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U.S. Citizenship
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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

APR 22 2008

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:

[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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 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 applicant is a native and citizen of Peru who obtained J-1 nonimmigrant exchange status in June 2001 to participate in graduate medical education training. He is thus 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 presently seeks a waiver of his two-year residence requirement, based on the claim that his U.S. citizen spouse would suffer exceptional hardship if she moved to Peru temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Peru.

The director determined that the applicant failed to establish that his spouse would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Peru. *Director's Decision*, dated October 9, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated December 4, 2007; an affidavit from the applicant's spouse, dated December 4, 2007; a letter from the applicant's spouse's physician, dated November 13, 2007; a letter from the applicant's spouse's psychiatrist, dated November 8, 2007; a letter and translation from a physician in Peru, dated February 12, 2007; a summary of benefits with respect to the applicant's spouse's health plan; and a quarterly interest statement with respect to the applicant's spouse's education loans. 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 spouse would experience exceptional hardship if she resided in Peru for two years with the applicant. To support this contention, the applicant’s spouse states the following:

...I cannot relocate to Peru with my husband, [REDACTED] [the applicant], because I suffer from a very severe form of Crohn’s disease, a condition in which my immune system attacks my bowels, generating an inflammation of my intestines....

My disease is very severe because the attack generated by my immune system against my bowels has continued despite the use of multiple medications and expensive infusions. My doctors have worked very hard to quiet my immune system, but they have been unsuccessful, to the extent that severe inflammation produced tunnels between my bowel, bladder and skin. These tunnels eventually got so bad that I had feces, pus, and blood ripping out of my belly button and bladder, causing me excruciating pain. The inflammation also produced severe obstruction of my intestines. Again, these complications appeared despite aggressive and prolonged use of many different medications to suppress the immune attack. I have visited with my doctors nearly once a month since I was diagnosed in 2005; however, despite their best efforts, including an emergency surgery, their treatments have only been moderately successful.

[REDACTED] and I began our courtship in July of 2004. After a few months, we made the decision to live together.... Before I was able to move into our new apartment in June of 2005, I was hospitalized for the first time and diagnosed with Crohn’s disease. By the time we got married in March of 2006, the diarrhea and stomach pain were fairly well controlled by medication. At that point, we felt that we could still live together anywhere in the world, and that relocating to Peru with Juan would not pose much of a threat to my health. Everything changed in the ensuing months when my health completely deteriorated. I lost twenty pounds and began to suffer from intense stomach aches and more frequent diarrhea. I required more frequent visits to emergency rooms followed by a subsequent hospital admission. During this time, I also slipped into a deeper depression. My primary focus during these months was staying alive.... I developed obstruction and perforations of my bowels and had to be flown from New Mexico to Los Angeles for emergency surgery in November 2006.

The emergency surgery cost more than \$170,000. Luckily, because I returned to work after a three-month medical leave of absence, my health insurance covered this exorbitant expense. However, I have been warned by my insurance company

that because coverage is tied to my ability to work, if I am forced to take another two-month medical leave of absence in the future, I will be dropped from this insurance. My recovery from surgery was slow and because standard medical treatment for my disease had failed, I was switched to a new medication that is still considered experimental.... This drug is called Humira.... Despite the use of Humira, my disease progressed and my condition deteriorated. For this reason, my gastroenterologist had to increase the frequency of my injections of Humira from once every two weeks to once a week, raising the cost of my treatment from \$35,000 a year to \$70,000 a year....

Humira is the only medication that is currently helping to control the symptoms of my disease and it is only available on a limited basis in Peru...if I relocate to Peru, I would be unable to maintain my American health insurance, and because I have a very serious pre-existing medical condition, obtaining Peruvian health insurance would be nearly impossible. Without insurance, Humira would cost us US\$70,000 a year out-of-pocket. My husband and I simply could not afford this expense because even if he were to find a job as a physician in Peru, which is not guaranteed, he will make at most the equivalent of \$1,000 per month. Additionally, I would be unable to practice psychiatry in Peru, as I do not speak Spanish. I could make at most \$300-\$500 a month in a non-professional job that would not require fluency in Spanish, such as a housekeeper or babysitter.

Another significant concern to [REDACTED] and I would be my exposure to other infectious diseases in Peru. Most medications used to treat Crohn's disease, including Humira, are called immunosuppressants because they work by inhibiting or suppressing the body's immune response. By suppressing the activity of the immune system they also decrease the body's ability to fight infections. The most feared infection in patients taking Humira is tuberculosis (TB). Tuberculosis is extremely prevalent in Peru. If I lived in Peru, I would be placed at a very high risk of not only becoming infected by tuberculosis but I would also be placed at an increase risk of death caused by multidrug-resistant strains of tuberculosis. I would also be exposed to other infectious diseases prevalent in Peru, such as bartonellosis, an infection which attacks the blood, causing anemia and potential death. The lack of familiarity and the extremely limited surgical experience of the doctors who treat Crohn's disease in Peru also place me at a high risk of complications if I had to undergo repeat surgery in Peru....

Affidavit of [REDACTED], dated December 4, 2007.

To corroborate the applicant's spouse's statements regarding her medical condition and the concerns with respect to residing in Peru, a letter is provided from [REDACTED] s. As stated by [REDACTED]

...I am [REDACTED], President of the Peruvian Society of Infectious and Tropical Diseases.... Currently I am the Chief of the Inpatient Service of the Department of Transmissible and Dermatological Diseases of Hospital Nacional Cayetano Heredia. This service is the national referral center for infectious diseases in Peru. I am also an Associate Professor of Medicine at the Universidad Peruana Cayetano Heredia and Associate Researcher of the Institute of Tropical Medicine "Alexander Von Humboldt" of Universidad Peruana Cayetano Heredia.

[REDACTED] [the applicant's spouse] has already required surgery for severe Crohn's disease and is currently on Adalimumab (Humira). A side effect of this medication is a decreased ability to fight infections (immunosuppression). She has already suffered complications of immunosuppression when she developed a post operative wound infection despite undergoing surgery at a world renowned facility in the United States. The post operative infectious complications in Peru could be even higher. The rates of hospital-acquired infections in surgical wards are high, with a very high rate of infections with bacteria resistant to common antimicrobials. The lack of surgical experience in severe Crohn's disease would increase the risk of post operative complications dramatically, including infections. If she had a second surgical procedure in Peru she would be at a higher risk of wound infections and abdominal sepsis. A disseminated infection after surgery in a patient with immunosuppression could be fatal.

Adalimumab belongs to a group of medications that interfere with immunity against infections. In Peru, besides the surgical infectious complications, this medication would put Jacqueline at a higher risk of acquiring tuberculosis, bartonellosis, salmonellosis, listeriosis, leishmaniasis, leprosy and disseminated fungal infections.

[REDACTED] does not have evidence of previous exposure to tuberculosis.... Hence, she has no immune memory to fight this infection. Peru has one of the highest rates of tuberculosis in Latin America.... Her immunosuppression would put her at risk of not only the pulmonary but also the disseminated disease....

...Due to her immunosuppression, she would not develop signs and symptoms typical for these diseases, making the diagnosis more difficult. This, along with a language barrier, if she does not speak Spanish, would delay prompt adequate treatment, worsening her prognosis.

For these reasons, I strongly recommend that [REDACTED] does not relocate to Peru given that she would be exposed to a high risk of severe infections and death due to her immunosuppression.

██████████ M.D. discusses the negative ramifications on the applicant's spouse's training, practice and education were she to relocate abroad for two years. As ██████████ states,

I am the Director of Psychiatric Residency Training...at the University of New Mexico School of Medicine. ██████████ [the applicant's spouse] is a third year Psychiatry Resident within our training program....

If she interrupted her career training for two years and then tried to restart it in the future, she would in all likelihood have to start it at a lower training level. The lack of continued medical education and ongoing patient evaluation will negatively affect her competencies in patient care, medical knowledge and systems-based practice, which are three major components considered in our program for completion of training.

Repeating a previous training level in addition to the two-year gap in her career can be interpreted in negative ways by future employers and could impact her chance of getting into a fellowship (further subspecialty training) or competing for a faculty position in a university program or even a position in the private practice community. Furthermore, given her history of repeated surgeries and lengthy recovery time, she could fall further behind in her training, practice and education than would a healthy physician being removed from their career for two years. Her career would fall behind significantly, perhaps to the equivalent of 3 to 4 years....

Letter from ██████████, M.D., Department of Psychiatry, University of New Mexico School of Medicine, dated January 26, 2007.

Based on the documentation provided by counsel with respect to Crohn's disease and its incurability, the gravity and unpredictability of the symptoms associated with the illness and its medications, the short and long-term ramifications for those afflicted, the need for those suffering from Crohn's disease to be treated by medical professionals familiar with the disease and its treatment and the training and career disruption that the applicant's spouse would encounter by relocating for two years (and the ramification of said departure once she returns after a two-year absence), the AAO concludes that the applicant's spouse would suffer exceptional hardship were she to relocate to Peru.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if she remained in the United States during the two-year period that the applicant resides in Peru. As stated by the applicant's spouse,

...██████████ has been a constant support throughout my battle with Crohn's and the care he provided me during my recovery was crucial. After my emergency surgery, I had a slow and painful recovery. During this time, Juan cared for me on a daily

basis. He did all of the cooking and household chores and also dressed and drained the pus from my wounds twice a day for three months. At times, he literally had to lift my feet up into bed because I could not do so myself. If [REDACTED] is not here to help me, I will not be able to care for myself should I need another life-saving abdominal surgery.

[REDACTED] and I have inquired with my health insurance carrier about the cost of a home health aid to assist with all the basic tasks of daily living. My insurance would cover the first 100 visits. These visits would last for two hours and I would require three visits per day. The average recovery time for major abdominal surgery is three months. So, after my next abdominal surgery, my insurance would pay for about 34 days of home health care and I would have to pay for the remaining 56 days of home health care out-of-pocket. Each visit costs about \$110.00. The total for 56 days would add up to \$330 per day, or \$6,160 for the home health care. I would have to declare bankruptcy, because this is about three months of my salary, and I still have to pay for rent, food, and my payments on my modest Toyota Corolla.

I have also looked into the possibility of residing in a skilled nursing facility...however, due to the high doses of immunosuppressants that I take to treat Crohn's, remaining in an institutionalized setting with other sick people is much too dangerous for my health.... Secondly, I cannot afford the cost of recovery in a skilled nursing facility. Even the most inexpensive skilled nursing facilities start at over \$3,000 per month. I earn close to \$2,700 per month while I am working. Should I require another operation, I would be placed on disability because I have already used all of my medical leave.... I would earn 65% of my regular pay, which would be around \$1,755 per month. I simply could not afford a skilled nursing facility.

I have no other family besides [REDACTED]. My mother passed away over 12 years ago from, ulcerated colitis, a very similar condition to Crohn's disease.... I have no brothers or sisters, and my father is estranged from me due to abuse.... I have Post Traumatic Stress Disorder due to childhood experiences and the traumatic and unexpected death of my mother. If I lose Juan, I lose my entire family.... My Post Traumatic Stress Disorder does not only cause me extreme sadness, but I also suffer from intrusive memories of feeling both helpless and hopeless. I am often tortured by nightmares of my mother's death and other abuse. [REDACTED] is the only person that can calm me down after these episodes and I sleep better when I know he is near....

I have made the choice not to have children because I do not want to risk passing on this terrible disease. Crohn's is a very painful and embarrassing disease that robs me of my dignity in every day life. I often have diarrhea and vomiting

accidents, and at time when I am at work or out running errands, I have to rush home to change my clothing because I have soiled myself. [REDACTED] understands my limitations and he gives me back my dignity.... I cannot survive without Juan, as he is my sole support.

...because I suffer from not only Crohn's disease, but also from Major Depression and Post Traumatic Stress Disorder, a forced separation from my husband would cause me extreme emotional anguish. It would not only mean the loss of my entire support network and family, but would also cause me to relive the trauma of losing my mother. Having my only family, Juan, taken away from me imposes extraordinary anguish and anxiety, which would have me seriously depressed and possibly suicidal....

An exacerbation of my depression is inevitable if [REDACTED] is required to return to Peru.... There is clear scientific evidence in the medical literature documenting that change in psychological states will affect the activity of inflammatory bowel diseases.... Hence, if my husband is required to return to Peru while I remain alone in the U.S., an exacerbation of my Crohn's disease is inevitable....

Supra at 5-9.

[REDACTED] corroborates the concerns outlined above with respect to the emotional, physical and psychological hardships that the applicant's spouse would experience were the applicant to reside abroad for a two-year period. As [REDACTED] states,

...I have worked with [REDACTED] [the applicant's spouse] sine January 2005....

As I am a specialist in suicide and mood disorders, I am very concerned that [REDACTED] will have limited contact with her husband for two years.... [REDACTED] possesses four key risk factors for a Major Depressive Disorder, Severe which can lead to suicide including: 1) she has very few family supports....2) She lives with daily chronic pain....3) Crohn's is an unpredictable illness that will never be cured, and will likely lead to future major surgeries, which increases her risk of future complications, that include infections, bowel paralysis, or death....4) She was previously diagnosed at 17 years old, and again at 33 years old with depression, and again at 35 and is now taking Sertraline, and three past diagnosis of depression correlate with 99% chance that she will be to be on anti-depressant medication for her lifetime or will relapse, possibly into a depression with suicidal ideation.

Secondly, it is well known that stress exacerbates chronic medical conditions.... I feel her depression is likely related to having a chronic illness that will be managed at best, but never cured and will likely result in multiple painful surgeries. Thus,

she needs as many supports as possible. If her husband had to leave the country, she will not have the money to visit frequently, and as we have established, she should not go to Peru for extended times due to lesser care she would receive there for Crohn's. The separation of a husband in a woman with depression who has already lost her family becomes a traumatic event. This separation will be perceived as a repeated major loss in her life, and the bereavement process will be followed by exceptional anguish, anxiety and loneliness. A sense of profound hopelessness may ensue. Suicide is the major risk in this scenario....

I have worked with this resident since January 2005 to the present and witnessed this resident struggle mightily with this disease, flying out to California at Cedars-Sinai to have surgery...taking 3 months off to recover from serious surgery at times her legs were so swollen [the applicant] had to lift them up or she could not get up to the bed. He had to cook and clean for her because she could not take care of her activities of daily living.

I sincerely hope this letter demonstrates that the departure of [redacted] from the United States would impose an extreme mental hardship upon his wife, as well as significantly impacting her life threatening chronic medical condition....

Letter from [redacted], MD, Professor of Psychiatry, University of New Mexico School of Medicine, dated November 8, 2007.

Due to the applicant's spouse's incurable medical diagnosis of Crohn's disease, the emotional and psychological stress associated with said disease, the applicant's spouse's documented history of depression and post-traumatic stress disorder, and the fears and anxieties associated with living with a lifelong and incurable illness, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse physical, financial, emotional and psychological hardship that would be significantly beyond that normally suffered upon the temporary separation of families. The applicant's spouse needs her husband's support on a day to day basis.

Upon review of the totality of the circumstances in the present case, the AAO finds the evidence in the record establishes that the applicant's spouse would experience exceptional hardship were she to relocate to Peru and in the alternative, were she to remain in the United States without the applicant, for the requisite two-year term.

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 she 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.