



U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date:

JUL 15 2009

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:

[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 record reflects that the applicant, a native and citizen of Ukraine, was admitted to the United States in J1 nonimmigrant exchange status in September 2000 to participate in a program sponsored by the U.S. Agency for International Development (USAID). 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 foreign residence requirement, based on the claim that her U.S. citizen spouse and child, born in February 2006, would suffer exceptional hardship if they moved to Ukraine 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 Ukraine.

The director determined that the applicant failed to establish that her U.S. citizen spouse and/or child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Ukraine. *Director's Decision*, dated June 6, 2008. The application was denied accordingly.

In support of the appeal, counsel provides a brief, dated August 5, 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:

- (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 U.S. citizen spouse and/or child would experience exceptional hardship if they resided in Ukraine for two years with the applicant. The applicant's spouse asserts that he will suffer exceptional emotional, professional and financial hardship. The applicant's spouse notes that relocating to Ukraine would mean abandoning his limousine business, thereby suffering professional and financial setbacks. Moreover, his child would suffer in Ukraine as he would not receive a U.S. education, thereby thwarting his chances of succeeding in life. *Affidavit of* [REDACTED] dated December 6, 2007. The applicant further notes that her spouse would suffer emotional hardship were he to return to Ukraine, as he would be socially isolated in Ukraine and unable to obtain comparable employment in Ukraine. She contends that her husband and child would experience a loss in quality of life, due to the high rate of crime and substandard housing, medical care and academics. *Affidavit of* [REDACTED] dated December 6, 2007. Finally, counsel contends that the applicant's child would suffer emotional hardship as he would be removed from a stable environment in the United States, away from friends, family and the life he knows. *Brief in Support of Appeal*, dated August 5, 2008.

To begin, no documentation establishing the involvement by the applicant's spouse in his business and its financial viability has been provided, to establish that his business would suffer financial setback and/or dissolve based on his two-year absence. Although counsel contends that the applicant's spouse will lose the business because he cannot maintain it from far away, the AAO notes that 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, nothing would prohibit the applicant's spouse and/or child from returning to the United States on a regular basis, to visit extended family and continue the successful operation of the business.

In addition, although counsel provides general information about country conditions in Ukraine, no evidence has been provided to document that the applicant and her spouse specifically, both Ukrainian nationals, would be unable to secure gainful employment in Ukraine. Moreover, although counsel notes that the family would be unable to obtain government support and will have to go through many bureaucratic circles and pay a lot of bribes before they can get their child registered at day care, as previously noted, unsupported assertions of counsel do not constitute evidence. *Id.* at 4. Finally, it has not been established that the applicant's child would be unable to attend a solid

academic institution in Ukraine for the two-year period, thereby ensuring scholastic ease upon his return to the United States. 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)). As such, it has not been demonstrated that the applicant's spouse and/or child would experience exceptional hardship were they to accompany the applicant to Ukraine for two years.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or child would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Ukraine. The applicant's spouse contends that he will suffer emotional hardship due to the long and close relationship he has with the applicant. He notes that the fear of his wife relocating abroad for two years is already causing him anxiety and an increasing sense of depression. *Supra* at 1. As for the applicant's child, counsel notes that children separated from an adult male and female role model will engage in deviant or anti-social behavior.

With respect to the applicant's spouse's assertion that he is suffering from anxiety and depression, no documentation has been provided from his treating physician outlining his current medical/mental health condition, the short and long-term treatment plan, the gravity of the situation, and what specific hardships he will endure should the applicant relocate abroad. Counsel has also failed to provide any documentation to establish that the applicant's child specifically will suffer exceptional emotional hardship were he to remain in the United States with his father while his mother relocates abroad for a two-year period. Nor has counsel established the applicant's spouse's work schedule, to corroborate that it will be a hardship to obtain appropriate child care coverage for his child and/or that such child care coverage will cause the applicant's child exceptional hardship. Finally, it has not been established that the applicant's spouse and/or child would be unable to travel to Ukraine to visit the applicant due to financial constraints, and or communicate with her regularly, to further obtain her emotional support during her two-year foreign residence

The record, reviewed in its entirety, does not support a finding that the applicant's U.S. citizen spouse and/or child will face exceptional hardship if the applicant's waiver request is denied. The AAO finds that the applicant has failed to establish that her spouse and/or child would suffer exceptional hardship if they moved to Ukraine with the applicant for the requisite two-year period and in the alternative, were the applicant's spouse and/or child to remain in the United States while the applicant relocates abroad for a two-year period. Rather, the record demonstrates that they will face no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse/parent relocates abroad due to a two-year foreign residence requirement. Although the AAO is not insensitive to the applicant's spouse's and child's situation, the record does not establish that the hardship they would face rises to the level of "exceptional" as contemplated by statute and case law.

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 her burden. Accordingly, the appeal will be dismissed.

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