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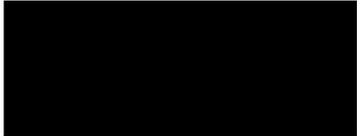
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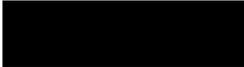
U.S. Citizenship  
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Services

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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: APR 05 2007

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, 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 appeal will be sustained and 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 (WRD).

The record reflects that the applicant is a citizen of the Philippines who 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 to the United States in J-1 nonimmigrant exchange status on June 23, 1994. The applicant's son is a U.S. citizen and he presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his son.

The director determined that the applicant failed to establish his son would experience exceptional hardship if he fulfilled the two-year foreign residence requirement in the Philippines. *Director's Decision*, dated August 22, 2005. The application was denied accordingly.

On appeal, counsel asserts that the applicant's son will suffer exceptional hardship if the applicant is required to fulfill the two-year foreign residence requirement. *Brief in Support of Appeal*, dated September 22, 2005.

The record includes, but is not limited to, counsel's brief, information on separation anxiety, documents related to the applicant's mother's death, the applicant's statement, the applicant's father's statement, documents related to the applicant's son's health, and information on country conditions and relevant issues in the Philippines. The entire record was considered in rendering this decision.

Counsel asserts that the application was denied without issuance of a Request for Evidence (RFE) in spite of applicable regulations and an RFE memo issued by Citizenship and Immigration Services (CIS). *Brief in Support of Appeal*, at 17. 8 C.F.R. § 103.2(b)(8) states, in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence and may request additional evidence, including blood tests.

The RFE memo states that when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of an RFE is usually discretionary, but strongly recommended. *CIS Interoffice Memorandum*, at 3, dated February 16, 2005. Therefore, neither the regulations nor the RFE memo require the issuance of an RFE when the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, although the AAO notes that it is strongly recommended to issue an RFE in these cases.

In addition, as counsel has supplemented the record on appeal, no purpose would be served in remanding the case to the director to have the record supplemented with new evidence.

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 [now, Department of State Waiver Review Division] 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 demonstrate that the applicant’s son would experience exceptional hardship if he moved to the Philippines for two years. Counsel asserts that there is an extremely serious risk of death or physical harm to the applicant’s son given the poor security situation and crime which targets prominent American families. *Brief in Support of Appeal*, at 6. The record includes evidence of security issues in the Philippines. Counsel states that the applicant’s son risks facing psychological harm based on violence targeted at his parents. *Id.* at 6. Counsel states that the applicant’s family has been singled out for crime due to the applicant’s mother’s murder. *Id.* at 7. The applicant’s father states that he has been subject to threats of violence. *Statement of the Applicant’s Father*, at 1, dated September 22, 2005. In addition, the record reflects that the applicant’s son would be a likely target of kidnappers for ransom. *Letter from [REDACTED] Philippine Army Commanding Officer, Pampanga Province*, dated September 11, 2005.

A local physician in the Philippines asserts that applicant’s son’s atopic dermatitis may be exacerbated due to the environment, he may be exposed to infectious diseases and speech language services are not readily available. *Letter from [REDACTED] M.P.H.*, dated September 19, 2005. The applicant’s son’s skin and speech issues do not appear serious and the likelihood that he will face serious problems upon relocation to the Philippines is not clear from the record. In addition, counsel states that the applicant’s son will be subject to financial hardship. *Brief in Support of Appeal*, at 13. Counsel states that the average income for doctors is \$300 to \$800 per month and it is \$55 per month for medical technologists, which is the applicant’s spouse’s profession. *Id.* Counsel asserts that the applicant is a dermatopathologist and there is a severe shortage of jobs for medical specialists, thereby resulting in an inability to support his family. *Id.* at 15. The AAO notes that relocation can entail financial and logistical problems which are common to those involved in the situation. The AAO notes that these problems alone do not result in a finding exceptional hardship. However, due to the unique security issues related to the applicant’s son, the AAO finds exceptional hardship to the applicant’s son in the event that he relocates to the Philippines for two years.

The second step required to obtain a waiver is to demonstrate that the applicant’s son would suffer exceptional hardship if he remained in the United States during the two-year period. As the applicant’s

spouse's legal status is based on the applicant's legal status, both of them would have to return to the Philippines. This would leave their two-year old son in the United States without his parents. By default, this situation would constitute exceptional hardship to their son if he remained in the United States.

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 AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the WRD. Accordingly, this matter will be remanded to the director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD 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 WRD recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** The appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.