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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

#3

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

APR 14 2010

IN RE:

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.

Perry Rhew
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, a citizen of Kazakhstan, obtained J-1 nonimmigrant exchange status in 1992. He is subject to the foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e) based on U.S. 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 and child, born in 2009, would suffer exceptional hardship if they moved to Kazakhstan temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled the foreign residence requirement in Kazakhstan.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Kazakhstan *Director's Decision*, dated October 26, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits, *inter alia*, a letter from the applicant's spouse, dated December 7, 2009, and referenced documentation. 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 and/or child would experience exceptional hardship were they to relocate to Kazakhstan to reside with the applicant due to his two-year foreign residence requirement. To begin, the applicant’s spouse asserts that she would suffer emotional hardship, as she does not speak Kazakh, has never lived in Kazakhstan, and is not familiar with the culture and customs. She further notes that she would be unemployable as a physician, due to being an ethnic Russian, the language barrier and because she does not have a Kazakh medical diploma. *Letter from* [REDACTED] dated December 7, 2009.

In addition, she asserts that were she to relocate abroad, she would experience career disruption, as she would lose her current gainful employment as a physician, would be unable to maintain her current medical knowledge, skills and certifications, would fall behind her colleagues in the United States, and ultimately, would have difficulties in obtaining employment in her area of expertise immediately upon her return to the United States due to her two-year absence from the medical profession. Finally, the applicant’s spouse notes that she fears for her daughter’s health, due to Kazakhstan’s primitive health care system, lack of preventative medicine and poor living conditions. *Letter from* [REDACTED] dated June 22, 2009.

To begin, the AAO notes the lack of quality medical care in Kazakhstan, as confirmed by the U.S. Department of State.¹ In addition, documentation has been provided establishing the applicant’s spouse’s medical licensure, Board Certification in Internal Medicine, and gainful employment as an Attending Physician for Hebrew Rehabilitation Center, earning over \$150,000. *Letter from* [REDACTED] *Medical Staff Office, Hebrew Rehabilitation Center*, dated July 28, 2008. Finally, the U.S. Department of State confirms Kazakhstan’s ethnic prejudices and hostilities against minorities. *2009 Human Rights Report-Kazakhstan, U.S. Department of State*, dated March 11, 2010.

Based on a totality of the circumstances, the AAO finds that the applicant’s U.S. citizen spouse would suffer exceptional hardship were she to relocate to Kazakhstan. A relocation abroad would

¹ The U.S. Department of State asserts as follows regarding medical care in Kazakhstan, in pertinent part:

Medical care in Kazakhstan is limited and well below North American and Western European standards. Basic medical supplies, including disposable needles, anesthetics, and antibiotics can be in short supply. Most resident Americans travel to Western Europe for serious medical treatment. Such travel can be extremely expensive if undertaken under emergency conditions.

cause the applicant's spouse hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residence requirement.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse would suffer exceptional hardship if she remained in the United States during the period that the applicant resides in Kazakhstan. Counsels notes and documents that the applicant's spouse was victimized by her now ex-husband. Specifically, he pointed a handgun containing two rounds in the chamber at her in July 2005. *Findings of Fact, Franklin County Court of Common Pleas, Division of Domestic Relations and Juvenile Branch*, dated September 1, 2005. Based on this incident and past abuses, an Order of Protection was issued, valid until September 1, 2010. *Order of Protection*, dated September 1, 2005. Based on these past incidents and additional abuses, the applicant's spouse contends that were her husband to relocate abroad for a two-year period, she would lose her only protector, as she has no other family in the United States, thereby causing her emotional hardship. Furthermore, she notes that were her ex-husband to find out that the applicant is residing abroad, she and her child could be in danger. Finally, the applicant's spouse contends that were the applicant to relocate abroad, due to her long hours as a hospitalist, oftentimes working nights and weekends, her daughter would have to be in daycare virtually around the clock, thereby causing the applicant's spouse exceptional hardship. *Supra* at 1.

The applicant's spouse has a unique and tragic past, having been subjected to trauma and violence in the hands of her now ex-husband, which lead to an order of protection that remains in effect at this time. The record reflects that the applicant's spouse has an emotional need to remain with her spouse, her only source of stability and protection. Thus, the AAO finds that the applicant has established that his U.S. citizen spouse would suffer emotional hardship were she to remain in the United States while the applicant relocated abroad to fulfill his two-year foreign residence requirement. The applicant's spouse would be required to assume the role of primary caregiver to herself and her young child, while pursuing a demanding career, without the complete emotional and financial support of her spouse, in light of the fact that she is in fear of her life due to her ex-husband's past abusive actions which have lead to a restraining order that remains in effect at this time. The AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse emotional hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

The AAO thus concludes that the applicant has established that his U.S. citizen spouse would experience exceptional hardship were she to relocate to Kazakhstan and in the alternative, were she to remain in the United States without the applicant, for the requisite two-year term. The evidence in the record establishes the hardship the applicant's spouse would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.²

² As the AAO has determined that exceptional hardship exists with respect to the applicant's U.S. citizen spouse were the applicant to relocate to Kazakhstan for a two-year period, it is not necessary to evaluate whether the applicant's U.S. citizen child would experience exceptional hardship were the applicant to relocate abroad for a two-year period.

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 his 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.