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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

H3

FILE:

Office: VERMONT SERVICE CENTER

Date:

JAN 31 2005

IN RE:

Applicant:

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Vermont 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 Ukraine, and that she 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 was admitted into the United States as a J1 nonimmigrant exchange visitor on August 8, 1998. She married a U.S. citizen on March 26, 2003. The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen husband will suffer exceptional hardship if he moves with her to Ukraine, or if he remains in the U.S., separated from the applicant for two years.

The director concluded the applicant had failed to establish that her husband [REDACTED] suffered from medical problems that would cause him exceptional hardship if he moved to Ukraine, or if he remained separated from the applicant for two years in the United States. The application was denied accordingly.

On appeal, counsel asserts that the medical evidence contained in the record establishes that [REDACTED] suffers from severe health problems for which he would be unable to receive adequate treatment in Ukraine. Counsel asserts further that the stress of separation from his wife, combined with [REDACTED] medical condition and his age (69 years old), would cause [REDACTED] to suffer exceptional hardship if he remained in the U.S. alone while the applicant fulfilled her two-year foreign residence requirements abroad.

Section 212(e) of the Act states in pertinent part that:

- (e) 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.

The record contains the following evidence relating to the applicant's exceptional hardship claim:

A letter from [REDACTED] dated June 20, 2003, stating that [REDACTED] has been under his care since 1977, for severe coronary artery disease. [REDACTED] states that [REDACTED] underwent coronary bypass surgery in 1992, but that he continues to have intermittent angina and other symptoms including arrhythmia and intermittent shortness of breath and a prolapsed mitral valve. The letter states that [REDACTED] requires medical follow-up visits every three months, and that [REDACTED] has follow-up visits with his cardiologist at least once every six months. The letter states that [REDACTED] also suffers from several severe insect and food related allergies, and that he has degenerative arthritis. The letter lists several medications that [REDACTED] takes daily, and [REDACTED] states that in his professional opinion, [REDACTED] medical condition would be adversely affected if he moved to a foreign country for an extended period of time.

A letter from [REDACTED] dated August 12, 2003, stating that [REDACTED] has been under his care form many years for coronary artery disease, hyperlipidemia and hypertension. Dr. Conti states that [REDACTED] had coronary artery bypass surgery in 1992, with an incomplete revascularization. The letter states that [REDACTED] recent nuclear stress test was positive and that his chest pain and dyspnea have recently increased in frequency and intensity. Dr. Conti states that [REDACTED] health history and the progressive nature of his symptoms make it unadvisable for him to travel overseas.

A second letter written by [REDACTED] dated February 11, 2004, repeating the medical information contained in his August 12, 2003, letter and stating further that he believes that a separation between [REDACTED] and his spouse is unnatural and would cause a major risk of adverse affects on [REDACTED]s cardiac condition.

An affidavit written by [REDACTED] dated August 18, 2003, discussing his medical history and stating that he has been medically disabled due to his heart problems since 1980. He states that he would be unable to obtain the medical care he needs in Ukraine. [REDACTED] states further that his siblings look to him for advice, counseling and financial help, which he would be unable to provide if he moved to Ukraine. [REDACTED] states that he and the applicant have a loving marriage and that if they were separated, his worry and stress would exacerbate his heart problems. [REDACTED] states that he would also be unable to financially support the applicant in Ukraine and simultaneously maintain a home in the U.S. and assist his siblings. [REDACTED] additionally states that due to his age and health problems he could die and not see the applicant again if they were separated for two years.

An affidavit written by the applicant, dated August 20, 2003, describing how she and [REDACTED] met and that they have a loving relationship. The applicant states that it would be medically impossible for [REDACTED] to go to the Ukraine. The applicant states that given his health and age, her husband might not have several years left to spend with her. She states that her husband has grown dependent on her as his companion, caregiver and wife, and that she wants to assist her husband with whatever he needs.

An article by the Department of Health and Human Services, Centers for Disease Control and Prevention, National Vital Statistics Report, entitled, "Deaths: Preliminary Data for 2001", discussing, generally, data on life expectancy and leading causes of death.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "[t]emporary 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 *Huck v. Attorney General of the U.S.*, 676 F. Supp. 10 (D.D.C. 1987) the U.S. District Court, District of Columbia, additionally stated that, "[c]ourts have recognized that the "exceptional hardship" standard must be stringently construed lest the waiver exception swallow the salutary two-year residence rule Forceful application of the standard also guards against attempts by applicants to manufacture hardship in order to come within its terms." (Citations omitted).

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 AAO finds that the applicant has established that [REDACTED] has several food allergies and a heart-related medical condition that requires monitoring, medication and regular follow-up by his doctors, and that [REDACTED] would suffer medically related exceptional hardship if he moved with the applicant to Ukraine.

The AAO finds, however, that the applicant has failed to establish that [REDACTED]'s medical condition would cause him to suffer exceptional hardship if he remained in the United States while the applicant fulfilled her section 212(e), two-year foreign residence requirement. The AAO finds further that the applicant has failed to establish that [REDACTED] would, in any other way, suffer hardship beyond the anxiety and loneliness ordinarily anticipated from a temporary, two-year separation.

The medical evidence submitted on appeal reflects that [REDACTED] has been diagnosed with and treated for severe coronary artery disease and related heart disease symptoms since 1977. The record reflects that [REDACTED] has effectively treated his condition with regular follow-up doctor visits and daily medications for over twenty five years, and although the record reflects that [REDACTED] underwent coronary bypass surgery twelve years ago in 1992 with incomplete results, the record contains no other evidence to reflect that [REDACTED] has required surgery or other emergent hospitalization since 1992. The AAO finds that Dr. Conti's February 2004 statement that a separation "would cause a major risk of adverse effects on [REDACTED] cardiac condition", is non-specific and that it lacks material details regarding the effects Dr. Conti believes [REDACTED] will suffer or the basis of the doctor's conclusion. The statement also lacks significant probative value in light of the previously discussed evidence contained in the record. The AAO additionally finds that the U.S. death statistics article submitted on appeal is general in nature, that it does not specifically address [REDACTED] case or circumstances, and that it fails to establish that [REDACTED] faces a likelihood of death during the applicant's temporary absence from the United States.

The AAO finds that the evidence in the record also fails to establish that [REDACTED] is dependent on the applicant based on his medical condition. The record contains no evidence to indicate that [REDACTED] needs a caretaker for medical or emotional reasons. Nor does the record contain evidence that the applicant provides such care to [REDACTED]. Moreover, the record reflects that it is [REDACTED] who financially supports the applicant, that the applicant is dependent on [REDACTED] for transportation, and that [REDACTED] and the applicant live in the home that [REDACTED] resided in prior to their marriage. See November 7, 2003 letter written by the applicant and August 20, 2003 affidavit written by the applicant. The fact that the applicant is young, has a college degree and states that she is able to work demonstrates further that it is reasonable to expect her to be employable and self-sufficient during her temporary residence in Ukraine. The applicant has therefore also failed to establish that [REDACTED] would need to support two households if the applicant were required to return temporarily to Ukraine. The AAO notes further that, although the medical evidence contained in the record establishes that [REDACTED] would suffer exceptional medical hardship if he moved to Ukraine for two years, the medical evidence does not indicate that temporary travel to Ukraine for the purpose of visiting the applicant would adversely affect [REDACTED] medical condition.

Based on all of the foregoing evidence, the AAO finds that the applicant has failed to establish that her husband would suffer medical or emotional hardship beyond that ordinarily anticipated from a temporary, two-year separation.

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 the applicant has not met her burden and the appeal will be dismissed.

ORDER: The appeal is dismissed.