



U.S. Citizenship  
and Immigration  
Services

H2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 03 2009

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.

A handwritten signature in black ink that reads "Perry Rhew".

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 record reflects that the applicant, a native and citizen of the Philippines, obtained J-1 nonimmigrant exchange status in June 2004 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 February 2008, 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 the two-year foreign residence requirement in Philippines.

The director determined that the applicant failed to establish that her spouse and/or child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in the Philippines. *Director's Decision*, dated June 18, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated July 10, 2008<sup>1</sup>, and referenced supplemental exhibits. 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

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<sup>1</sup> The Decision of the Director was issued on June 18, 2009. However, counsel notes that the appeal was filed by U.S. Express Mail on July 10, 2008. *Brief in Support of Appeal*. As the appeal was received by the USCIS on July 13, 2009, the AAO will proceed with the understanding that counsel filed the appeal by U.S. Express Mail on July 10, 2009. The incorrect date noted on the appellate brief is harmless error.

(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. The applicant contends that returning to the Philippines would put her family at risk, due to the volatile political and social environment. She asserts and documents that both her father and her mother have been actively involved in politics. Her father was mayor for the town of Malvar, Batangas from 1980 to 1988, and her mother, [REDACTED], is in her third term as the Mayor of Malvar, Batangas, Philippines. Due to their successful and high profile political career, the applicant's family has received numerous threats, death and kidnapping to name a few. For example, the applicant notes that when she was in her first year of college, her mother was told she had been kidnapped. It was not true, but it was one of the many terrors the applicant's family had to face. The applicant's spouse states that were her family to relocate to the Philippines, her son, being the youngest in the family, would be a major target for kidnapping for ransom. As noted by the applicant's spouse,

My siblings and I grew up surrounded by drivers and personal guards, having instilled in our minds that danger might be lurking around. I would not want my child to grow up in such an environment, but that type of extreme and exceptional danger is exactly what little [REDACTED] [the applicant's child] would be exposed to as an American living with a high-profile political family....

*Affidavit of* [REDACTED] dated February 13, 2009.

Counsel has provided extensive documentation with respect to country conditions in Philippines, including evidence of security problems and terrorist violence, kidnapping and human trafficking, and political killings. Based on the documented problematic country conditions and security concerns for U.S. citizens residing in the Philippines, the applicant's family's high profile political career and their own past traumatic experiences in the Philippines, and their effect on the applicant's child's emotional and psychological well-being, the AAO concurs with the director that the

applicant's child would experience exceptional hardship were he to accompany the applicant to the Philippines for a two-year period. A relocation abroad would cause the applicant's child hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or child would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in the Philippines. As the applicant and her spouse state:

A prolonged absence from his mother [the applicant], at this early stage of his life, is the paradigm of exceptional hardship. Unfortunately, our son is just beginning to speak and cannot verbalize his feelings. He will, however, express himself on a nightly basis as he cries himself to sleep wondering where his mother has gone. These tears will, of course, subside and likely be replaced with feelings of abandonment, etc. In short, our son will likely suffer emotional trauma....

Letter from [REDACTED] and [REDACTED] dated July 8, 2009.

The applicant further asserts:

My husband [REDACTED] [the applicant's spouse] is a young litigation partner in a big law firm. He has an almost unbelievably demanding job. He simply could not possible care for a baby all by himself without catastrophic consequences for his career. Moreover, this option would be very damaging to little [REDACTED] [the applicant's child] by forcibly separating him from his mother during the most formative time of his life. It would almost certainly lead to permanent emotional scars and possibly even development damage....

*Supra* at 9-10.

Due to the fears and anxieties with respect to the applicant's anticipated return to the Philippines, in light of her family's political position and past traumatic experiences, and the negative emotional and/or psychological ramifications of separating a young child from his mother, the AAO finds that the applicant's departure for a two-year period would cause the applicant's child exceptional hardship that would be significantly beyond that normally suffered upon the temporary separation of families. The AAO thus 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 period.<sup>2</sup>

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<sup>2</sup> As exceptional hardship to the applicant's U.S. citizen child has been established, the AAO does not find it necessary to determine whether exceptional hardship has been established with respect to the applicant's U.S. citizen spouse.

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.