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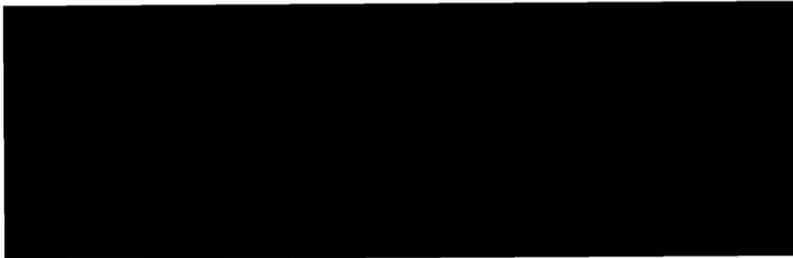
Date: JAN 30 2008

IN RE:



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:



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 the Philippines who was granted J1 nonimmigrant exchange status in August 1991 to participate in graduate medical 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 U.S. citizen spouse and three children, born in 1993, 1996 and 1999, would suffer exceptional hardship if they moved to the Philippines 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 the Philippines.

The director determined that the applicant failed to establish that her U.S. citizen spouse and/or children would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in the Philippines. *Director's Decision*, dated January 4, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated February 27, 2007. 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 children would experience exceptional hardship if they resided in the Philippines for two years with the applicant. To support this contention that her U.S. citizen children would experience exceptional hardship, the applicant states the following:

...My eldest son [REDACTED] has been diagnosed with bronchial asthma since infancy. My husband and I constantly take measures to protect our son from an asthma attack....

[REDACTED]'s treatment for asthma includes having a filter mechanism in our home to circulate the air and to keep dust at a minimal level, a nebulizer for liquid inhaler, steroid inhaler and Albuterol upon the first sign of difficulty in breathing... The filter in the house must always be on so that he can breath fresh air at all times while he is in the house. When we travel, we have to carry with us all these treatment mechanisms because his asthma could be triggered by the slightest change in the environment.

...If I return to the Philippines with [REDACTED] his asthma would certainly get worse. The environmental problems in the Philippines are too numerous to count.... The air pollution in Manila, Philippines has been reported as one of the worse in the world.... Respiratory diseases have become the most common illnesses among children who live in Manila....

Our children are very well adjusted to the American way of life. They have been here all of their lives and would suffer a great deal if they had to give up this lifestyle. Everything my children are familiar with, love, enjoy and care for is in California.... They have no concept of what life is like in the Philippines.... Our children do not speak Tagalog nor understand it; thus they would feel very alienated if they had to move to the Philippines for two years.

...One of my chief concerns about returning to the Philippines is the violence that grips the nation, particularly the incidence of kidnapping for ransom.... I fear that because we are from the U.S., my children will be targeted by kidnappers who will believe we are a lucrative target....

...The daily tension that exists in the Philippines due to the struggle against the terrorism of the separatist groups is strong. There are various groups that engage in violence and terror....

Affidavit of [REDACTED] dated January 19, 2005.

An April 27, 2007 Travel Warning issued by the U.S. Department of State corroborates the statements made by the applicant with respect to country conditions in the Philippines. As stated in the warning,

This Travel Warning updates information on the security situation and reminds Americans of the risks of travel in the Philippines. This Travel Warning supersedes the Travel Warning for the Philippines issued June 16, 2006.

U.S. citizens contemplating travel to the Philippines should carefully consider the risks to their safety and security while there, including those due to terrorism. While travelers may encounter such threats anywhere in the Philippines, the southern island of Mindanao and the Sulu Archipelago are of particular concern. Travelers should exercise extreme caution in both central and western Mindanao as well as in the Sulu Archipelago.

Kidnap for ransom gangs operate in the Philippines. In January 2007, one such gang abducted two U.S. citizen children outside their home in Tagum City, Davao Del Norte, in Mindanao. The New People's Army (NPA), another terrorist organization, operates in many rural areas of the Philippines, including in the northern island of Luzon. While it has not targeted westerners in several years, the NPA could threaten U.S. citizens engaged in business or property management activities, and it often demands "revolutionary taxes."

Terrorist groups, such as the Abu Sayyaf Group and the Jema'ah Islamiyah, and groups that have broken away from the more mainstream Moro Islamic Liberation Front or Moro National Liberation Front, have carried out bombings resulting in deaths, injuries and property damage. Recent incidents have occurred in urbanized areas in Mindanao. On January 10, 2007, separate bombings in the cities of Kidapawan, Cotabato and General Santos killed seven people and injured 41. While these incidents do not appear to have targeted Westerners or Western interests, travelers should remain vigilant and avoid congregating in public areas.

Travel Warning-Philippines, Bureau of Consular Affairs, U.S. Department of State, issued April 27, 2007.

In addition, the applicant has provided numerous articles about country conditions, environmental concerns and the dangers of residing in the Philippines, and a letter from [REDACTED]'s treating physician for over two years, confirming that [REDACTED] has been diagnosed with Asthma, and that "...he takes inhalers.... He is allergic to high doses of pollen, dust and a simple cold could quickly escalate into an asthma attack. He will not tolerate living in heavily polluted areas..." *Letter from [REDACTED] PediaHealth Medical Group, dated November 29, 2004.*

Based on the documentation provided, the AAO finds that the hardship the applicant's children would encounter were they to relocate to the Philippines for a two-year period goes significantly beyond that

normally suffered upon the temporary relocation of families based on a two-year home residency requirement. The record indicates that the applicant's son, [REDACTED], suffers from a medical condition that will be exasperated were he to reside in the Philippines. The record also establishes the turmoil and safety concerns with respect to being a U.S. citizen residing in the Philippines. Moreover, the record establishes that the applicant's three U.S. citizen children are integrated into the U.S. lifestyle and educational system. They have never lived outside the United States and they do not speak, read or write in the native language of the Philippines. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, who was completely integrated into the American lifestyle, and who was not fluent in Chinese, would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO finds *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern. To uproot the applicant's children at this stage of their education and social development and relocate them to the Philippines would be a significant disruption that would constitute exceptional hardship. As such, based on a totality of the circumstances, the AAO finds that the applicant's children would encounter exceptional hardship were they to relocate to the Philippines.

In regards to the hardship the applicant's spouse would face were he to relocate to the Philippines with the applicant, the applicant's spouse states the following:

...If I were to accompany my wife to the Philippines, I would be unable to continue to provide for my family, as it will be very difficult for me to establish a similar profitable dental practice anywhere in the Philippines.... Needless to say, if I left the country my dental practice would cease [sic] to exist and it would be basically impossible to rebuild it to its present level....

Affidavit of [REDACTED] dated January 12, 2005.

To begin, no corroborating and objective evidence has been provided to establish that the applicant and his spouse would be unable to obtain gainful employment in the Philippines. Moreover, no documentation has been provided with respect to the finances of the applicant's spouse's dental practice to establish its viability, and to confirm that without the applicant's spouse's presence, it would be unable to continue and would thereby cause the applicant's spouse exceptional hardship. Finally, the applicant's spouse is a native of the Philippines. It has not been established that he would suffer exceptional hardship were he to return to his native country for a two-year period.

Counsel also asserts that the applicant's spouse suffers from hypertension and major depressive disorder. *Brief in Support of Appeal*, dated February 27, 2007. It has not been established that the applicant's spouse's condition for hypertension cannot be properly treated in the Philippines. Moreover, with respect to the applicant's spouse's mental health, the AAO notes that although the input of any mental health professional is respected and valuable, the submitted affidavit from [REDACTED] Psy.D., Licensed Psychologist, is based on a single interview between the applicant's spouse and the psychologist. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's spouse or any history of treatment for the depressive disorder suffered by the applicant's spouse. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration

commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of exceptional hardship. Finally, although the applicant's spouse has been diagnosed with the above-referenced medical and mental conditions, he is able to run a "solo practice" and work "ten to twelve hours per day...." *Id.* at 1. His medical and psychological conditions clearly do not hinder his ability to maintain an active professional career and assist in supporting his family.

As such, although the AAO finds that the applicant's children will experience exceptional hardship were they to relocate for two years with the applicant to the Philippines, it has not been established that the applicant's spouse, a native of the Philippines, would experience exceptional hardship were he to accompany the applicant to the Philippines for the requisite two-year period.

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 the Philippines. As stated by the applicant,

...my husband would be forced to care for all three children while at the same time running a busy dental practice. Taking care of my son [REDACTED] and being watchful of his asthma condition would be a very difficult task for my husband to handle alone.... Having to take care of an asthmatic child while at the same time caring for two younger children and running a busy dental practice would certainly heighten my husband's blood pressure....

My youngest daughter [REDACTED] who is now 5 years old, is of all the children the closest to me and most emotionally dependent on me....

Furthermore, if I return to the Philippines...our children's well being would be in jeopardy because since they were born I have been the primary caregiver in our home. I am responsible for taking our children to and from school, attending to their daily needs and accompanying them to their extracurricular activities...All three of my children would suffer a great deal if I were away for two years. They are liable to feel abandoned and unloved by their own mother. They will most likely develop separation anxiety and will be scarred....

Supra at 2, 4.

[REDACTED] MD, the applicant's children's pediatrician, states the following:

I am the pediatrician of her [the applicant's] three young children.... These children are highly dependent on their mother as she is their primary caregiver.... All of these children suffer from atopic dermatitis which is an allergic condition of the skin, exemplified by a rash and can be exacerbated by periods of stress and emotional tension.... It has become quite apparent that these rashes have often

appeared in these children when they experience undue stress.... In addition, [REDACTED] has bouts of Asthma, necessitating the use of steroid inhalers, occasional use of systemic steroids for better control of the wheezing. This condition may be exacerbated by pollution, dirty environment.... A severe attack of asthma may lead to respiratory arrest.... [REDACTED] has wonderfully maintained very good grades and this year has made First Honors in school. [REDACTED] has also been an above average student. [REDACTED] who is soon to start Kindergarted [sic] in the fall, will need a lot of care and supervision to adjust to a new phase in her life. It will be extremely detrimental to these children to be separated from their mother, who all these years has been their pillar of support....

Letter from [REDACTED], MD, Pediatrics, dated July 15, 2004.

With respect to the applicant's spouse, it has not been established that he would be unable to travel to the Philippines, his native country, to see his wife on a regular basis. Moreover, it has not been established that he would be unable to afford and obtain adequate child care to assist with the three children while the applicant is residing abroad. Finally, counsel has not provided a letter from a medical professional that establishes the applicant's spouse's current medical and mental health situation, the short and long-term treatment plans, and the gravity of the situation, and moreover, that corroborates that the applicants' spouse's medical situation will worsen without the applicant's physical presence. As stated above, the applicant's spouse lives an active life, running a lucrative dental practice while helping raise his three children. It has not been established that the applicant's physical absence would cause her spouse exceptional hardship.

However, the AAO does concur with counsel, the applicant, and the children's pediatrician, a medical professional, that the psychological ramifications of separating three young children from their mother, their primary caregiver, for a two-year period would cause the children exceptional hardship.

The AAO thus concludes that with respect to the applicant's spouse, the record does not support a finding that he will face exceptional hardship if the applicant's waiver request is denied. Nevertheless, the AAO does find that the applicant has established that her three U.S. citizen children would experience exceptional hardship were they to relocate to the Philippines and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's children would suffer if the applicant temporarily departed the U.S. for two years would go significantly beyond that normally suffered upon the temporary separation of families.

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.