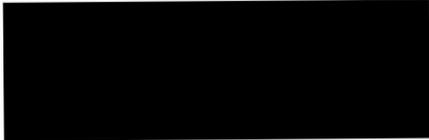




U.S. Citizenship
and Immigration
Services

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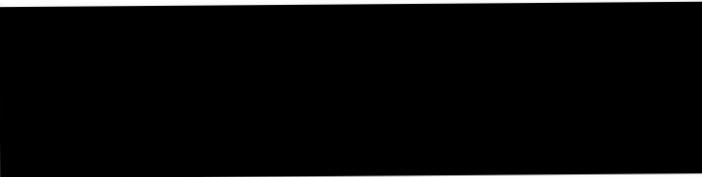
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: NOV 05 2009

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:



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.

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 Ukraine, obtained J-1 nonimmigrant exchange status in April 2000. He 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) based on government financing. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse would suffer exceptional hardship if she moved to Ukraine temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Ukraine.

The director determined that the applicant failed to establish that his U.S. citizen spouse would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Ukraine. *Director's Decision*, dated June 19, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits the following, *inter alia*: the Form I-290B, Notice of Appeal, dated July 17, 2009; two statements from counsel; an affidavit from the applicant's spouse, dated July 16, 2009; a letter from the applicant's spouse, dated July 16, 2009; a letter from the applicant, dated July 17, 2009; evidence that the applicant's spouse is pregnant, with an expected delivery date of December 25, 2009; mental health documentation pertaining to the applicant's spouse; financial documentation; evidence of country conditions in Ukraine; and a letter from numerous family members of the applicant's spouse. 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 would experience exceptional hardship if she resided in Ukraine for two years with the applicant. To begin, the record establishes that the applicant is pregnant and is being treated for depression and anxiety through regular therapy sessions with a psychologist. The applicant's spouse contends that she would suffer medical hardship in Ukraine, as she would not qualify for medical and mental health care. In addition, she asserts that she would suffer hardship as she does not speak the language and is unfamiliar with the culture and customs of Ukraine. She also notes that she would suffer financial hardship, as unemployment is high in Ukraine. *Affidavit of* [redacted] dated July 16, 2009. Moreover, the applicant's spouse's siblings state that the applicant's spouse would suffer emotional hardship as she would live far away from her four siblings, to whom she is close, and she would be separated from her church community; the record indicates that the applicant's spouse is an active member of Devine Mercy Catholic Church. *Letter from* [redacted] and [redacted] and [redacted] and [redacted] and [redacted] dated October 18, 2008. Finally, the applicant contends that his wife is working towards a Master's Degree in Finance at Dominican University in Illinois while working full-time as a personal banker at MB Financial Bank, but a relocation abroad would mean a significant interruption in her career and her education. *Letter from* [redacted] dated July 17, 2009.

Based on a totality of the circumstances, the AAO concurs with the director that the applicant's U.S. citizen spouse would suffer exceptional hardship were she to relocate to Ukraine due to the lack of medical coverage and substandard care¹, unfamiliarity with the language, culture and customs of

¹ The U.S. Department of States notes the following regarding medical care in Ukraine:

Many facilities have only limited English speakers, and some have none at all. No hospitals in Ukraine accept American health insurance plans for payment, and the level of medical care is not equal to that found in American hospitals. (Some facilities are adequate for basic services. Basic medical supplies are available; however, travelers requiring prescription medicine should bring their own). When a patient is hospitalized, the patient, relative, or acquaintance must supply bandages, medication, and food. The Embassy also recommends that travelers obtain private medical evacuation insurance

Ukraine, separation from her siblings and her church, and significant career and academic disruption. A relocation abroad would cause the applicant's spouse 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 would suffer exceptional hardship if she remained in the United States during the period that the applicant resides in Ukraine. In a declaration the applicant's spouse states that she would suffer exceptional emotional hardship due to the close relationship she has with the applicant and due to the fact that they are expecting a child and she will suffer as she needs the applicant's daily presence and support. As the applicant's spouse states, "I just cannot imagine how I would be able to handle taking care of our baby, working, keeping up the house, managing finances and even making day to day decisions for our family, all by myself. Just the mere separation for so long would be extremely stressful, but dealing with the emotional and financial consequences that it would bring, as well as taking care of an infant by myself, would just be impossible..." *Letter from* [REDACTED] dated July 16, 2009. She further notes that the stress with respect to her husband's two-year foreign residency requirement has led to a diagnosis of depression and anxiety, for which she is being treated regularly by a psychologist. *Evaluation of* [REDACTED] dated July 18, 2009, and *Health Insurance Claim Forms*, February 2009-July 2009. Finally, the applicant's spouse contends that were the applicant to reside abroad for two years, she would be unable to stay at home with the baby and would have to continue her full-time employment. She notes that she would need to obtain daycare while she is at work, which would be cost-prohibitive, and she would have to cease the pursuit of her advanced studies, not only because of lack of finances, but because she would be the only one to take care of the baby and maintain gainful employment; she would not be able to dedicate herself to her studies. *Supra* at 2.

In support, counsel has provided documentation with respect to the applicant's spouse's mental health. In addition, financial documentation has been submitted, establishing the applicant's contributions to the finances of the household as a carpenter, and further corroborating the applicant's spouse's assertions that without the applicant's income, she will suffer financial hardship.

As noted by the applicant's spouse,

prior to traveling to Ukraine. Payment in cash for medical services and hospitalization may be demanded before any services are provided.

Medical evacuation remains the best way to secure Western medical care.

Country Specific Information-Ukraine, U.S. Department of State, dated June 25, 2009.

[O]n average I make \$3,000 net per month.... Our expenses that include mortgage payments, property taxes, utility bills...and a \$9,000 credit card bill that we are paying off monthly are about \$2,100 per month (in the winter, when the house has to be heated, it's about \$200 more because the gas bill is higher).... I am currently in therapy and my insurance does not cover it. This costs us about \$600 per month depending on the number of visits. Please note that expenses already meet my monthly income and it does not even include food, clothing, car expenses, insurance payments and house maintenance as well as the medical and dental care (the portion that is not covered by insurance). This also does not include the additional expenses that we'll incur once our baby is born....

Supra at 2.

Based on the record, the AAO has determined that the applicant's U.S. citizen spouse would experience exceptional hardship if she remained in the United States while the applicant relocated to Ukraine to comply with his foreign residency requirement. The applicant's spouse would be required to assume the role of primary caregiver and breadwinner to a young child, while maintaining full-time employment, while suffering from depression and anxiety. Moreover, the record indicates that the applicant's spouse is integrated into the U.S. lifestyle and educational system; she is currently pursuing her advanced degree while relying on the applicant's financial and emotional support. The Board of Immigration Appeals (BIA) found that a U.S. citizen spouse who was in pursuit of an advanced degree and was thus completely dependent on her spouse for support would encounter exceptional hardship if her spouse's waiver request was not granted. *Matter of Chong*, 12 I&N Dec. 793, Interim Decision (BIA 1968). The AAO finds *Matter of Chong* to be persuasive in this case due to the similar fact pattern. Were the applicant's waiver request denied, his spouse would have to cease the pursuit of her studies due to financial hardship and the need to care for her child as a single parent, all without the continued support of her husband. Such a disruption at this stage of her education would be significant as to constitute exceptional hardship.

The AAO thus concludes that the applicant has established that his U.S. citizen spouse would experience exceptional hardship were she to relocate to Ukraine and in the alternative, were she to remain in the United States without the applicant, for the requisite two-year term. The evidence in the record establishes the hardship the applicant's spouse would suffer if the applicant temporarily departed the U.S. 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 his 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 he 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.