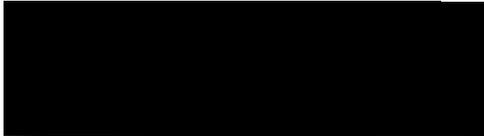


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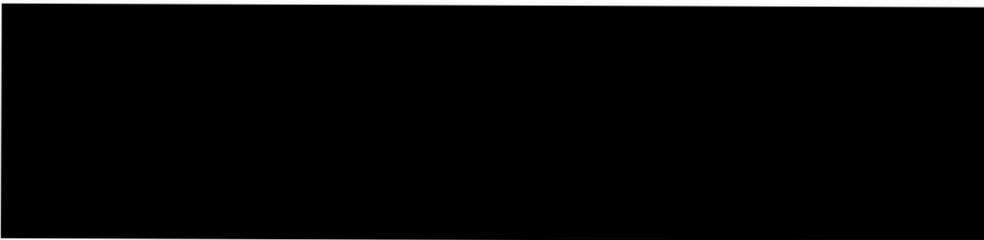
IN RE:



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:



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 record reflects that the applicant is a native and citizen of Ukraine who was admitted to the United States in J-1 nonimmigrant exchange status on July 31, 1994 to participate in a program funded by the U.S. government. She 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 her two-year residence requirement, based on the claim that her U.S. citizen spouse and child, born on June 13, 2004, would suffer exceptional hardship if they moved to Ukraine temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Ukraine.

The director determined that the applicant failed to establish that her spouse and child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Ukraine. *Director's Decision*, dated July 24, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated August 23, 2007; a letter from the applicant's child's pediatrician, dated August 8, 2007; a letter and supporting medical documentation from the applicant's child's pediatric nurse practitioner, dated August 9, 2007; a letter and curriculum vitae from the applicant's child's psychiatrist, dated August 16, 2007; numerous articles regarding separation anxiety disorder, mother-child interaction, depression and chronic stress, and child care issues; a copy of the Speech Language Evaluation Summation with respect to the applicant's child, dated August 25, 2006; a letter from the applicant's spouse, dated August 16, 2007; a letter from [REDACTED]

LCSW-C, dated August 10, 2007, with respect to the applicant's spouse; a letter from the applicant's spouse with respect to the applicant's household; evidence of the applicant's and her family's current health care coverage and quotes; copies of the applicant's and her spouse's recent pay checks; copies of household bills; and information about average monthly wages in Ukraine. 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 and/or child would experience exceptional hardship if they resided in Ukraine for two years with the applicant. To support the contention that the applicant's spouse would suffer exceptional hardship were he to relocate to Ukraine for two years with the applicant, the applicant states the following:

...My husband, [redacted] was diagnosed with aortic stenosis at the age of 5 years old and was under close medical supervision until he was 24 years old, when his condition suddenly worsened and he required an open-heart surgery to replace the aortic valve. He now has a mechanical aortic valve and has to be under close medical supervision by a cardiologist and he takes daily blood thinning medication.... He needs to have prothrombin times (a measure of the blood's thinness) tested at least once a month, and his medication is adjusted often depending on the test results.

Relocating to Ukraine would present an extreme hardship for my US citizen husband because of the low standard of medical care in Ukraine. He will have difficulty finding a qualified cardiologist who is familiar with the type of mechanical aortic valve that he currently has (which is produced in the USA) and who is familiar with the maintenance of patients with such devices. In addition, his life might be in danger, especially in case of any accident...as his blood does not clot normally because of his medication.

In addition, my husband has a history of depression, which ranges from mild to moderate. He has undergone counseling for his depression for several years and is currently in therapy. Relocating to Ukraine will prevent him from getting the adequate therapy because mental health services in Ukraine for non-Ukrainian language speaker are not available....

Letter from [redacted] dated July 31, 2006.

Corroborating documentation regarding the above-referenced medical and psychological conditions has been provided by counsel. As stated by [redacted]

[redacted] [the applicant's spouse] has been under my professional care for treatment of heart disease. [redacted] has a history of congenital aortic stenosis with an ascending aortic aneurysm, and had aortic valve replacement with a mechanical prosthesis in 1992.... He has been carefully maintained on anticoagulation with warfarin since that time and has had periodic echocardiograms to evaluate prosthetic valve function. It is essential that his clotting parameters be monitored at least on a monthly basis and that adjustments to his dose of warfarin be made in order to maintain his level of anticoagulation in therapeutic range. The consequences of under or over-anticoagulation could be catastrophic, including valve thrombosis, stroke, severe bleeding and death. Because of the unpredictable nature of anticoagulant therapy, it is necessary that the ability to monitor his clotting parameters be available not only on an ongoing basis but also on an emergency basis.... In addition, periodic echocardiography utilizing modern and high-quality technology performed by trained technicians and interpreted by cardiovascular specialists skilled in this arena is mandatory. Full medical emergency services should also be immediately available should unexpected problems arise. Medical care at a level less than described above could potentially pose life-threatening risks for [redacted]

Letter from [redacted] dated September 5, 2006.

In addition, a letter has been provided by [redacted] licensed clinical social worker. As stated by Mr. [redacted]

Please be advised that.. [redacted] [the applicant's spouse] has been an active client...since April of 2006 until the present. [redacted] has attended regularly during this time and has met all expectations of treatment....

Recommendations:

1. Continue counseling with emphasis on resolving conflicts with family of origin
2. Develop strategies for coping with anxiety and stress....

Treatment history:

1994-95: Went to counseling services provided by American University r/t depression and suicidal ideation w/o plan.

2002-2003 Individual therapy with [redacted] Frederick, MD for depression r/t to job and career concerns and a general feeling of hopelessness.

2006 Current therapy r/o symptoms of depression with increased anxiety and agitation.

...Loss of his support systems and change in job status would have devastating effects and probably lead to his premature return to this country....

Letter from [REDACTED] LCW-C, dated January 17, 2007.

Finally, counsel provides a Consular Information Sheet for Ukraine, released by the U.S. Department of State, Bureau of Consular Affairs. With respect to medical care in Ukraine,

The U.S. Embassy maintains a list of hospitals and clinics with some English-speaking staff. Many facilities have only limited English speakers. There are no hospitals in Ukraine that provide a level of medical care equal to that found in American hospitals, or which accept American health insurance plans for payment (see the section on Medical Insurance below). Some facilities are adequate for basic services. Basic medical supplies are available; however, travelers requiring prescription medicine should bring their own. Elderly travelers and those with existing health problems may be at risk due to inadequate medical facilities. When a patient is hospitalized, the patient, relative, or acquaintance must supply bandages, medication, and food. The Embassy recommends that ill or infirm persons not travel to Ukraine. The Embassy also recommends that travelers obtain private medical evacuation insurance prior to traveling to Ukraine.

Medical evacuation remains the best way to secure western medical care. This option, however, is very expensive and could take at least several hours to arrange. Travelers may wish to purchase medical evacuation insurance prior to travel, or have access to substantial lines of credit to cover the cost of medical evacuation. The Consular Section of the U.S. Embassy has information on various air ambulance companies that perform medical evacuations to Europe or to the U.S. Serious medical problems requiring hospitalization and/or medical evacuation to other European countries can cost from \$25,000 to \$50,000, and to the U.S. as much as \$70,000 or more. More information can be found on the U.S. Embassy's web site in the document Medical Services in Kyiv.

Please note that while the Embassy can help American travelers and their families make contact with a medical evacuation service, the U.S. Government cannot pay for medical evacuation. Travelers should make sure they have medical evacuation insurance, which is available from many private companies, or have funds available for evacuation, should the need arise.

Consular Information Sheet-Ukraine, released by the U.S. Department of State, Bureau of Consular Affairs, dated August 16, 2007.

Based on the documented medical and psychologist hardships that the applicant's spouse would encounter were he to reside in Ukraine for a two-year period with the applicant, and the concerns outlined above regarding the language barrier that the applicant's spouse would face, the AAO concurs with the director that the applicant's U.S. citizen spouse would experience exceptional hardship were he to accompany the applicant to Ukraine for a two-year period.

With respect to the applicant's child, the applicant states the following

...Our child, [REDACTED] is now 2 years old and has been diagnosed with speech delays and separation anxiety. Separation from his father for 2 years will present an extreme hardship to our son's development. First, it will exacerbate separation anxiety he already exhibits.... Second, his language development will be detrimentally affected by such separation. He is currently delayed in language and will need special professional services by speech pathologists to develop fluently in English. If he goes to live in Ukraine for 2 years, his English language development will be stopped and he will not be able to get the help he needs in developing the English language.... As he will eventually return to the US after the 2 years, his English speaking skills are absolutely necessary for his proper adjustment to the country....

Supra at 1-2.

A letter has been provided by [REDACTED] the applicant's child's psychiatrist. As [REDACTED] states,

...I first evaluated [REDACTED] [the applicant's child] on September 22, 2006. The evaluation was recommended by [REDACTED] s pediatrician who was concerned with his psychological and language development and the effect on his development of possible family separation associated with relocation of his mother and he to Ukraine....

My examination revealed that [REDACTED] has significant anxiety symptoms and meets criteria for DSM-IV Anxiety Disorder.. [REDACTED] anxiety is associated genetically and environmentally with the family history of anxiety and depression on his both his mother's and father's side. His mother has been treated over the years for a variety of anxiety-related disorders.... His maternal grandmother...has a history of severe depression. [REDACTED] s father also has a history of depression. In addition, the increased anxiety in the family brought on by the potential separation of the family and relocation to Ukraine is already creating anxiety symptoms....

In addition, [REDACTED] is globally delayed in his language development in both Russian and English, which was confirmed by speech pathologist examination on August 25, 2006. Sebastian's timely language development is extremely important

for his success in school and his adaptation to society. To improve his language development, [REDACTED] requires weekly speech therapy....

It is especially important that [REDACTED] develops an appropriate English language capacity.... However, at present, Russian is the dominant language spoken in the family.... Especially given [REDACTED]'s global language delay, it is important for his English language development that he be exposed to English consistently. [REDACTED]'s parents have been advised by a speech pathologist to increase his proportion of English exposure. Currently, [REDACTED] father is the only native English speaker in the home.... In Ukraine, Sebastian would be exposed to English only through his mother. His preschool teachers and classmates will most likely not speak English. Thus, again his English language development would be impeded by a move to Ukraine....

Letter from [REDACTED], dated January 12, 2007.

Based on the applicant's child's documented speech language delays and the need for weekly therapy, and the diagnosed anxiety disorder suffered by the applicant's child, the AAO concurs with the director that the applicant's U.S. citizen child would experience exceptional hardship were he to accompany the applicant to Ukraine for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's spouse and/or child would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Ukraine. With respect to hardship that the applicant's spouse would encounter were he to remain in the United States while the applicant returns to Ukraine for the requisite two-year period, the applicant's spouse states the following:

...Inessa [the applicant] is the main source of my emotional support as I struggle with recurring depression and the heavy load that comes with parenting. I have been suffering from depression since adolescence and for most of my adult life.... I sought therapy to help with my mental state, but when I thought I couldn't handle it any more, at the lowest point in my life, I considered suicide as a way to end my suffering. That was before I met Inessa and before we had our child, Sebastian. My family now is the main source of my emotional support and it gives me the reason to live.... Without Inessa's support, I shudder to think of how I would make it alone. I have come to depend on Inessa for most of my emotional support....

Letter from [REDACTED] dated August 16, 2007.

LCSW-C expounds on the statements made by the applicant's spouse.

[redacted] [the applicant's spouse] has sought treatment for his mental disorders for over ten years. Before he was married to his current wife, and before he encountered the stresses of providing for a family, [redacted] suffered from depression and anxiety directly related to early childhood trauma. He sought treatment for these disorders in the form of recurrent therapy sessions with a licensed professional. [redacted] has used his current wife, Inessa [the applicant] for emotional and mental support and has come to depend on her in order to maintain his mental health and function on a day-to-day basis.

Based on my history of treating [redacted] for over one year, I am convinced that separation from his wife...would be detrimental to [redacted]'s mental health and his ability to function in life....

For over the past 8 year [redacted] the applicant's spouse] has been the main source of emotional support for [redacted]. Because [redacted] has a very introverted nature, he is not able to develop close friendships easily. In addition, he lives far from the rest of his family, who reside in Michigan, only seeing them once a year. As a result he has had to rely primarily on his wife for emotional support.

In addition to the usual level of support that spouses normally offer to each other, Inessa is also able to offer her skills in empathic listening.. [redacted] has developed her empathic listening skills because she has been trained as a volunteer for a suicide hotline, CrisisLink and volunteered weekly as the hotline counselor for over 6 months. The emotional and mental support Inessa provides for [redacted] is more than that which is usually found in a spousal relationship....

.. [redacted] requires weekly visits to a therapist in order to function normally in his daily life. With family separation, loss of his wife's emotional support and his depression exacerbated he will likely require more frequent sessions, increasing the number of visits to twice weekly. In addition, his counseling might need to be supplemented with antidepressant medications, which may adversely affect his heart condition....

Letter from [redacted], LCSW-C, dated August 10, 2007.

Based on the applicant's spouse's medical and psychological conditions, and his need for his wife's continued support, the AAO concludes that the applicant's spouse would suffer exceptional hardship were he to be separated from his spouse for a two-year period.

[redacted] outlines the emotional and psychological hardship that the applicant's child would experience were the applicant to reside abroad for a two-year period. As [redacted] explains,

...The best treatment for [the applicant's child's] current separation anxiety is to keep him in a familiar environment, with his mother, father, and grandmother as his main caregivers, and to reduce the level of stress and anxiety in the family and in [redacted]. If the family were to be separated, [redacted]'s current level of anxiety will be greatly exacerbated. Studies have shown that separation from a parent at a young age can have serious detrimental effects on a healthy child.... For a three-year-old child, a two-year separation from his primary caregiver (mother) is equivalent to serious neglect, as experienced by the young child....

If [redacted] [the applicant] were to leave for two years, [redacted]'s grandmother, his main caregiver when his parents work, would also leave. To help him cope, [redacted] would likely require intensive psychotherapy far beyond the two years of separation....

Because of [redacted]'s current Anxiety Disorder, his global language delay, and his family history of mental health disorders, the increased stress of separation from his primary parent (mother) and the disadvantage of not having ongoing exposure to both English and Russian put him at extremely high risk for negative consequences for his long-term development and his mental and physical health....

Letter from [redacted], dated August 16, 2007.

[redacted] echoes the concerns outlined by [redacted]. As stated by [redacted]

[redacted] [the applicant's child] has been my patient since birth....

I am particularly concerned about [redacted] because he has a history of anxiety symptoms.... Also there is a family history of anxiety and/or depression on both sides, which would suggest he would be particularly susceptible to anxiety with separation from his mother and grandmother, the two closest people to him. (His mother breastfed him for more than one year, brings him to most of his doctor's appointments, and is the parent who usually calls regarding non-urgent problems. Also, his maternal grandmother has been his primary caregiver for over 40 hours a week since he was three months old. She lives with the family and often comes along for doctor's visits. He is very attached to her.)... His speech has improved, but stress could easily affect his continuing speech, language, communication, and social development.

This proposed separation would create exceptional hardship on three year-old [redacted] way beyond the normal temporary separations many families experience....

Letter from M.D., Kensington Pediatrics, dated August 8, 2007.

Numerous articles are provided that corroborate the statements made above regarding the negative ramifications of separating a mother from her child. The AAO thus concurs with counsel that the psychological ramifications of separating a young child from his mother for a two-year period would cause the child exceptional hardship.

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 and child would experience exceptional hardship were they to relocate to Ukraine and in the alternative, were they 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 her 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.