



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 24 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 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 Cyprus 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 last admitted to the United States in J1 nonimmigrant exchange status on September 4, 1994. The AAO notes that the applicant subsequently obtained F-1 status. Any time that the applicant spent in Cyprus after completing his J1 program would count towards the two-year requirement. Therefore, the amount of time that the applicant would be required to spend in Cyprus is less than two years. The applicant's spouse is a U.S. citizen. The applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his spouse.

The director determined that the applicant had failed to establish his spouse would experience exceptional hardship if he fulfilled the two-year foreign residence requirement in Cyprus and denied the application accordingly. *Director's Decision*, dated March 7, 2007.

On appeal, counsel asserts that the applicant's spouse would experience hardship if she resided in Cyprus or remained in the United States without the applicant. *Brief in Support of Appeal*, at 2,5, undated.

The record includes, but is not limited to, counsel's brief, the applicant's statement, a settlement statement, a letter from the applicant's spouse's psychotherapist, a letter from the applicant's spouse's physician, a psychological evaluation of the applicant's spouse, information on asthma, country conditions information on Cyprus and numerous letters of support. The entire record was considered in rendering this decision.

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 the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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, Department of Homeland Security (DHS), "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. (Quotations and citations omitted).

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 spouse would suffer exceptional hardship upon relocation to Cyprus for two years. Counsel states that the applicant's spouse works in Oakland, California as a product analyst for a software company and she would not be able to develop her career in Cyprus as she does not speak Greek. *Brief in Support of Appeal*, at 2, 4, undated. Counsel states that the applicant's spouse is attending classes at the district attorney's office for victims of crime. *Id.* The record does not include substantiating evidence of this claim. However, the applicant's spouse's psychotherapist states that the applicant's spouse is being treated for an adjustment disorder with depression related to the murder of her brother and that the violent death of her brother has been devastating to her. *Letter from [REDACTED], MFT*, dated April 16, 2007. Counsel states that as a result of her brother's death, the applicant's spouse is in great need of support of her family. *Brief in Support of Appeal*, at 2.

The director states that the applicant's spouse has decided to return to an area (Los Angeles) where she previously claimed her health suffered, her health claims must not be as grave as she indicated in her letter of hardship, her condition is stable but chronic, and there is not sufficient evidence to show that the applicant's spouse's condition would worsen if the applicant complied with the two-year residency requirement. *Director's Decision*, at 4. Counsel states that the applicant's spouse suffers from chronic asthma, she takes multiple medications for this condition and Cyprus is a country with high humidity, extensive pollen and pollution, all of which would seriously affect the health of the applicant's spouse. *Brief in Support of Appeal*, at 3. Counsel states that the applicant's spouse wanted to move to Los Angeles to be close to her family, but she purchased property in Berkeley, California instead of Los Angeles due to her chronic asthma. *Id.* The record includes a settlement statement for property purchased by the applicant and his spouse in Berkeley, California.

The applicant's spouse's physician states that the applicant's spouse's condition is stable but chronic, exposure to specific allergens can induce a serious asthmatic response necessitating immediate medical attention, the applicant's spouse has required medical attention for numerous allergy-related asthma attacks, she must stop two of her four medications if she becomes pregnant and she should be closely monitored if she decides to start a family. *Letter from [REDACTED], M.D.*, at 1-2, dated February 2, 2006. The record reflects that air pollution is associated with shortened life expectancy in the adult population of Cyprus. *Article from the Cyprus International Institute for the Environment and Public Health in Association with the Harvard School of Public Health, Respiratory and Cardiovascular Diseases and the Environment Research Program*, at 1, undated. The record reflects that the applicant's spouse may encounter problems related to her asthmatic condition if she relocates to Cyprus for two years. However, the AAO finds exceptional hardship, in the event of relocation to Cyprus, based primarily on the unique emotional issues related to the murder of applicant's spouse's brother and the accompanying cessation of the applicant's spouse's established psychotherapy treatment for adjustment disorder with depression and bereavement.

The second step required to obtain a waiver is to demonstrate that the applicant's spouse would suffer exceptional hardship if she remained in the United States during the two-year period. As mentioned previously, the applicant's spouse's psychotherapist states that the applicant's spouse is being treated for an adjustment disorder with depression and bereavement related to the murder of her brother and that the violent

death of her brother has been devastating to her. *Letter from [REDACTED] MFT.* Counsel states that as a result of her brother's death, the applicant's spouse is in great need of support of her spouse. *Brief in Support of Appeal*, at 2. The applicant's spouse's psychotherapist states that the support of the applicant is essential for the applicant's spouse in this very difficult time. *Letter from [REDACTED] MFT.* As such, the record demonstrates that exceptional hardship would be imposed on the applicant's spouse if she 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.