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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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[REDACTED]

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FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date NOV 09 2010

IN RE: Applicant:

[REDACTED]

APPLICATION:

Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act, 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:

[REDACTED]

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,

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, a native and citizen of the Philippines, entered the United States as an exchange visitor on December 19, 1981. She 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 the Exchange Visitor Skills List. The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to the Philippines temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled the foreign residence requirement in the Philippines.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in the Philippines and denied the application accordingly. *Decision of the Service Center Director* dated June 1, 2010.

In support of the appeal, counsel for the applicant provides a brief 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:

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:

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 would experience exceptional hardship if he resided in the Philippines for two years with the applicant. In an affidavit, the applicant's spouse notes that relocating abroad would cause him emotional hardship as he would be in fear for his safety and that of the applicant due to dangerous conditions there and would have to leave his family, including his adult son who suffers from a medical condition for which he would not receive adequate treatment in the Philippines. *Affidavit of [REDACTED]* dated January 14, 2010. He further asserts that if he were to relocate abroad, he would suffer financial hardship, as he would have to abandon his medical practice and employment in the United States. *Affidavit of [REDACTED]* The decision of the Service Center Director conceded that the applicant's husband would suffer exceptional hardship if he were to accompany the applicant abroad for two years, and the AAO also finds that relocating to the Philippines would result in exceptional hardship for the applicant's husband.

Counsel asserts that the applicant's husband would suffer exceptional hardship if he remained in the United States without the applicant, including emotional hardship due to their separation and concerns for her safety and well-being, and financial hardship because he relies on her for their medical practice to survive. *Brief in Support of Appeal* at 5-6. Counsel further asserts that the applicant and her husband are experiencing financial difficulties that would be exacerbated if the applicant were to depart the United States, and her presence is also needed to provide specialized medical care for their adult son. *Brief* at 9-11. In support of these assertions counsel submitted documentation related to the mortgages on the primary residence of the applicant and her husband and on a rental property they own. The documents indicate that the applicant and her husband have been unable to make their scheduled mortgage payments and that foreclosure on one property has been initiated and they are delinquent on the mortgage for their primary residence. The applicant's husband states in his affidavit that their family is experiencing financial difficulties because they were defrauded of their retirement savings, including accounts worth more than \$100,000, and that this loss, and the possible foreclosure on their rental property and the loss of the income that it generates, necessitate that the applicant remain in the United States so that their medical practice can survive. *Affidavit of [REDACTED]* In support of these assertions counsel submitted a letter from the U.S. Postal Inspection Service indicating that the applicant and her husband had been identified as possible victims of mail fraud and the case was currently under investigation, as well as

letters from banks concerning payment arrangements and balance liquidation programs for three credit cards.

Furthermore, counsel has provided documentation regarding the problematic country conditions in the Philippines, including political violence and crime, a high unemployment rate, and substandard medical care. Finally, the AAO notes the following from the U.S. Department of State, in pertinent part:

U.S. citizens contemplating travel to the Philippines should carefully consider the risks to their safety and security while there, including those risks due to terrorism.

Bombings have also occurred in both government and public facilities in Metro Manila which resulted in a number of deaths and injuries to bystanders.

Kidnap-for-ransom gangs operate in the Philippines and sometimes target foreigners as well as Filipino-Americans. The New People's Army (NPA), a terrorist organization, operates in many rural areas of the Philippines, including in the northern island of Luzon. While it has not targeted foreigners in several years, the NPA could threaten U.S. citizens engaged in business or property management activities and often demands "revolutionary taxes."

....

Adequate medical care is available in major cities in the Philippines, but even the best hospitals may not meet the standards of medical care, sanitation, and facilities provided by hospitals and doctors in the United States. Medical care is limited in rural and more remote areas.

Serious medical problems requiring hospitalization and/or medical evacuation to the United States can cost several or even tens of thousands of dollars. Most hospitals will require a down payment of estimated fees in cash at the time of admission. In some cases, public and private hospitals have withheld lifesaving medicines and treatments for non-payment of bills. Hospitals also frequently refuse to discharge patients or release important medical documents until the bill has been paid in full.

Country Specific Information-Philippines, U.S. Department of State, dated May 11, 2010

The AAO further notes that the U.S. State Department has issued a Travel Warning for certain areas of the Philippines, including the island of Mindanao, where the applicant was born and where she states her family still resides. The Travel Warning states in pertinent part:

The State Department warns U.S. citizens of the risks of travel to the southern Philippine islands of Mindanao and the Sulu Archipelago, and urges extreme caution if traveling there. Sporadic violence throughout the Philippines is also possible before and after the May 10 national and local elections and the June 30 inaugurations. This replaces the Travel Warning dated September 17, 2009, to reflect continuing threats due to terrorist and insurgent activities, as well as possible concerns about election related violence.

Travelers should exercise extreme caution if traveling in the central and western portions of the island of Mindanao, as well as in the islands of the Sulu Archipelago. Regional terrorist groups have carried out bombings resulting in injuries and death. Since August 2008, sporadic clashes have occurred between lawless groups and the Philippine Armed Forces in the Mindanao provinces of North Cotabato, Lanao del Sur and Lanao del Norte, as well as the Sulu Archipelago.

Kidnap-for-ransom gangs are active throughout the Philippines and have targeted foreigners. U.S. Government employees must seek special permission for travel to Mindanao or the Sulu Archipelago. Travelers to these areas should remain vigilant and avoid congregating in public areas. Some foreigners who reside in or visit Mindanao and the Sulu Archipelago hire their own security.

The Philippine government declared a state of emergency on November 24, 2009, for the two provinces of Maguindanao and Sultan Kudarat, as well as Cotobato City, as a result of election-related violence. This state of emergency is still in effect. . . . *U.S. Department of State, Bureau of Consular Affairs, Travel Warning- Philippines, April 2, 2010.*

Upon review of the totality of circumstances in the present case, including the financial situation of the applicant and her spouse and the dangerous conditions that exist in the applicant's home province in the island of Mindanao, the AAO finds the evidence on the record establishes the hardship the applicant's spouse 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. This hardship includes financial hardship due to loss of the applicant's income and her contribution to their medical practice and concern over her safety due to conditions in the Philippines. The AAO finds that the applicant has established that her U.S. citizen spouse would experience exceptional hardship were he to remain in the United States without the applicant, for the requisite two-year term.

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 her 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.