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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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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

JUL 29 2010

IN RE:

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:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

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). A combined motion to reopen and reconsider was dismissed. The matter is again before the AAO on a combined motion to reopen and reconsider. The motion will be granted. 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 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.

On motion, the AAO concluded that the concerns raised by the AAO in its decision to dismiss the appeal, with respect to exceptional hardship to a qualifying relative, had not been addressed. Consequently, the motion was dismissed. *Decision of the AAO*, dated April 14, 2010.

In support of the instant motion, the applicant submits the following: a letter from the applicant, dated May 5, 2010; a letter from the applicant's spouse, dated May 8, 2010; financial documentation; two articles regarding country conditions in Vietnam; and a letter in support from John H. Southworth, University of Hawaii at Manoa, dated May 4, 2010. 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 decisions dated August 3, 2009 and April 14, 2010, concluded that no specific documentation had been provided with respect to the hardships the applicant's spouse and child would experience were they to relocate to Vietnam.

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 left Vietnam for over five years, his father was a soldier for the American Army in Vietnam and his sister resides in Texas.

[REDACTED] The applicant further contends that his son was born with eczema and is under a strict schedule for skin treatment and other vaccinations but were they to relocate to Vietnam, his son would experience medical hardship as he would not receive adequate medical care. Finally, the applicant contends that he will be unable to find gainful employment in Vietnam since he has been gone for more than five years and he would be questioned by the communist leaders or the police. [REDACTED]

In support, counsel has submitted articles regarding problematic country practices in Vietnam. In addition, the AAO notes the following regarding substandard medical care in Vietnam:

Medical facilities in Vietnam do not meet international standards and frequently lack medicines and supplies. Medical personnel in Vietnam,

particularly outside [REDACTED], may speak little or no English. Doctors and hospitals expect immediate cash payment for health services. International health clinics in [REDACTED] can provide acceptable care for minor illnesses and injuries, but more serious problems will often require medical evacuation to Bangkok or Singapore. Although many medications can be purchased at pharmacies without having a prescription, some common U.S. medications are not available in Vietnam. Travelers should bring adequate supplies of medications for the duration of their stay in Vietnam.... Emergency medical response services are generally unresponsive, unreliable, or completely unavailable.

Travelers should be cautious about drinking non-bottled water and about using ice cubes in drinks. Travelers may wish to drink only bottled or canned beverages, or beverages that have been boiled (such as hot tea and coffee).

Country Specific Information-Vietnam, U.S. Department of State, dated August 28, 2009.

Moreover, the U.S. Department of State confirms that the human rights record in Vietnam is problematic. As noted,

The government's human rights record remained a problem. Citizens could not change their government, and political opposition movements were prohibited. During the year the government increased its suppression of dissent, arresting several political activists and convicting others arrested in 2008. Several editors and reporters from prominent newspapers were fired for reporting on official corruption and outside blogging on political topics, and bloggers were detained and arrested for criticizing the government. Police commonly mistreated suspects during arrest or detention. Prison conditions were often austere. Although professionalism in the police force improved, corruption remained a significant problem, and members of the police sometimes acted with impunity. Individuals were arbitrarily detained for political activities and denied the right to fair and expeditious trials. The government continued to limit citizens' privacy rights and tightened controls over the press and freedom of speech, assembly, movement, and association. The government maintained its prohibition of independent human rights organizations. Violence and discrimination against women as well as trafficking in persons continued to be significant problems, despite laws and government efforts to combat such practice. Some ethnic minority groups suffered societal discrimination. The government limited workers' rights to form and join independent unions.

2009 Country Reports on Human Rights Practices-Vietnam, U.S. Department of State, dated March 11, 2010.

Finally, the AAO notes the problematic economic conditions in Vietnam to support the assertion that the applicant would not be able to support his wife and child in Vietnam as the per capita income in Vietnam is [REDACTED] and the unemployment rate is high. As referenced by the U.S. Department of State:

[REDACTED]

Background Note-Vietnam, U.S. Department of State, dated May 27, 2010.

Based on the substandard medical care, the problematic human rights record and the economic woes in Vietnam, the AAO concludes that the applicant has established that his U.S. citizen spouse and 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. On motion, the applicant's spouse asserts that she needs her spouse to help care for their child and to provide critical financial support. She notes that although she graduated, she has been unable to find a good job related to her major and is working as a part-time cashier at a market. Her current salary is just enough to pay her school loan and credit card bills. *Supra* at 2. Without the applicant's financial contributions, the applicant contends that his spouse and child would suffer financial hardship as his spouse would be unable to pay the rent, utilities, car insurance and the necessities for the baby, including diapers, milk and clothing. *Supra* at 2.

In support, financial documentation has been provided confirming the applicant's and his spouse's financial obligations and the applicant's spouse's current salary, to support the assertion that the applicant plays a critical role in the finances of the household, as he is earning over \$26,000 per year working for [REDACTED]. In addition, as noted above, the U.S. Department of State confirms the problematic economic conditions in Vietnam to support the assertion that the applicant would not be able to support his wife and child in the United States while residing in Vietnam. The AAO thus concludes that based on the evidence submitted, the applicant's spouse and child would suffer exceptional hardship were the applicant to return to Vietnam for a two-year period while they remained in the United States. Both the applicant's spouse and child need the applicant's day to day support, emotionally and financially.

The AAO finds that the applicant has established that his U.S. citizen spouse and child would experience exceptional hardship were they to relocate to Vietnam and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's spouse and child would suffer if the applicant temporarily departed the U.S. for two years would go significantly beyond that normally suffered upon the temporary separation of families.

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 motion will therefore be granted. 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.