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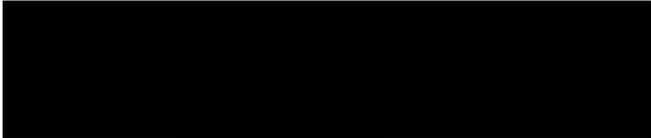
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U.S. Citizenship and Immigration Services

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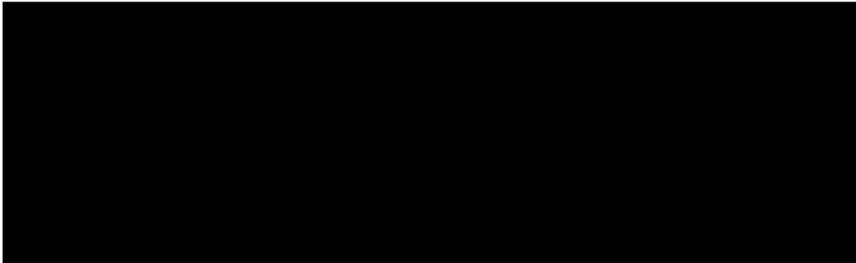


FILE: [Redacted] Office: NEBRASKA SERVICE CENTER Date: **JAN 29 2008**

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:



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, Nebraska 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 India who obtained J1 nonimmigrant exchange status on July 3, 2001 to participate in graduate medical education training. 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 lawful permanent resident spouse and U.S. citizen children, born in 1999 and 2005, would suffer exceptional hardship if they moved to India 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 India.

The director determined that the applicant failed to establish that her spouse and children would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in India. *Director's Decision*, dated January 5, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated February 2, 2007; case law with respect to waivers; copies of two decisions from the AAO; a letter from the applicant and her spouse, dated January 29, 2007; a letter from the applicant's spouse's treating physician, dated January 28, 2007; and copies of articles written in regards to hardship waivers. The entire record was reviewed and 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, 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 children would experience exceptional hardship if they resided in India for two years with the applicant. To support the contention that the applicant’s spouse will suffer exceptional hardship were he to relocate to India, the applicant states the following:

...We would like to throw more light on the option of my husband moving with us to India. It might be indeed possible that there could be doctors that are knowledgeable in treating Crohn’s disease in India. But, on the other hand the combined possibility of finding such a doctor where we will be living in India and the possibility of that doctor having treated a Crohn’s patient in recent years and the possibility of the same doctor to be in touch with the latest treatment methods that are available in USA is very thin. We base this argument on the fact that Crohn’s is highly uncommon in Indian population.

Besides these possibilities, the emergency care in most parts of India is neither as advanced nor as reliable as in USA. Until now, my husband has had pain episodes every six to eight months even before it was diagnosed to be Crohn’s disease. Hence it is highly likely that he will have pain episodes in India also, if he lives there for two years. Though I am a medical doctor, I have been studying and practicing Pathology which is a non-clinical field in medicine and Pathologists seldom deal with patients directly. I will not be in a position to advise or replace a Gastroenterologist...Hence, in case of my husband living in India for two years the chances of getting worse with the chronic, relapsing Crohn’s condition is much stronger than in the case of he living in USA...

Letter from [redacted] and [redacted] dated January 29, 2007.

To corroborate the applicant’s statements regarding her husband’s medical condition and the concerns with respect to residing in India, a letter is provided from [redacted] a practicing Gastroenterologist. As stated by [redacted]

...I am a practicing Gastroenterologist in Cincinnati, OH. I am board certified in Gastroenterology and Internal Medicine...I have extensive experience in managing various forms of Inflammatory Bowel Disease of which Crohn’s disease is a type. I am also involved in several research studies involving patients with Crohn’s disease.

I saw [redacted] [the applicant’s spouse] on 09/27/2006 in Jewish Hospital. He had come in to ER the previous night for severe abdominal pain and vomiting. The

clinical presentation was typical for Crohn's disease. Given that [REDACTED] is of Indian origin, I suspected that he might have Intestinal Tuberculosis. I am a person of Indian origin myself, and trained extensively in India. Crohn's disease is extraordinarily rare in the Indian subcontinent and Tuberculosis is endemic...

...Unfortunately for [REDACTED] the diagnosis now is condition called Crohn's disease...Crohn's disease is a form of Inflammatory Bowel disease, which has no cure. It is lifelong condition and has a varied course in different individuals. Some of the symptoms of Crohn's Disease are diarrhea, abdominal pain, and malnutrition; however, other side effects of the disease include bowel obstructions, fistulas, and excessive bleeding. While malnutrition and dehydration are serious concerns, they can be treated with vitamin supplements and increased fluid intake. However, bowel obstructions, fistulas, and excessive bleeding may cause death...and are not easily treated. Bowel obstructions often stop nutrient absorption and cause vomiting. Fistulas sometimes lead to abscesses and extreme cases of infection, which, left untreated, could lead to sepsis. Likewise, bleeding through the digestive tract may lead to anemia that can also be life threatening. Many Crohn's patients suffer from depression due to the ordeal that they have to go through.

In my professional opinion, it is indeed a real hardship to fight with a chronic condition such as Crohn's disease. Very often, the patient may have to undergo surgery and sometimes repeated surgeries. Chronic pain is an unfortunate complication as well.

Letter from [REDACTED] MD, Greater Cincinnati Gastroenterology Associates & Center for Clinical Research, dated January 28, 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, the short and long-term ramifications for those afflicted, and the need for those suffering from Crohn's disease to be treated by medical professionals familiar with the disease and its treatment, the AAO concludes that the applicant's spouse would suffer exceptional hardship were he to relocate to India.

To support the contention that the applicant's children will suffer exceptional hardship were they to relocate to India, the applicant states the following:

...in India there is still a social stigma attached to people who consult a psychologist or psychiatrist, and people who take medication for the same reason. They are simply labeled as psychotics and society shuns them. It will be hard for [REDACTED] [the applicant's child] to handle that kind of reaction when he would already be facing the social-cultural shock in relocating to India. Even though he doesn't understand these issues now, he is strongly protesting against going to

India and living there. He keeps saying that he is an American and wants to live in America. For a very short while, he went to school in India...He still remembers his experience in the classroom vividly, but unfortunately, it is not the good side that he remembers. He remembers very well about the physical punishments that the students used to receive in his class. The system of education in India is still the old style of the British school system, coupled with the Indian way of treating students. Monetary fines and physical punishments are taken for granted and are just ways of life there. Students are not encouraged to express their opinion in the classroom and they are expected to obey whatever the teacher says. These customs are emotionally disturbing for a child who was born, brought up, and went to school in the United States. It is difficult for Roshan to understand the system in India and he will not be a happy child and this may worsen his ADHD [Attention Deficit Hyperactivity Disorder] symptoms.

Affidavit of [REDACTED] dated August 7, 2006.

No documentation has been provided from a mental health professional that outlines in detail the applicant's child's current prognosis, its gravity, and its short and long-term treatment plans. Moreover, it has not been established that the applicant's child would be unable to obtain appropriate care and/or medications in India to treat the ADHD, or that any stigmas felt by the applicant's child due to his treatment would lead to exceptional hardship. In addition, no documentation has been provided that confirms that schools in India would be unable to assist the applicant's child with respect to his diagnosis of ADHD. Finally, were the applicant's spouse to remain in the United States, it has not been documented by a mental health professional that the hardship the applicant's children would experience in India for a two-year period, with a single parent, would be exceptional, or that the applicant's spouse would be unable to travel to India on a regular basis to visit his family. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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

...we strongly urge that the probability of my husband having pain episodes during the two-year period if I were to leave should not be discounted. We would like to bring to your notice that my husband had severe pain episodes again in September 2006...and he had to stay in the hospital...for a few days and then had to go for follow up tests as outpatient. The extent of pain he suffers during such episodes is so severe that it would be highly unlikely for him to call for help himself. In 2005 my parents called 911 and in 2006, I had to call 911 for help. As he was unable to even sit up during the pain episode, it would be impossible for anyone to move him to the car and drive him to the hospital. That was the reason why we had to call 911 each time.

It is worthwhile to mention about the support system we have in USA. From the affidavits we submitted with the application for waiver, it is noticeable that we do have a good support system in place...But it is also evident from the same affidavits that their addresses are nowhere near where we live now. In fact, most of them live in far away cities and different States too...Even if they are prepared to help my husband as soon as they could, with the nature of pain episodes related to Crohn's disease, it is utmost important to get help at the very moment of the episode...

Supra at 2-3.

The applicant further states,

...If I go back to India as originally planned, my husband will be helpless at the time of any acute episodes, which may require hospitalization and unexpected surgical intervention. It would take months for me to get a visa in India to enter the United States (currently the wait for a visa interview appointment at the American consulate in Chennai, India is three months), and a week to make travel arrangements from India to reach here in case and emergency would arise. Thus, there would be a very high chance that my husband would end up being hospitalized with no one else to care for our children, and it would be very emotionally traumatic for him to go through such a crisis without my presence.

Needless to say, it would be an emotional trauma for the children, too. In turn, the stress related to taking care of two young children just by my husband alone might precipitate his symptoms. Our second son [REDACTED] is only 14 months old and needs a lot of attention at this age...

If I go to India and leave him [REDACTED] with my husband, it will be difficult for my husband to take care of my son at the time of my husband's illness...my husband may have to go for emergency care and may have to stay in the hospital for a few days. It will certainly be a stressful and disturbing situation for my son [REDACTED] who is not mature to understand and handle the situation.

Supra at 6-7.

[REDACTED] corroborates the concerns outlined by counsel and the applicant with respect to the hardship that the applicant's spouse and children would experience were the applicant to reside abroad for a two-year period. As [REDACTED] states,

...He [the applicant's spouse] was diagnosed by a bowel specialist (a gastroenterologist) as having Crohn's disease. This is a disease that affects the bowel, that is not curable. The battle with this disease can be lifelong with

remissions and relapses, and, in some cases, resulting in surgical removal of a portion of the bowel...

My concern is that if [REDACTED] has another severe episode of his Crohn's disease that places him in the hospital again, he will have no one to take over his household and take care of his young children. His children are ages one and six years old. They obviously cannot be left alone and cannot help to take care of [REDACTED] when he is sick. Moreover, [REDACTED] has seen the bowel specialist over twelve times in the past several months. He has also visited my office and has had visits for special testing, such as the CT scan. These visits take time and energy away from his family...

It is my professional medical opinion that it would be medically contraindicated for my patient to have his physician/wife travel to her home country for two years. [REDACTED] has established medical doctor/patient relationships with several physicians in this area and needs to continue care here...

Letter from [REDACTED], DO, Family Practice, Dublin Medical Clinic, Inc., dated May 15, 2006.

Due to the applicant's spouse's incurable medical diagnosis of Crohn's disease, the emotional and psychological stress associated with said disease, 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 emotional, physical and psychological that would be significantly beyond that normally suffered upon the temporary separation of families. The applicant's spouse needs his spouse's emotional, physical and psychological support on a day to day basis and when emergencies arise that oftentimes lead to his hospitalization.

Moreover, due to the applicant's spouse's medical situation, the AAO finds that the applicant's children would suffer exceptional hardship were they to remain in the United States without the applicant, as they would be forced to contend with their father's medical condition and its unpredictable and unknown manifestations, without the support of their mother, or any nearby relatives and family friends. Their mother's absence in such a precarious situation would lead to emotional trauma for the two young children.

The AAO thus concludes that with respect to the applicant's children, the record does not support a finding that the applicant's children will face exceptional hardship if the applicant's waiver request is denied. Although the AAO finds that the applicant has established that her children would suffer exceptional hardship were they to remain in the United States while the applicant relocated abroad for two years, it has not been established that they would suffer hardship were they to relocate to India with the applicant.

As for the applicant's spouse, 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 he to relocate to India and in the alternative, were he 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 application must be approved. If, however, 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.