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U.S. Citizenship
and Immigration
Services

H3

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAY 22 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.

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 applicant is a native and citizen of the former Yugoslavia (which, pursuant to the U.S. Department of State, has adopted the name Serbia and Montenegro) (Serbia) who was admitted to the United States in J-1 nonimmigrant exchange status in June 2001 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 her child born in February 2006, would suffer exceptional hardship if they moved to Serbia 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 Serbia.

The director determined that the applicant failed to establish that her spouse and/or child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Serbia. *Director's Decision*, dated October 9, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated November 5, 2007; a copy of an emergency recusal motion, dated October 31, 2007; a letter from the applicant and her spouse, dated October 23, 2007; two previously issued decisions from the AAO; case law with respect to waivers; and a copy of an article about hardship waivers, written by counsel. 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 U.S. citizen spouse would experience exceptional hardship if he resided in Serbia for two years with the applicant. To support this contention, the applicant’s spouse states the following:

returning to Serbia with both Luka and me poses an entirely new set of exceptional hardships. In Serbia, I would be unable to find employment as a physician. Being a United States citizen and receiving my medical education and training within the United States, I would be unable to find employment within the Serbian medical system. I would be expected to repeat portions of my training in Serbia, which would take several years. More importantly, however, I do not speak or understand Serbian. I would therefore have difficulty finding employment.... would be the only source of income for the family.

...due to the economic climate in Serbia, the salary of physicians in Serbia is beneath that of medical interns in the United States. We would be unable to adequately support a family at that income level. Furthermore, like many young physicians, I would be carrying with me approximately \$80,000 of debt from my medical school loans. Being unable to make the necessary monthly payments, I would expect my debt to continue to increase while in Serbia.

My health and safety would also be jeopardized if I were to go to Serbia with and . I would have no health insurance, as a United States Citizen, in Serbia. The socialized healthcare system in Serbia would cover and but would not cover me. I would have to purchase private health insurance, but with our limited finances in Serbia, would be unlikely to be able to afford it....

As additional safety concern should the entire family go to Serbia with Maja would be the profound animosity of Serbians toward Americans. The NATO bombing of Belgrade to end the war in the Balkans is seen as directly orchestrated by the United States.... The majority of Serbians view the United States as unilaterally supporting Albania and the ethnic Albanian majority in Kosovo.... I fear that the inevitable independence of Kosovo will result in new violence in the territory which could potentially be directed at and me.

Finally, this would place a significant stress on my recovery from alcoholism. The only proven method for sustained recovery is AA, and its numbers are not very good. Although AA is located throughout the world, its presence is markedly diminished outside of the United States. Throughout eastern Europe, including

Serbia, it essentially does not exist. Should I have to move to Serbia with [REDACTED] my recovery program will be completely destroyed. The chances of relapse in the absence of an organized recovery program such as AA is greater than 90 percent....

Affidavit of [REDACTED], M.D., dated July 3, 2007

The applicant further outlines the hardships that her husband and child would face were they to relocate to Serbia:

In a steady voice, he [the applicant's spouse] proceeded to tell me that he had an addiction problem. He was 21 years old when he was arrested more than once for drinking and driving. His parents tried to help however they could, but after he was sentenced to spend some time in jail, they decided he needed professional help. He was hospitalized at the Cleveland Clinic and went through a 28-day inpatient rehabilitation program. Ever since then, he was being treated for alcoholism. He was seeing a psychiatrist and going to group therapy with a psychologist.

After he decided to go through medical school, he also embarked on the difficult road of being a physician with a history of an addiction problem. Very few people know how closely such physicians are monitored in order to be able to practice medicine. But [REDACTED] [the applicant's spouse] abided by every rule that was imposed upon him, gave urine samples for toxicology screens on a weekly basis, had to carry a pager 24/7 and be available to report to the psychiatry department whenever they called him. His condition was life-long and he had learned to live with it. Although his treatment was successful and he had managed to stay abstinent with the help of his doctors, his family and me, he would always be at risk for relapsing and that risk would never go down to zero. A relapse would be detrimental to his career in medicine....

Ever since I found out about his addiction problems, I have spent a lot of time researching about alcoholism, its causes and consequences.... Recovering alcoholics live with a constant risk of relapsing. Described in their own words, they fear the day that that single glass of liquor will undo years of abstinence and push them back into the abyss....up to 90 percent of recovering alcoholics are expected to relapse eventually. Many risk factors that contribute to alcoholic relapse have been identified, and among them stress seems to be the leading cause, followed by loss of social support and family separation.... The consequences of a relapse can be catastrophic to the individual in question and to the family.

The third option would involve all three of us moving to Serbia.... Serbia is still a politically unstable country....

Currently, I feel relatively safe in Belgrade and I have even taken both my husband and my child to visit with my family. A short stay, however, is very different from a two-year period....

...would be in a hopeless position in finding employment in Serbia. First, he does not speak the language, and medicine is not like engineering or mathematics, where you might be able to get by without knowing the language...the only employment that a non-Serbian speaking, top-trained radiologist from the United States would qualify for would be manual labor... career would be affected in many adverse ways by a two-year interruption. Radiology is a field of constant advancement, and an extended period away would leave him at a significant disadvantage regarding employment once he returned to the United States. For two years in Serbia, ... would be unemployed in a foreign country whose population is not friendly towards Americans....

Under these circumstances, with Claus unemployed, compromising his entire radiology career in a country in which neither he nor ... are welcome and would likely suffer some form of social isolation, the risk for a relapse would be equally as high as in the other two available options, or even higher. In addition, should ... relapse in Serbia, we would have absolutely no access to professional medical therapy, since the majority of Serbian psychiatrists speak Russian as their only foreign language and not English. Another distressing fact about the absence of a 'safety net' in Serbia for ... is the fact that an integral part of his therapy, should he require any, is group therapy and support from others who have experienced the same hardships and are battling the same disease. Sadly, nowhere in Belgrade or anywhere else in Serbia for that matter, would we be able to find a support group or an AA (Alcoholics Anonymous) group that is English speaking. In Serbia's corrupt and somewhat discriminatory health system, mental health is not taken very seriously, as the scarce financial resources are spent on medical conditions that are 'fixable.' Of the 200,000 people in Serbia with some kind of psychiatric diagnosis, around 70,000 that are considered 'a danger to themselves and others' are hospitalized and treated with obsolete, aggressive methods. The rest are simply not given access to therapy.

Affidavit of ... *M.D.*, dated June 29, 2007.

..., an attorney and a physician who has represented the applicant's spouse in conjunction with issues relating to his medical license, further elaborates on the hardships the applicant's spouse would face were he to relocate abroad for two years to Serbia. As stated by ...:

The extreme and unusual hardship that would face [redacted] [the applicants' spouse] should his wife [redacted] [the applicant] return to her native country would confront [redacted] with a bitter choice. Either he could accompany his wife to her home country of Serbia in which event he would violate the terms of his probation with the State Medical Board of Ohio with the results that he would probably become ineligible for licensure to practice medicine in the United States. Based upon my experience for over three decades in practicing in this area of the law it is highly unlikely that [redacted] himself could be able to make arrangements in Serbia to meet their requirements of attendance at Alcoholics Anonymous meetings, processing random observed urine tests and obtaining the psychotherapy and counseling from a qualified professional. All of these elements are simply not readily available outside of the United States. Without continued compliance of these probationary terms Dr. [redacted] would violate his consent agreement with the Ohio Medical Board and be subject to discipline for that reason including denial or revocation of this license....

Letter from [redacted] MD, CO, LPA, Attorney-at Law, dated March 19, 2007.

Counsel has provided extensive documentation with respect to country conditions in Serbia, the applicant's spouse's alcoholism, the realities of relapse for alcoholics, and the negative ramifications of relapse on practicing physicians. Based on the documentation provided, the AAO finds that the hardship the applicant's spouse would encounter were he to relocate to Serbia 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 spouse has never lived outside the United States, nor is he able to speak, read or write in the native language of Serbia. Moreover, the record contains specific documentation which reflects that the applicant's spouse has a serious medical problem, namely, alcoholism, which goes beyond the normal. In addition, the record reflects that relocation abroad would mean the possible loss or revocation of his medical licensure, thereby causing career disruption. Finally, the applicant's spouse would be concerned for his and his family's safety and financial security in Serbia. The AAO thus concludes that the applicant's U.S. citizen spouse would experience exceptional hardship were he to accompany the applicant to Serbia for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would suffer exceptional hardship if he remained in the United States during the two-year period that the applicant resides in Serbia. As stated by the applicant:

In our case, [redacted] [the applicant's child] and I would leave [redacted] [the applicant's spouse] by himself in the United States at an extremely inopportune time. Claus will finish his radiology training in June 2008. This means that he will have to search for a job as a staff radiologist in a completely new environment, with more responsibilities and without the support structure the training program was offering. A new job is a stressful event on its own, but that will be coupled with

our departure, loss of an established, safe family setting, combined with [REDACTED] completion of the dependence treatment program. Any of those stresses—starting a new job for the first time after years of training, extended separation from wife and child, and loss of an established support system—could be enough to send any alcoholic into relapse....

Having to be separated from one's wife and young child will cause loneliness, anxiety, and sadness even in individuals with normal coping behavior. I fear that [REDACTED] coping ability will be overwhelmed, with multiple risk factors accumulating, and that he will at some point resort to old friends and habits for comfort and help. None of [REDACTED]'s close friends are in medicine, and they have never taken his problem seriously. Unfortunately, they do not understand the fatal consequences of an alcoholic relapse....

Physicians are a very vulnerable group with regards to dependence disorders and related substance abuse. They are entrusted with other people's lives and are thus expected to perform at their very best all the time.... For [REDACTED], a relapse would mean the immediate loss of his license and ability to practice medicine, which would further perpetuate a vicious cycle....

The second option is for me to go to Serbia for two years and leave [REDACTED] with my husband. [REDACTED] is an affectionate and devoted father. He is conscientious and reliable, though at times overly anxious. Since [REDACTED]'s birth, we have both taken care of him, split responsibilities, and dealt with every problem together. For short stretches of time, several weeks at most, [REDACTED] [the applicant's spouse] has had to leave town to do a pediatrics rotation in Cincinnati or in Washington, at which times [REDACTED] and I were left alone.... Ever since then, I have had immense respect for single parents, for their strength and endurance. It is hard to describe the extra pressure and constant worry that a single parent is subjected to. He or she has sole responsibility for the child and there is no one around to help carry the burden. In all honesty, I don't think [REDACTED] would cope with this situation on top of all the other extraordinary stresses describes above. I believe that it would add to his anxiety and apprehension, greatly increasing the risk of relapse. A relapse under these circumstances would put both [REDACTED] and [REDACTED] lives in danger....

Supra at 11.

The applicant's spouse further states:

[REDACTED] [the applicant's] return to Serbia would result in an exceptional hardship on myself. As a recovering alcoholic, routine and familiarity are essential for me to maintain a stable recovery. Starting a new job, moving to a new city,

becoming separated from one's wife, losing the structured support system I have had under the consent agreements, and raising a toddler as a single parent all at the same time would be an enormous combination of stress on anyone. Each of these individual stressors are major risk factors for relapse.... If [REDACTED] were to return to Serbia, I would lose the major piece of my support system.

Should I happen to relapse, my medical license would be immediately suspended pending an investigation, followed by whatever disciplinary action the State Medical Board chooses to impose on me at that time. Typical disciplinary action involves inpatient alcohol treatment which can vary from 28 days to several months.... License suspensions are generally from 6 to 12 months, followed by a new consent agreement with the State Medical Board. After having your medical license reinstated, it becomes difficult to find employment and malpractice insurance.....

A relapse would have devastating effects on both my career and my family. The resulting suspension and unemployment would leave my family in poverty. The salary [REDACTED] could get as a physician in Serbia could not support two homes in separate countries. More importantly, my unemployment could result in loss of my health insurance.... [REDACTED] and I would unfortunately join the millions of United States citizens unable to afford health insurance....

... [REDACTED] and [REDACTED] going to Serbia would leave me alone for a minimum of two years. Despite no longer having [REDACTED] to look after, if he were to go to Serbia with [REDACTED], I would have to endure the long-term separation from my family. A common mantra in AA [Alcoholic's Anonymous] is that you should not make any major life changes early in recovery. Becoming separated from my family, starting a new job, losing my structure support system, and moving to a new city would constitute multiple major life changes simultaneously. This would be an extremely vulnerable time for me, and statistically my chances for a relapse at this time would be extremely high. Personally, I find it hard to admit to myself the full gravity of this danger, but the objective scientific evidence is indisputable...the impact that a relapse would have on my career and family would be catastrophic. My medical license would be suspended, followed by disciplinary action by the State Medical Board. I would find myself unemployed, having no qualifications for a job outside of medicine. The result would be our family losing its only significant source of income, not to mention the impact on my health and that of my family. Furthermore, the length of my unemployment would be uncertain, and it could potentially be permanent....

A letter from [REDACTED], the applicant's spouse's psychiatrist, further attests to the hardships the applicant's spouse would face were the applicant to relocate to Serbia for two years.

As [REDACTED] states,

I have been the treating physician for [REDACTED] [the applicant's] husband, [REDACTED] [the applicant's spouses] since [REDACTED] was age 21. At that time he was arrested twice for driving under the influence of alcohol, leading to his evaluation and subsequent treatment for alcohol dependence....

At some point in the next year or two he is going to face major life transition, involving incredible stress and uncertainty. First, he will be released from the strict observation and treatment regime, for the first time in years. Second, he will end his medical training and will find himself unemployed and then starting a new position for the first time. Third, he will face the challenge of caring for the well-being of his wife and young child.

If these stresses are compounded by the additional extreme stressor of a forced separation for two years from his wife and child, he will have lost his entire support network. In such circumstances, it is absolutely certain that Dr. [REDACTED] would be full of pain and misery. He will clearly face exceptionally serious psychological hardships. These hardships would be much more serious than those faced by an average husband upon separation from his spouse, because [REDACTED] has exceptional psychological vulnerabilities....

...in this case the hardship risks would actually be much more serious...because in the face of such a combination of stresses, while deprived of his entire support system, the chance of a catastrophic relapse of alcoholism would be extremely high. Indeed, as a matter of objective scientific probability, it is virtually certain that there would be a relapse of alcoholism, and possibly other clinical psychiatric illnesses as well.

This would lead to an exceptionally high risk of death or serious injury from suicide attempt or accident. It could also lead to a wide range of life-threatening medical complications....

Even if he were to avoid an alcoholic relapse, [REDACTED] would be so miserable to lose all his support system at the same time that he would certainly be incapable of best performance during the crucial beginning of his professional career. If he were to have an alcoholic relapse the consequences for his professional career would be catastrophic....

Letter from [REDACTED] M.D., Section Head, Alcohol and Drug Recovery Center, Cleveland Clinic, dated January 10, 2007.

Due to the applicant's spouse's documented diagnosis of alcoholism and the need for his continued supervision and treatment, the concerns with respect to his professional career were he to suffer a relapse, and the applicant's spouse's dependence on his family for his emotional and psychological well being, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse emotional, psychological and financial hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

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 he to relocate to Serbia and in the alternative, were he to remain in the United States without the applicant, for the requisite two-year period.¹

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.

¹ As exceptional hardship to the applicant's U.S. citizen spouse has been established, the AAO does not find it necessary to determine whether exceptional hardship has been established with respect to the applicant's U.S. citizen child.