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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: AUG 03 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting 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 dismissed.

The applicant is a native and citizen of Vietnam who was admitted to the United States in J-1 nonimmigrant exchange status in April 2005. He 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) based on government financing. 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 Vietnam 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 Vietnam.

The director determined that the applicant failed to establish that the applicant's spouse would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Vietnam. *Director's Decision*, dated July 10, 2008. The application was denied accordingly.

In support of the appeal, counsel provides a brief, dated August 31, 2008 and referenced exhibits. 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 she resided in Vietnam for two years with the applicant. A reference is made by the applicant to the fact that his spouse's parents are old and often get sick, and thus need their daughter to care for them. *Letter from [REDACTED]* dated October 7, 2007. However, no specific documentation has been provided with respect to the hardships the applicant's spouse, the only qualifying relative in this case, would experience were she to relocate to Vietnam, her home country. Nor has a statement been provided by the applicant's spouse outlining the hardships she would face were she to relocate to Vietnam. As such, it has not been established that the applicant's spouse would suffer exceptional hardship were she to reside in Vietnam for two years with the applicant.

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 Vietnam. To begin, counsel for the applicant contends that the applicant's spouse will suffer exceptional emotional hardship as she is afraid the Communist government in Vietnam will place the applicant in prison and will torture him if he were to return to Vietnam; he will be blamed for having escaped the country. *Brief in Support of Appeal*, dated August 31, 2008. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Moreover, the applicant notes that he will be unable to find employment in Vietnam, because sooner or later, he will return to the United States and thus, prospective employers will not want to hire him. *Letter from Bao Le*, dated August 18, 2008. 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)).

In addition, counsel notes that the applicant and his spouse wish to start a family but being separated would cause the applicant's spouse pain, hopelessness and struggle. While the AAO sympathizes with the applicant's spouse regarding her desire to start a family, all couples separated by a foreign residency requirement have to make alternate arrangements if they want to conceive. It has not been documented that such arrangements rise to the level of exceptional hardship.

Furthermore, it has not been established that the applicant's spouse would be unable to travel to Vietnam, her home country, to visit the applicant, and or communicate with him regularly, to further obtain his support during his two-year foreign residence. Finally, the applicant's spouse notes that his wife is attending school and that his physical absence may lead to her inability to continue her studies. *Supra* at 1. No documentation has been provided verifying the applicant's spouse's enrollment and/or establishing that without the applicant's physical presence, she will be unable to continue her studies and that such inability will cause her exceptional hardship. As such, it has not been established that the applicant's spouse would suffer exceptional hardship due to the applicant's two-year absence.

The record, reviewed in its entirety, does not support a finding that the applicant's U.S. citizen spouse will face exceptional hardship if the applicant's waiver request is denied. The applicant has failed to establish that his spouse would suffer exceptional hardship if she moved to Vietnam with the applicant for the requisite two-year period and alternatively, the applicant has failed to establish that his spouse would suffer exceptional hardship were he to relocate to Vietnam while she remained in the United States. The record demonstrates that the applicant's spouse faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse temporarily relocates abroad based on a foreign residence requirement.

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 not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.