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U.S. Citizenship
and Immigration
Services

HS

MAR 02 2005

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

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:

[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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska 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 the Philippines. She was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on April 3, 1996 to receive graduate medical training at the University of Louisville in Louisville, Kentucky. The applicant 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 record reflects that the applicant married [REDACTED] United States citizen (USC), on December 28, 1995. The applicant seeks a waiver of her [REDACTED] requirement in the Philippines, based on the claim that her husband would suffer exceptional hardship if he moved to the Philippines with the applicant for the two years she is required to live there, or if he remained in the United States.

The Director found that the applicant failed to establish that her compliance with the two-year foreign residence requirement would impose an exceptional hardship to her USC spouse. The application was denied accordingly. *Decision of the Director, Nebraska Service Center, Lincoln, Nebraska dated April 26, 2004.*

On appeal, Counsel contends that the Service failed to consider the extent and seriousness of the exceptional hardships that the applicant's husband would face should she be required to return home for two years. In support of the appeal, counsel submitted a brief; a letter from the applicant's physician; and an affidavit from [REDACTED]. The entire record was 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 at 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 (ii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of the Immigration and Naturalization [now, the Director of

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, "[E]ven 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)."

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.)

I. Potential Hardship if [REDACTED] Accompanies the Applicant to the Philippines

First analyzed is the potential hardship [REDACTED] will experience if he relocates to the Philippines with the applicant for the two years she is required to live there. Counsel maintains that [REDACTED] career would be interrupted, which would make it extremely difficult to find employment when he returned to the United States. Counsel provided no evidence to support this claim.

Counsel asserts that the applicant and [REDACTED] would be unable to find suitable employment in the Philippines. Counsel submitted several articles that describe why doctors are leaving the Philippines;

however, these articles do not address whether [REDACTED] or the applicant could find employment as doctors in the Philippines. Rather, the articles address the fact that doctors often leave the Philippines for more lucrative positions in the United States or in other countries. Counsel provided no evidence to establish that [REDACTED] and the applicant would be unable to find suitable employment in the Philippines.

Counsel contends that if the applicant returns to the Philippines, she and [REDACTED] would be forced to discontinue their fertility treatments, and since the applicant is 42 years old, waiting two years would make it less likely that they could have children. [REDACTED] Sheppard has been treating the applicant, [REDACTED] for infertility. In a June 16, 2004 letter, [REDACTED]

Because of this couple's advanced reproductive age, the situation is extremely stressful. Time is of the essence because of potential waning reproductive function for both members of this couple. Treatment will very likely required advanced reproductive techniques which will not be available to them in a timely fashion if they are forced to discontinue treatment at this time.

[REDACTED] did not state that appropriate treatment would be unavailable in the Philippines. Counsel provided no evidence to establish that the applicant and [REDACTED] will be unable to obtain fertility treatment in the Philippines.

The AAO notes that the Applicant's visa, which was issued on March 14, 1996, clearly indicated that the applicant was subject to the 212(e) two-year residency requirement. The applicant indicated in her February 3, 2004 affidavit accompanying the original waiver application that she and [REDACTED] have been trying to have children since they got married in December 1995. Knowing of the two-year residence requirement, the applicant and [REDACTED] have chosen to try to have a child and to receive fertility treatments.

The AAO also notes that the applicant and [REDACTED] chose to live in different states when the applicant was accepted to surgical residence training in Pennsylvania. [REDACTED] explained the situation in a June 20, 2004 affidavit:

The only drawback with my acceptance into a surgical residency training, was that I had to go to Pennsylvania for this stint, which would obviously be detrimental to our desire to have children of our own. Despite this, I decided to continue on for 2 more years, since my conviction to make this country my home became even stronger. (emphasis added)

Counsel maintains that [REDACTED] will be at risk of terrorist attacks in the Philippines. Counsel cited a July 16, 2003 United States Department of State Public Announcement on the Philippines which indicated that the terrorist threat to Americans in the Philippines for kidnapping and bombings remains high. Counsel does not explain how the risk relates specifically to [REDACTED] or whether the danger exists throughout the Philippines. Additionally, the AAO notes that [REDACTED] was a Philippine citizen who later became a naturalized United States citizen. As such, he may not stand out as an American citizen.

II. Potential Hardship [REDACTED] Remains in the United States

Next examined is the potential hardship [REDACTED] if he stays in the United States during the two years the applicant is required to live there. Counsel contends that [REDACTED] would suffer from the

disruption of fertility treatments for the applicant, which would result in a severely lessened possibility of having children. As indicated above, counsel provided no evidence indicating that the applicant cannot receive appropriate treatment in the Philippines. Also, the applicant and [REDACTED] knew of the two-year residency requirement and chose to try to have a child and to receive fertility treatments.

Counsel asserts that separating [REDACTED] from the applicant will cause serious emotional consequences and might cause permanent damage to their relationship. In her affidavit, the applicant described what happened to [REDACTED] the two were separated while they were in residency training in different states, and what she thinks would happen if she lives in the Philippines for two years:

During this brief time period of separation, my husband suffered extreme mental anguish and depression, which led to him frequenting bars, as well as his arrest for DUI (driving under intoxication) on two separate occasions. A prolonged two-year period of separation from me would very likely exacerbate his medical anguish and could result in him experiencing even more severe depression.

The criminal records submitted by counsel indicate that [REDACTED] had two DUI arrests, and that the charges were dismissed and the record expunged after he complied with the terms of a one-year probationary period, which included successfully completing a treatment program for alcohol addiction.

Aside from the applicant's affidavit, the record contains no evidence indicating that [REDACTED] was depressed because he was separated from the applicant, and that this separation resulted in two arrests for drunk driving. Indeed, in [REDACTED] affidavit of June 20, 2004, which was written in response to the Director's denial of the applicant's waiver, [REDACTED] specifically refers to the separation from the applicant, yet he never mentions being depressed or getting arrested for drunk driving.

Counsel maintains that [REDACTED] faces the possibility of the applicant suffering from death or serious injury in the Philippines because of the continued violence there. Counsel provided no evidence establishing that the applicant, a citizen of the Philippines and a physician, would be at particular risk in the Philippines.

Counsel contends that [REDACTED] faces the possibility of his wife contracting a severe disease or illness due to the poor health situation in the Philippines. Counsel provided no evidence addressing any potential health risk that the applicant would face in the Philippines.

III. Conclusion

The AAO finds that the evidence in the record fails to establish that the applicant's husband would experience exceptional hardship if he traveled to the Philippines with the applicant. The AAO also finds that the evidence in the record fails to establish that the applicant's husband would experience exceptional hardship if he remained in the United States while the applicant returned temporarily to the Philippines.

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 not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.