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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: FEB 26 2008

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, 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 the Philippines who obtained J-1 status to pursue graduate medical training in 1979. 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 foreign residence requirement, based on the claim that his U.S. citizen spouse would suffer exceptional hardship if she moved to the Philippines 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 the Philippines.¹

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 the Philippines. *Director's Decision*, dated September 20, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated November 20, 2007; an affidavit from the applicant's spouse, a U.S. citizen, dated November 19, 2007; an affidavit from the applicant's son, a U.S. citizen, dated November 19, 2007; an affidavit from the applicant, dated November 19, 2007; a letter from [REDACTED], LCSW, Counseling Solutions, Inc., dated October 24, 2007; a letter from [REDACTED] Ph.D., dated October 18, 2007; a letter from [REDACTED] M.D., dated November 16, 2007; a letter from [REDACTED] Mayor, City of Burlington, dated October 18, 2007; a letter from [REDACTED], dated October 18, 2007; articles regarding stress and breast cancer recurrence; articles and documentation about physician shortages in rural areas in the United States, namely, Burlington, Wisconsin; a demographic profile for Burlington, Wisconsin; and articles about health care conditions and concerns in the Philippines. 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,

¹ The record indicates that the applicant has a U.S. citizen son, [REDACTED], born in November 1981, and a U.S. citizen daughter, [REDACTED], born in May 1980. As both [REDACTED] and [REDACTED] are over the age of twenty-one and are not considered qualifying relatives for purposes of section 212(e) of the Act, any hardships faced by them due to the applicant's two-year foreign residence requirement can not be considered, except as such hardships may impact the applicant's spouse, a U.S. citizen.

(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(I): 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 the Philippines for two years with the applicant. To support this contention, the applicant's spouse states the following:

I am 60 years old. I have been married to my husband [redacted] [the applicant] for 30 years, and we have been together for 40 years. He has been my lifetime partner and best friend....

My two children are grown up, but...my son, who we all call [redacted] (for [redacted] is single and has been struggling with depression and attention deficit disorder for many years now. At the lowest point of his depression, [redacted] was extremely anxious, isolated himself from his friends for days on end, and even had thoughts of suicide. Aside from having regular visits to the psychologist and psychiatrist, my husband [redacted] and I have been his biggest support through this ordeal and are key in helping him stay well.

Providing [redacted] with that support has taken its toll on me. Even before [redacted] s problems became so serious, I have been weakened physically and was diagnosed with breast cancer. I had a mastectomy and have dealt with all the extreme physical and emotional stress that involved; I had to reduce my work to a part-time schedule to ease the stress. Supporting [redacted] has made me weaker. Emotionally, it has been very difficult for me to admit the effect that constantly worrying about [redacted] has had on me, and my Chinese cultural background has caused me to avoid talking to anyone about it.... For myself, I used my access to free prescription medicine samples to begin self-medicating. Over two years ago, I started regularly taking Paxil, an anti-depressant, and Ambien, an anti-insomnia medication. I also

began seeing [REDACTED] alone, as my own therapist, in addition to the family sessions we had with her....

The only reason I could continue functioning at all since [REDACTED] problems have grown has been my husband [REDACTED]. I call [REDACTED] every single day to make sure he is ok. Whenever I call and [REDACTED] doesn't answer, it is [REDACTED] who calms me down and assures me everything is alright, that [REDACTED] will call back....

Once [REDACTED] didn't call back [REDACTED] and I knew he was particularly depressed at that time, so we kept calling. Each time [REDACTED] didn't answer, I became more and more anxious, worried that he might have done something to hurt himself. Twelve hours passed, and by then I had called [REDACTED] several times, each time with no answer. Joe helped me call [REDACTED]'s friends, but none of them knew where he was....

I began to really panic and I couldn't just sit still. So [REDACTED] drove himself and me down to Chicago, to [REDACTED]'s apartment. We found him physically ok, but he was so depressed he refused to answer his phone or talk to anyone....

Affidavit of [REDACTED] dated November 19, 2007.

The applicant's spouse further states,

...There is a chance that my cancer will come back—and I need to be here to receive the oncological treatment that I need. I also want to support my two children. My son, who was nearly hospitalized for his condition, will likely go into deeper depression if my husband or I were to leave him.

Our family is very close because we do not have any other family members around here. I would have no one else to turn to. This has been our home for over two decades and I cannot imagine living anywhere else.

...Also, I am not licensed to practice in the Philippines. As I am nearly 60 years old, I would not be able to pass the licensing exams nor return to a rigorous work schedule. We need to be together as a family; otherwise, we will not be able to function separately as individuals.

Affidavit of [REDACTED] dated April 3, 2006.

To corroborate the above concerns, counsel provides numerous articles that tie increased stress to the recurrence of breast cancer. In addition, counsel provides a letter from the applicant's spouse's therapist, [REDACTED] Ph.D. As [REDACTED] states,

...I have known [redacted] [the applicant's spouse] for the six years I have been treating [redacted] [the applicant's son]. She has actively participated in his treatment, as part of a family treatment plan. She has also come to see me both in the context of family meetings and in the context of individual therapy. In family meetings, when the focus was on [redacted]'s increasingly debilitating depression and possibility of suicide, [redacted] presented as being very anxious and depressed. As a result, and with [redacted]'s permission, she came to see me for individual psychotherapy. In those sessions, we reviewed her state of mind. In addition to being deeply depressed, she frequently complained of anxiety as well as panic attacks.... The possibility of a separation...from her son, will throw her into a cycle of anxiety and depression that may manifest in decompensation, and significantly lowered level of functioning....

To summarize, the situation is dire...whether she accompanies him [the applicant], leaving her son, she will suffer greatly and perhaps even life-threatening consequences. In addition, and in the meantime, [redacted] will suffer a spiraling effect from this disruption, very possibility putting him back in the deep depressive and suicidal state of a few years ago....

Letter from [redacted], Ph.D., Licensed Marital and Family Therapist, dated October 18, 2007.

[redacted] describes in further detail the diagnosis and short and long-term treatment plans with respect to the applicant's spouse and son,

...I first began treating [redacted] [the applicant's spouse] in October, 2007. She presented in my office suffering from a Major Depressive Episode, which has since become worst as she has dealt with the possibility that her husband...may have to return to the Philippines.

[redacted] was referred to me by her psychotherapist, [redacted] who she has been seeing for several years. Prior to seeing me, [redacted] had been self-medicating for over two years, taking 20 mg of Paxil (an anti-depressant) per day, as well as 10 mg of Ambien (sleep-aid) at bedtime to help her overcome her anxiety. I took her off of the Paxil, as I did not feel that it was effectively addressing her depression. I have now diagnosed [redacted] with Major Depressive Disorder, and prescribed 37.5 mg of the anti-depressant Effexor two times per day. I plan to gradually increase her total daily dose to 150 mg. In addition, I have prescribed 25 mg of the sleep-aid Trazodone for her to take at bedtime.

I have been treating [redacted]'s son, [redacted] for about two years. [redacted] has seen three other psychiatrists over the past eight years...before coming to me.

█ has been diagnosed with both Attention Deficit Disorder and Major Depressive Disorder....

█ has made some progress, but I am still monitoring him for the positive and negative effects of his medication regime. █ remains in a fragile condition. It is my opinion and the opinion of █'s psychotherapist that the stress of his father's situation has severely impeded █'s ability to cope with his illness or to make significant progress. █ would be emotionally devastated by the loss of his father's close support....

Letter from █ M.D., General and Forensic Psychiatry, dated November 16, 2007.

Counsel has documented that the applicant's spouse's mental state is directly connected to her adult son's medical condition and welfare and any uncertainty regarding his care and well-being while she is thousands of miles away, in the Philippines, will cause the applicant's spouse exceptional hardship. This has been corroborated by numerous medical professionals who treat the applicant's spouse regularly and note that the son's medical condition has been the principal cause of the applicant's spouse's anxiety and depression and that the applicant's spouse's continued presence is critical to her son's mental health improvement. Moreover, counsel has documented that the applicant's spouse is directly involved in her adult son's day-to-day existence, and suffers significantly if she is unable to communicate and/or see her son often to ensure his safety. Finally, counsel has confirmed that increased stress, including the applicant's spouse's relocation to the Philippines, where she has not resided in decades, away from her children, could lead to a recurrence of breast cancer and deterioration in her mental health. As such, the AAO concludes that the applicant's spouse would suffer exceptional physical, emotional and psychological hardship were she to relocate to the Philippines with the applicant for a two-year period.

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 the Philippines. As stated by the applicant's son,

...Family has always been my dad's number one priority, both as a husband and father. Since their marriage in 1977, my father has been my mother's best friend and soul mate. In my eyes, they have an ideal marriage. Living back at home with my parents for the past few months has allowed me to once again witness the deep love, strength, and closeness of their relationship....

For the past five years I have been suffering with an increasingly worsening clinical depression.... I have been seeing a therapist, █ twice a week for several years now. Over the years I have also taken a battery of medication. Last year I underwent a very expensive brain scan that confirmed my previous diagnosis and further revealed a previous closed head injury that contributed to my

problems. Thanks to my parents, I have been receiving the therapeutic help that I need....

This has been a very painful time for not only me, but for my parents as well. I have caused both of them, especially my mother, enormous anxiety and suffering. Through our numerous family therapy sessions with [REDACTED] I learned about the tremendous amount of anxiety my mom has suffered. Thinking about me would at times even cause her to have panic attacks.

During these times when my mother would be overcome with fear and worry, my father eased her anxieties. He has played this crucial role before. When my mother was struck with the horrors of breast cancer, my father was the one who helped her manage not only her illness, but also her fears. My mom told me how my dad was the one who added hope, comfort, and encouragement. His presence and support made all the difference.

If my father were to leave the U.S., my mother would be devastated.... If they were to separate, my mother would lose her life long partner and best friend. In addition to the emptiness she would feel, without my father to alleviate her anxiety, she will have a very difficult time coping with the uncertainties of my life and problems....

Affidavit of [REDACTED] dated April 21, 2006.

The applicant's daughter echoes the sentiments referenced above. As she states,

...My mother suffers from constant anxiety. I see her condition deteriorating because of all the stress she encounters. Somehow, I feel that she would not be able to handle my brother's needs on her own, at least without destroying her own health first. My father's presence, coaching and continuous support allows her to remain stable and therefore focused on the needs of my brother....

Affidavit of Marissa Graciosa, dated April 12, 2006.

Finally, [REDACTED] a licensed clinical social worker, affirms the applicant's spouse's need for her husband to remain in the United States. As [REDACTED] states,

...I will lastly state that my assessment of the hardship likely to be faced by [REDACTED] (the applicant's spouse) was based on my interview with her, her husband and family, and the treating psychologist for the family; her history with anxiety; and the fact that her husband has historically played such a significant role in helping her to cope with her chronic anxiety. He has the ability to soothe and calm her. He will drive her to Chicago when she is feeling overwhelmed by worry about their son, he provides the majority of the financial resources....

Given how poorly she has historically coped with her anxiety while benefiting greatly from the soothing and support she receives from [REDACTED] (the applicant), I stand by my assessment that she is likely to have great difficulty coping with the emotional loss and financial loss that is inherent should [REDACTED] be required to return to the Philippines. Moreover, her ability to cope with this situation I believe would be significantly more impaired than what one would ordinarily expect of any individual facing the same circumstances. One must take into account her entire history with anxiety and the degree to which she has successfully (or unsuccessfully) coped with this in the past, as well as the significant additional stress of losing her primary source of support. Moreover, there is the issue of [REDACTED] severe depression which is a highly significant source of stress and anxiety.... If [REDACTED] must return to the Philippines there will be a multitude of significant issues which [REDACTED] will be faced with and will be required to find a way to cope with. I have grave concerns about her ability to manage all of the issues that will be impinging upon her....

Letter from [REDACTED] LCSW, Counseling Solutions, Inc., dated October 24, 2007.

Based on the above statements and the documentation provided, the AAO concludes that the applicant's spouse would encounter exceptional emotional and psychological hardship were the applicant to relocate abroad for a two-year period, as the record establishes that the applicant's spouse relies on the applicant for support, especially in light of her own anxiety and depression, and their son's continuing mental health problems. The hardship she would suffer goes beyond the anxiety and loneliness ordinarily anticipated from a two-year separation. Her hardship if she remained in the United States for two years without the applicant would go significantly beyond that normally suffered upon the temporary separation of a spouse from his wife and children.

As such, 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 the Philippines 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.