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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 16 2010

IN RE: [redacted]

APPLICATION: Application for Waiver 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]

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.

Ellen C. Johnson

Perry Rhew
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 applicant is a native and citizen of the Philippines who obtained J-1 nonimmigrant exchange status in May 2005 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 child, born in 2007, would suffer exceptional hardship if they moved to the Philippines 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 the Philippines.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in the Philippines. *Director's Decision*, dated August 27, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated September 16, 2009. 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 child would experience exceptional hardship if they resided in the Philippines for two years with the applicant. In a declaration, the applicant contends that her U.S. citizen child would suffer emotional, physical, developmental and financial hardship were he to relocate to the Philippines to reside with the applicant for a two-year period. She notes the poor environmental conditions, the exposure to tropical diseases and the unavailability of quality health care, anti-American sentiment, crime and kidnappings for ransom, and the inability to obtain gainful employment to maintain her child's quality of living. She further references that her child has been diagnosed with Failure to Thrive, due to poor weight gain, and such a condition will worsen in the Philippines due to substandard medical care and the inability to obtain proper treatment due to the poor financial prospects in the Philippines. *Affidavit of* [redacted] dated July 21, 2008.

In support of the applicant's assertions, counsel documents that when the applicant's child traveled to the Philippines for a two week vacation in mid-December 2008 to early January 2008, he contracted an upper respiratory infection and returned to the United States with significant weight loss, thereby worsening his diagnosis of Failure to Thrive, due to the child's low resistance to infection given his poor nutritional status. *Letter from* [redacted] dated July 17, 2009. In addition, counsel has submitted extensive documentation about the problematic country conditions in the Philippines, including crime and kidnappings, anti-American sentiment, terrorist activity, environmental and health concerns and evidence of the low salaries paid to physicians.

Finally, the applicant notes that since the filing of the Form I-612, the applicant's child has been enrolled in the New York City Early Intervention Program for therapy and treatment. In the program, he "receives regular monitoring of his progress and special treatment so that he is able to attain his already delayed developmental milestones and proceed further with his development...." *Affidavit of* [redacted] dated July 22, 2009. In support, documentation with respect to the applicant's child's involvement in the New York City Early Intervention Program has been submitted. Said documentation confirms the applicant's child's delays in his Cognitive, Communication, Social/Emotional, Adaptive, Physical-Fine Motor and Sensory Processing. *Summary of Multidisciplinary Evaluation/Screening,* dated January 24, 2009. Moreover, as [redacted] confirms,

> He [the applicant's child] has significant issues with feeding and swallowing associated with his poor growth, for which gastroenterologic interventions are being recommended. His overall nutritional growth is way below the acceptable standard weight for his age, which may be linked to his high susceptibility to infection.
>
> [redacted] [the applicant's child] continues to have mixed developmental delays and therefore at risk for further developmental problems as he ages. The Early Intervention Program has been helping him and his family.... Being his pediatrician, I believe that having [redacted] continue such treatments will improve his prognosis.... With early intervention, he may continue treatment for his developmental delays here in the United States. These services are not available in the Philippines....
>
> I am very much concerned that if he leaves the country without the benefit of all these treatments and intervention, it can be an extreme hardship for the child.....

Supra at 1.

Based on the applicant's child's documented medical hardships while in the Philippines as evidenced by his previous visit to the country, problematic country conditions, including substandard health care and safety concerns[1], the applicant's child's developmental delays and his need for

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[1] The U.S. Department of States notes the following regarding safety and medical care in the Philippines, in pertinent part:

> U.S. citizens contemplating travel to the Philippines should carefully consider the risks to their safety and security while there, including those due to terrorism.
>
> Kidnap-for-ransom gangs operate in the Philippines and sometimes target foreigners as well as Filipino-Americans.
>
> Adequate medical care is available in major cities in the Philippines, but even the best hospitals may not meet the standards of medical care, sanitation, and facilities provided by hospitals and doctors in the United States.
>
> Serious medical problems requiring hospitalization and/or medical evacuation to the United States can cost several or even tens of thousands of dollars. Most hospitals will require a down payment of estimated fees in cash at the time of admission. In some cases, public and private hospitals have withheld lifesaving medicines and treatments for non-payment of bills. Hospitals also frequently refuse to discharge patients or release important medical documents until the bill has been paid in full.

continued monitoring and treatment by individuals familiar with his conditions and financial hardship due to the applicant's inability to find gainful employment to support her child, the AAO concludes that the applicant's U.S. citizen child would experience exceptional hardship were he to accompany the applicant to the Philippines for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen child would suffer exceptional hardship if he remained in the United States during the two-year period that the applicant resides in the Philippines. The record establishes that the applicant plays an integral role in the daily care and survival of the child; her spouse works long and stressful hours at the New York State Division of Human Rights, as Regional Director for the Lower Manhattan Office, and he can not care for their child by himself. Moreover, she notes that separating a young child from his mother, in light of his physical and developmental delays, would cause the child exceptional hardship. *Letter from* [redacted] *to* [redacted], dated July 12, 2009. In light of the applicant's child's medical and developmental situation and his need to remain with both parents, as corroborated by [redacted] who evaluated the applicant's child, the AAO concludes that the emotional, psychological and physical ramifications of separating a young child from his mother due to a foreign residence requirement would cause the child exceptional hardship.

The AAO finds that the applicant has established that her U.S. citizen child would experience exceptional hardship were he to relocate to the Philippines and in the alternative, were he 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 finds the evidence in the record establishes the hardship the applicant's child 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.[2]

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

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Country Specific Information-Philippines, U.S. Department of State, dated November 6, 2009.

[2] As the AAO has determined that exceptional hardship exists with respect to the applicant's U.S. citizen child were the applicant to relocate to the Philippines for a two-year period, it is not necessary to evaluate whether the applicant has also established exceptional hardship to her U.S. citizen spouse were she to relocate to the Philippines for a two-year period.

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.