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FILE:



Office: CALIFORNIA SERVICE CENTER

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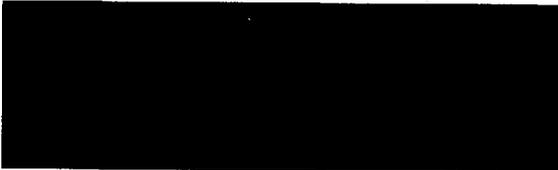
IN RE:



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, California 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 and citizen of Malaysia. She was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on September 17, 1998 to receive graduate training at the University of Southern California Medical Center at Los Angeles County. 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] a citizen of Malaysia, on May 14, 1999. [REDACTED] won the Diversity Lottery and became a lawful permanent resident of the United States on October 24, 1999. The applicant and [REDACTED] have two United States citizen children; [REDACTED] was born on July 1, 2000, [REDACTED] was born on September 29, 2003. The applicant seeks a waiver of her two-year residence requirement in Malaysia, based on the claim that her husband and sons would experience exceptional hardship if they moved to Malaysia with the applicant for the two years she is required to live there, or if they remained in the United States while she lived in Malaysia.

The director concluded that the hardships set forth by the applicant did not constitute exceptional hardship as described under section 212(e) of the Act and denied the I-612 Application for Waiver of the Foreign Residence Requirement accordingly. *Decision of the Director*, California Service Center, dated December 29, 2004.

On appeal, counsel contends that the director:

- 1) [REDACTED] in finding that no exceptional hardship would be endured by the Applicant's family should she return alone to Malaysia, where the record contains documentary evidence of the hardship her children would suffer;
- 2) Failed to correctly analyze the financial hardship and the extreme difficulties facing the Applicant's family if she were to leave them behind;
- 3) Committed a clear error of law and frustrated Congressional purpose in concluding that the Applicant knew of her foreign residence obligation prior to admission in J-1 status and thus any hardship to be suffered by her family through her absence is minimized;
- 4) Failed to consider the public interest in allowing the Applicant to remain in the United States.

In support of the appeal, counsel submitted a brief. In support of the original waiver application, counsel submitted a brief; statements from the applicant and [REDACTED] a letter from a psychologist regarding the effect of separating the children from their mother; information on country conditions in Malaysia; financial documents; letters in support of the applicant; educational and professional documents related to the applicant's position as a physician; photos of the family; and various other materials. 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 (iii), 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 to [REDACTED] and the Children if They Accompany the Applicant to Malaysia for Two Years

First analyzed is the potential hardship [REDACTED] and the children will experience they live with the applicant in Malaysia for two years. The director concluded:

The applicant submitted numerous documents relating to the situation in Malaysia. Upon review of the file, the applicant has provided evidence, allowing the Service to find it a hardship for the permanent resident spouse and United States citizen children to live in Malaysia with the applicant.

The AAO finds that that evidence in the record establishes that the applicant's United States citizen children would experience exceptional hardship if they lived with their parents in Malaysia for two years.

II. Potential Hardship if [REDACTED] and the Children Remain in the United States While the Applicant Lives in Malaysia for Two Years

Next examined is the potential hardship to [REDACTED] and the children if they remain in the United States during the two years the applicant is required to live in Malaysia. [REDACTED] is a lawful permanent resident, and the children are United States citizens. As such, they are not required to accompany the applicant to Malaysia.

Counsel contends that the applicant's sons will experience exceptional psychological and developmental hardship if they are separated from their mother for two years. In a June 10, 2003 letter addressed to counsel, [REDACTED] a psychologist, answered the question "[W]ould there be a significant hardship for the child (the applicant was pregnant with her second child) if his parents are forced to return to Malaysia and leave the child behind in the United States?" Dr. Edwards stated:

According to a study completed at the Mailman School of Public Health, Columbia University, children thrive in stable families. The more nurturing children receive at home, the more likely there are to do well in school, form healthy relationships, and create better lives for themselves. What children experience in their first few years is extremely important. Early experiences are crucial to school success. To thrive, young children need healthy family relationships and quality early care and learning experiences. **It will be psychologically and emotionally devastating for [REDACTED] if he is left in the United States without his parents, since he has developed a strong attachment to his parents, particularly his mother.** (emphasis added)

The AAO notes that [REDACTED] is a lawful permanent resident of the United States and can stay in the United States with his United States citizen children. Accordingly [REDACTED] conclusion above is based on an inaccurate interpretation of the facts. The issue is whether the children will experience exceptional hardship if they are separated from their mother for two years, not from both parents.

[REDACTED] referred to a variety of sources, including a seven-part video series, an article on personality development, and studies on separation anxiety in children. She concluded:

It is highly probable that [REDACTED] a 3 year-old United States citizen, along with his soon-to-be-born sibling, may inevitably experience severe trauma, 1) if deported with his family to Malaysia where they can be target [sic] of terrorist violence, or 2) if the child and sibling are forced to be separated from their mother [REDACTED] who has to depart from the United States because of her J-1 visa status. As is clearly supported by longitudinal research studies consistent with my clinical experience, either scenario depicted above can significantly inflict detrimental psychological and emotional hardship on [REDACTED] and his sibling, particularly at their most vulnerable and significant formative stage of development. The abrupt uprooting from a familiar environment and the forced separation in the mother-child relationship can have adverse emotional and psychological implications in the years to come. For humanitarian reason [sic] and the best interests of the child and his sibling, it is highly recommended that the children be safely protected from the highly toxic and detrimental effects of the above conditions, at all costs.

[REDACTED] letter does not establish that the applicant's sons will experience exceptional hardship if they live in the United States with their father for two years while the applicant lives in Malaysia. First, [REDACTED] conclusions are based on interviewing the parents and observing [REDACTED] in different settings. It does not appear that [REDACTED] spoke with [REDACTED]. The record contains no evidence indicating that [REDACTED] subsequently met with the family or observed [REDACTED] their second son. [REDACTED] lack of an ongoing, therapeutic relationship with [REDACTED] or his parents raises doubts about her ability to accurately diagnose the children's psychological condition or possible reaction to being separated from their mother. Second, the entire section of [REDACTED] letter addressing the effect of separating the applicant from her sons consists of references to general studies and other general psychological literature. [REDACTED] does not explain how these materials specifically relate to the applicant's family. Third, [REDACTED] provided no analysis of possible treatment for the children to assist them in coping with a two-year separation from their mother. Fourth, the AAO notes that [REDACTED] and the children can visit the applicant in Malaysia. The applicant's sons are United States citizens, and while the record contains evidence concerning risks to American citizens in Malaysia, their parents are Malaysian, so the children would not "stand out" as Americans.

Counsel asserts that the applicant, who is Christian and ethnic Chinese, may have limited ability to provide for herself in Malaysia because of economic discrimination against ethnic Chinese and Christians. The record does not indicate that the applicant or her husband has experienced significant discrimination in Malaysia. Indeed, the applicant received her medical degree in Malaysia, and [REDACTED] received a degree in electronic and systems engineering. The AAO notes that in participating in the J-1 Visitor Exchange Program, the applicant is expected to return to Malaysia to utilize her skills there. The applicant's training and experience in the United States will presumably place her in a stronger professional position than when she left Malaysia in 1998. Counsel has not established that the applicant will experience discrimination in Malaysia that will cause her husband or sons to experience exceptional hardship.

Counsel maintains that the applicant is at risk of being injured or killed in Malaysia because of terrorist activities, and that this risk will cause the applicant's husband and sons to experience severe emotional hardship. Counsel submitted dozens of articles and/or reports on country conditions in Malaysia. The evidence submitted by counsel does not establish that the applicant would be at particular risk in Malaysia.

First, many of the articles refer to the risk to American citizens or American interests. The applicant is a Malaysian citizen who has lived most of her life there. Second, counsel does not explain how the articles discussing the general risk of terrorism, and the presence of al-Qaida in Asia, specifically relate to the applicant. Counsel has not established that the general risk of terrorism in Malaysia will cause the applicant's husband and sons to experience exceptional hardship.

Counsel contends that if the applicant lives in Malaysia for two years, her husband will not be able to support the family. [REDACTED] is currently not working, so the family lives on the applicant's salary. [REDACTED] previously had an engineering job with a computer company. In his August 5, 2004 response to the director's Request for Evidence, counsel indicated that [REDACTED] decided not to work so that he could take care of the children. The record contains no evidence suggesting that [REDACTED] cannot work. Counsel has not established that [REDACTED] is unable to secure employment that pays a salary adequate to support the family. Additionally, the AAO notes that the law does not require that the family maintain their existing standard of living while the applicant lives in Malaysia.

Counsel asserts that if the applicant returns to Malaysia for two years, that:

[H]er career would be severely disrupted, due to her inability to keep abreast of and utilize medical advances, procedures, and technologies which would be implemented in United States medical facilities in her absence. This would be detrimental to her upon her return to the United States, and would result in a profound career disruption to her, which would adversely impact upon her children in the following ways: she would earn less money which would lower the children's standard of living, and which would reduce their ability to attend the same caliber of schools and colleges that they would have had they remained in the United States.

Counsel's assertion is unsupported by evidence. The record includes several letters of commendation that indicate that the applicant is an accomplished and highly regarded physician. Her high standing and connections in the United States would presumably assist her when she returned from Malaysia. Counsel has not established that two-year absence from the United States would "profoundly disrupt" the applicant's medical career in the United States and cause her husband and sons to experience exceptional hardship.

Counsel maintains that granting the applicant a waiver is in the public interest, because "she is a highly trained medical doctor with tremendous skills in research and diagnostic surgical pathology," and "has proven to be an asset to her employers while in valid nonimmigrant status in the United States, and has also helped the medical facilities for whom she has served by providing critical medical pathological diagnoses for indigent patients, as well as in research efforts to better understand and treat forms of cancer." The AAO acknowledges that the applicant's work is of benefit to the United States, however, counsel fails to consider the fact that under the terms of her J-1 visa, the applicant is expected to return to Malaysia to practice medicine so that her fellow Malaysian citizens can benefit from her training and experience in the United States.

Living apart from the applicant for two years will cause [REDACTED] and the children to experience hardship, however, counsel has not established that the hardship would be exceptional.

III. Conclusion

The AAO finds that the evidence in the record establishes that the applicant's children would experience exceptional hardship if they lived in Malaysia for two years with the applicant. The AAO also finds that the

evidence in the record fails to establish that the applicant's children would experience exceptional hardship if they remained in the United States while the applicant returned temporarily to Malaysia.

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.