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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**

H3

APR 14 2010

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

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).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is again before the AAO on a combined motion to reopen and reconsider. The motion 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 and/or child, born in 2009, would suffer exceptional hardship if they moved to Vietnam temporarily with the applicant and in the alternative, if they 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 a qualifying relative 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.

On appeal, the AAO concurred with the director that exceptional hardship to a qualifying relative had not been established, as required by section 212(e) of the Act. Consequently, the appeal was dismissed. *Decision of the AAO*, dated August 3, 2009.

In support of the instant motion, the applicant submits the following: a letter from the applicant, dated August 19, 2009; a letter from the applicant's spouse, dated August 18, 2009; evidence of the birth of the applicant's and his spouse's U.S. citizen child; financial and insurance documentation; an employment confirmation letter for the applicant; and a photograph. 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 if they resided in Vietnam for two years with the applicant. The AAO, in its decision dated August 3, 2009, concluded that no specific documentation had been provided with respect to the hardships the applicant's spouse would experience were she to relocate to Vietnam, her home country. *Id.* at 4.

On motion, the applicant's spouse contends that were she to relocate abroad, she fears that the communist government would not accept the applicant legally since he escaped Vietnam for over four years, his father was a soldier for the American Army in Vietnam and his sister resides in Texas. *Letter from* [REDACTED], dated August 18, 2009. The applicant further expounds on these concerns. He states that the Vietnamese government is aware that "that I escaped from the country, quit the job, and got a family in the United States. In the communist officials' minds, it is impossible to accept such a person to return and work with fair behaviors. Actually my parents were many times interviewed by communist police with questions related to my wife and me, and my elder sister living in Texas. I am also really scared and distressed when thinking about going home and being put in the jail like some other people coming back to the country after escaping from the country for a while...." *Letter from* [REDACTED], dated August 19, 2009.

The applicant has failed to address, on motion, the concerns raised by the AAO in its decision to dismiss the appeal with respect to exceptional hardship to the applicant's spouse were she to relocate to Vietnam, her native country. No documentation has been provided establishing that the applicant's spouse would experience exceptional hardship in Vietnam. Nor has any documentation been provided establishing that the applicant himself would be in danger in Vietnam, thereby causing exceptional hardship to a qualifying relative. 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 for the applicant's U.S. citizen child, this criteria has not been addressed. As such, it has not been established that the applicant's spouse

and/or child would suffer exceptional hardship were they to relocate to Vietnam to reside with the applicant for a two-year period.

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 Vietnam. The AAO, in its decision to dismiss the appeal, noted that it has not been established that the applicant's spouse would suffer exceptional hardship due to her fears relating to her husband's return to Vietnam and/or that that applicant would be unable to obtain gainful employment in Vietnam. Furthermore, the AAO asserted that it had 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. *Supra* 4-5.

On motion, the applicant asserts that his spouse needs his assistance and presence in caring for their child. He further contends that his child needs the presence of both parents. Moreover, the applicant notes that he is financially responsible for the family because his spouse is unemployed at this time. *Supra* at 2-3.

Based on a thorough review of the instant motion, the AAO concludes that the reservations raised by the AAO when the appeal was reviewed and adjudicated in August 2009 remain unresolved, as they have not been adequately addressed with the instant motion. As previously noted in the AAO decision, dated August 3, 2009, no documentation has been provided to establish that the applicant's spouse and/or child will experience exceptional emotional hardship due to a temporary separation from the applicant. Nor has it been established that they would be unable to travel to Vietnam to visit the applicant. Information about country conditions in Vietnam, to support the assertions that the applicant may be in danger upon his return to Vietnam and that traveling to the country and/or being able to communicate with her spouse would cause exceptional hardship to the applicant's spouse, has not been provided. In addition, no documentation has been provided establishing the applicant and his spouse's income and expenses, assets and liabilities, to establish that the applicant's spouse will suffer exceptional financial hardship while the applicant resides abroad, due to the applicant's inability to obtain gainful employment in Vietnam due to the substandard economy. As such, it has not been established that the applicant's spouse and/or child would suffer exceptional hardship due to the applicant's two-year absence.

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 motion, the applicant has not met his burden. Accordingly, the motion will be dismissed.

ORDER: The motion is dismissed.