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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

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

APR 22 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.

A handwritten signature in black ink, appearing to read "Perry Rhew".

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 applicant is a native and citizen of India who obtained J-1 nonimmigrant exchange status in July 1992 to participate in graduate medical training. He 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 his two-year foreign residence requirement, based on the claim that his lawful permanent resident spouse and U.S. citizen children, born in 1997 and 2001, would suffer exceptional hardship if they moved to India 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 India.

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 India. *Director's Decision*, dated January 21, 2010. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated February 18, 2010, 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 lawful permanent resident spouse and/or U.S. citizen children would experience exceptional hardship if they resided in India for two years with the applicant. In a declaration, the applicant's spouse contends that she would suffer emotional and professional hardship were she to relocate to India. As she explains and documents, she is currently head of the Section of Urogynecology and Pelvic Reconstructive Surgery at Temple University. She is also an Associate Professor of Obstetrics, Gynecology, and Reproductive Sciences, an Associate Professor of Public Health, and the Residency Program Director of Obstetrics, Gynecology, and Reproductive Sciences at Temple University. Were she to relocate abroad with the applicant, the applicant's spouse asserts that she would have to abandon her contractual obligations to Temple University, as they would not be able to keep her position open for a two-year period, and she would have to forego the chance of advancing with respect to her career, causing her exceptional hardship. Moreover, were she to relocate abroad, the applicant's spouse contends that she would not be able to return to the United States after a two-year period and obtain a position of the same caliber due to her absence from the medical field in the United States. Finally, the applicant's spouse notes that her children have a recurring history of Streptococcus Pyugens infections and were they to relocate abroad, the poor air quality and health standards in India would be detrimental to the children's health, thereby causing her and her children exceptional hardship. *Letter from* [REDACTED] dated August 24, 2009.

In support of the applicant's spouse's assertions, a letter from [REDACTED] School of Medicine, Temple University, has been provided establishing the applicant's spouse's current gainful employment and outlining her duties and responsibilities. *Letter from* [REDACTED] *Dean, School of Medicine, Temple University*, dated June 30, 2009. In addition, the applicant's children's pediatrician has written a letter confirming that the children "have a history of recurrent Strep throat infections since 4 years of age, resulting in multiple infectious episodes. Extreme side effects of recurrent strep throat infection can possibly include Glomerulonephritis (Kidney infection and failure), Rheumatic fever (joint involvement) and Rheumatic heart disease. Recommended treatment include avoidance of overcrowded area, dust and antibiotics...." *Letter from* [REDACTED]

[REDACTED] dardted June 17, 2009. Finally, counsel has provided documentation about the problematic country conditions in India, including substandard wages that would lead to a lower standard of living for the applicant's spouse and children, gender discrimination in India, and environmental concerns, including poor air quality and its ramifications on the health and well-being of those in India.

The AAO further notes that the U.S. Department of State has issued a Travel Alert for U.S. citizens intending to travel to India. As the U.S. Department of State notes, in pertinent part:

The Department of State alerts U.S. citizens to ongoing security concerns in India. The U.S. government continues to receive information that terrorist groups may be planning attacks in India. Terrorists and their sympathizers have demonstrated their willingness and capability to attack targets where U.S. citizens or Westerners are known to congregate or visit. This replaces the Travel Alert dated December 29, 2009, and expires on April 30, 2010.

The November 2008 attacks in Mumbai provide a vivid reminder that hotels, markets, and other public places are especially attractive targets for terrorist groups.

Travel Alert-India, U.S. Department of State, dated January 29, 2010.

Moreover, the AAO notes that the U.S. Department of State corroborates the applicant's statements regarding substandard health care in India. *Country Specific Information-India, U.S. Department of State, dated February 17, 2010.*

Based on the career disruption and professional setbacks to the applicant's spouse, the applicant's children's documented medical conditions, and the problematic country conditions, including terrorist activity, a lower quality of living, and environmental and health care concerns that could exacerbate the children's medical condition, the AAO concurs with the director that the applicant's lawful permanent resident spouse and U.S. citizen children would experience exceptional hardship were they to accompany the applicant to the India for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's lawful permanent resident spouse and/or U.S. citizen children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in India. With respect to this criteria, the applicant's spouse details the following hardships:

As a physician, I have a hard-earned, demanding career....

If my husband [the applicant] must return to India for two years, I would become the sole caretaker of our children. My schedule usually requires

me to spend at least 12 hours a day at the hospital, plus one night per week and one full weekend day per month. In addition, I am often called to the hospital for emergencies involving my patients. We have arranged our lives so that my husband is home while I am at work.

My husband and I take the important responsibility of parenthood quite seriously and have taken great care to ensure that we raise our daughters ourselves, rather than relying on outside childcare. As devout Hindus, my husband and I incorporate our religion and culture in our daily lives and integrate our beliefs and traditions in the raising of our daughters. We have no immediate family in the United States to care for our children. Without my husband to assist me in caring for and raising our two young daughters, I would need to find full-time, live-in childcare, so that I may continue to attend to my job duties. Not only would this leave my children in the hands of unfamiliar caregivers, but also such an arrangement could hinder the religious and cultural education that my husband and I impart to them.

[M]y young daughters will suffer the exceptional hardship of losing their father during crucial developmental years, as well as having to make the adjustment of being raised in part by strangers. I am a dedicated wife and mother, but altering my schedule to be with our daughters at times when my husband would usually care for them would cause an exceptional hardship in regard to my role as physician and provider of patient care....

Letter from [REDACTED] dated December 28, 2009.

Counsel further notes that the applicant and his spouse attempt to incorporate the wisdom of Rig Veda, a sacred Hindu text, into their lives. The teachings and the religion consider the practice of cohabitation of husband and wife an essential element of living a holy and upright life. Were the applicant to return to India, the applicant's spouse would also suffer spiritual hardship, as a separation would be in direct contradiction to the tenets of their faith. *Brief in Support of Appeal*, dated February 18, 2010.

Based on a totality of the circumstances, the AAO finds that the applicant has established that his lawful permanent resident would suffer exceptional emotional, professional and spiritual hardship were she to remain in the United States while the applicant relocated abroad to fulfill his two-year foreign residency requirement. The applicant's spouse would be required to assume the role of primary emotional, religious and financial caregiver to herself and their two young children, both with recurrent medical conditions, while pursuing a demanding career, without the complete emotional and spiritual support of her spouse. The applicant's departure for a two-year period would cause the applicant's spouse 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 lawful permanent resident spouse would experience exceptional hardship were she to relocate to India 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.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 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.

¹ As the AAO has determined that exceptional hardship exists with respect to the applicant's lawful permanent resident spouse were the applicant to relocate to India for a two-year period, it is not necessary to evaluate whether the applicant's U.S. citizen children would experience exceptional hardship were the applicant to relocate abroad for a two-year period.