter from [REDACTED] and [REDACTED], dated November 26, 2007

Counsel has provided extensive documentation to corroborate the statements made by the applicant and her spouse with respect to the unique situation that the applicant is in with respect to her obligations to Mahidol University in Thailand, either by paying significant fines currently over \$1 million, or working for 21 years for said institution, and the hardships her spouse would face were he to accompany her to Thailand, including long-term separation from his disabled parents, career disruption, and the requirement that he reside in a country in which he does not know the language or customs. As such, the AAO concludes that the applicant's spouse would suffer exceptional emotional, psychological, professional and financial hardship were he to relocate to Thailand with the applicant.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if he remained in the United States during the period that the applicant resides in Thailand. As stated by the applicant,

...If I go to Thailand, I would face the following dreadful options. First, I would have to file for bankruptcy because, even with an income from a private dental practice that is 10 times higher than the government \$250/month salary, I would not be able to pay off the loan, penalty, and interest to Mahidol University in my lifetime. And as a bankrupt individual, I would not be able to exit the country or travel freely. My passport would probably never be renewed. Second, and I am not sure whether it is still an option, I could be forced to work exclusively for Mahidol University for at least 21 years. Regardless of which of these two choices becomes my fate, one thing is certain: I would not be able to travel to the United States to visit [REDACTED] [the applicant's spouse], his family and my Mom.

If [REDACTED] stays in the United States to keep his job and care for his parents no matter what option I take, he would have to travel to Thailand to visit me for the next 21 years or for the rest of my life. But since [REDACTED]'s consulting job is demanding (he has to be at IBM's client site every week and sometimes have to work overtime or even on weekends to meet project deadlines), he would not be able to make frequent trips to Thailand. Probably the most he could manage would be to spend his three weeks per year vacation in Thailand.... If [REDACTED] is forced to adhere with this choice, I am certain that he would not be able to handle it. Given his psychological vulnerability due to the burn accident, post-traumatic stress disorder from childhood abuse and neglect, and the propensity to depression and self-medication, the long-term separation would likely cause him to plunge into deep depression and suicidal thinking....

...It is likely that I would not be able to travel to the United States to visit him due to the passport and fiscal issues.... The psychological effect from this forced separation would adversely affect his job performance and as a result stunt his

career growth and advancement. His professional future would undoubtedly be in jeopardy....

...If [REDACTED] stays in the United States and uses his income to help me pay off the debt, he would barely be able to catch up with the mounting interest, and definitely not the principal. Even if [REDACTED] gave up his savings and retirement plan, it would still not be enough to cover the demanded payment....

...Both of his [the applicant's spouse's] parents have been going through major health problems for the past few years.... [REDACTED] [the applicant's spouse's father's] health is rapidly declining. The symptoms from Parkinson's disease coupled with the fact that he cannot farm anymore could easily push him into an alcoholic relapse. [REDACTED] [the applicant's spouse's mother] would definitely be very sad and under extreme stress. I fear that she would plunge into a deeper depression and become more vulnerable to potentially crippling multiple sclerosis attacks. [REDACTED] is such an anchor to his family....

*Affidavit of* [REDACTED], dated July 20, 2007.

The applicant's spouse further elaborates,

...Mahidol University has adamantly stated that the terms to which Porsche [the applicant] agreed to for her education require her to either work for them for 21 years, or to pay them approximately \$900,000 USD (consisting of tuition paid and an assessed opportunity cost for the time she was not present in Thailand, and then that amount multiplied by two as a penalty), which is constantly increasing at a compounding 15% interest rate....

...The coping mechanisms I developed during my childhood served well to enable me to survive it but later in life, they have proven responsible for many other difficulties. My extreme self-reliance and inherent distrust of others has proven a barrier to forming healthy, close relationships. My sense of competitiveness and need to outperform others stems from a constant need to feel worthy. That sense of need for approval was responsible for a great deal of risky, unhealthy behavior in my youth as I succumbed to peer pressure or tried to impress others.

Porsche's difficult upbringing through her formative years led her to develop some of the same characteristics. This has enabled both of us to understand each other and either temper our negative characteristics or turn them into positives. Both of us have learned to form a healthy, loving, trusting relationship with each other, something neither of us were previously capable of.... I ceased living day-

to-day only for myself, and now try to plan for a long-term future and, once these immigration issues are worked out, to have children together....

...I fear I would tend to become like my abusive father, blaming Porsche for my problems and turning to alcohol as a crutch. I would also have to live with being responsible for the stigma that Porsche would suffer. In Thailand, females in interracial relationships are perceived as prostitutes....

...The stress incurred throughout the waiver process has already impacted my performance at work, as I have not been able to concentrate on full utilization of my problem-solving skills on work problems, but have had to divert a great deal of my time to this effort. The resulting depression should we be separated I fear may be too much to maintain being a leader in my profession and instead I would become a liability....

...I would be fully responsible for paying off the usury 'loan,' requiring me to minimize my expenses and saving as much as possible until I had saved enough over the next likely 10 years, liquidate my retirement funds and savings, as well as selling my home. Even then, I have no guarantee that they would ever renew her passport to enable her to return to the United States....

...Porsche's separation from me would certainly exacerbate my parents' medical conditions to potentially terminal levels....

*Supra* at 15-19.

Finally, [REDACTED], Psy.D., a licensed clinical psychologist, affirms the applicant's spouse's need for his wife to remain in the United States. As [REDACTED] states,

... [REDACTED] [the applicant's spouse] is a 34 year old male who suffers from PTSD [Post Traumatic Stress Disorder], as a result of significant ongoing abuse and neglect throughout most of his childhood. He was physically abused by his alcoholic father as well as a witness to the abuse of his mother and brother. Mr. [REDACTED] mother developed MS when he was 4 years old which contributed to his being neglected as well. At around the age of 10 [REDACTED] exhibited psychological distress and saw a therapist.... He left home at 14.... He started college at the age of 17.... At the age of 23 as a result of an accident he sustained burns across more than 26% of his body. He became depressed at that time and started taking Prozac....

It is my opinion that if the [REDACTED] must separate for an extended period (with no end in site)...he will be at a very high risk for serious psychological problems which might include major depression, unmanageable anxiety, substance abuse,

and an increased risk of suicide. His family history of abuse and neglect, combined with a family history of major depression and alcoholism may predispose him even further. Essentially, the healthy adaptations and defenses that he has developed could become quite brittle and disintegrate under the stress of extended separation....

*Psychological Assessment and Consultation, Prepared by [REDACTED], dated April 1, 2007.*

The AAO notes that the applicant's residency requirement is unique as she is facing relocation to Thailand of over two decades, with the inability to return to United States on a regular basis to visit her spouse, mother and in-laws, due to the Thai government's refusal to revalidate her passport without the express permission of the president of Mahidol University, which she has been unable to obtain due to the referenced and documented dispute. As such, based on the above statements and the extensive documentation provided by counsel, the AAO concludes that the applicant's spouse would encounter exceptional emotional, psychological, professional and financial hardship were the applicant to relocate abroad while her spouse remains in the United States. His hardship if he remained in the United States without the applicant would go significantly beyond that normally suffered upon the temporary separation of a spouse from his wife.

As such, upon review of the totality of the circumstances, the AAO finds the evidence in the record establishes that the applicant's spouse would experience exceptional hardship were he to relocate to Thailand and in the alternative, were he to remain in the United States without the applicant, for the requisite period.

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.