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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
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U.S. Citizenship  
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[REDACTED]

FILE: [REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: **OCT 19 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 [REDACTED] obtained J-1 nonimmigrant exchange status in May 2004. 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 and child, born in 2009, would suffer exceptional hardship if they moved to the Philippines temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled the two-year 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. *Director's Decision*, dated December 10, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated March 8, 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 U.S. citizen spouse and/or child would experience exceptional hardship if they resided in the [REDACTED] for two years with the applicant. In a declaration, the applicant's spouse notes that relocating abroad would cause him emotional hardship as he would have to leave his country, his long-term gainful employment, his extended family, including his parents and siblings, his home and his community. He further asserts that were he to relocate abroad, he would suffer financial hardship, as he would not be able to find gainful employment in the Philippines in his area of expertise, namely, nursing, due to the fact that the Philippines educates more nurses than it needs and salaries are low, and as a result of such a predicament, he would be unable to maintain the family's standard of living and continue fulfilling his financial obligations in the United States. *Declaration of [REDACTED]* dated November 19, 2008. Moreover, counsel explains that the applicant's child was born with [REDACTED] at birth which requires constant monitoring by specialists and were they to relocate abroad, he would suffer due to substandard medical care. Finally, counsel contends that the applicant's spouse and child may be in danger in the [REDACTED] due to the risks of being kidnapped for ransom. *Brief in Support of Appeal*, dated March 8, 2010.

In support of the emotional and financial hardship referenced, evidence of the applicant's spouse's gainful employment in the United States as a registered nurse, in the form of numerous pay stubs, has been submitted. In addition, evidence of the applicant and her spouse's financial obligations, including a mortgage, has been submitted. Moreover, medical documentation has been provided establishing that the applicant's child suffers from [REDACTED] that requires [REDACTED] to facilitate a correction and possible surgery. *Letter from [REDACTED]* dated March 4, 2010. Furthermore, counsel has provided documentation regarding the problematic country conditions in the Philippines, including 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 [REDACTED] 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 [REDACTED] which resulted in a number of deaths and injuries to bystanders.

Kidnap-for-ransom gangs operate in the [REDACTED] and sometimes target foreigners as well as [REDACTED]. The [REDACTED] operates in many rural areas of the [REDACTED] including in the [REDACTED]. 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."

U.S. citizens in the [REDACTED] are advised to monitor local news broadcasts and consider the level of preventive security when visiting public places, especially when choosing hotels, restaurants, beaches, entertainment venues, and recreation sites.

Adequate medical care is available in major cities in the [REDACTED] 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*

In addition, with respect to the financial situation in the Philippines, as noted by the U.S. Department of State, in pertinent part:

Annual GDP growth has averaged 4.3% under the Arroyo administration, but it will take a higher, sustained economic growth path--at least 7%-8% per year by most estimates--to make progress in poverty alleviation given the [REDACTED] annual population growth rate of 2.04%, one of the highest in [REDACTED]... The food, fuel, and global financial shocks and severe typhoon-related damages of 2008-2009 are expected to have pushed more Filipinos into poverty. Drought brought by the [REDACTED] weather phenomenon has reduced agricultural and hydroelectric production in late 2009 and early 2010.

*Background Note-Philippines, U.S. Department of State, dated April 19, 2010.*

Based on the applicant's spouse's ties to the United States, including home ownership, the presence of his parents and siblings, gainful employment, and the problematic country conditions in the Philippines, including substandard economy and medical care, high poverty and unemployment, terrorist activity and crime, the AAO concludes that the applicant's U.S. citizen spouse and child would experience exceptional hardship were they to accompany the applicant to the [REDACTED] 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 the [REDACTED]. To begin, the applicant's spouse notes that he is the sole wage earner for his wife, child, parents and siblings and has to work full-time, overtime and night shifts for [REDACTED] to make ends meet. Due to his work schedule, were his wife to relocate abroad, he would not be able to properly care for his child. Moreover, due to his own financial obligations to his child, parents and siblings, the applicant's spouse contends that he would not be able to financially support his spouse in the [REDACTED], thereby causing him hardship. In addition, the applicant's spouse asserts that he would suffer hardship as a result of long-term separation from his wife, and due to the hardships his young child would suffer as a result of long-term separation from his mother, in light of his medical condition and the need for constant vigilance. Further, he contends that he has lost weight and his asthma is flaring up due to the stress of his wife's two-year home residency requirement. *Supra* at 2-3.

In support, documentation has been provided outlining the emotional hardship the applicant's spouse is experiencing due to his wife's pending relocation abroad. *Final Report of* [REDACTED] dated October 12, 2008. In addition, documentation establishing the applicant's spouse's extensive work and financial obligations has been provided, to establish that without his wife's physical presence and daily support, he will become sole caregiver to his young child who suffers from a serious medical condition that requires continuing treatment, while continuing to care for his parents and siblings, a responsibility he has as the oldest son of the family, thereby causing him hardship. In addition, documentation establishing the substandard economy in the [REDACTED] has been provided, to establish the applicant's difficulty in obtaining employment to support herself while living abroad. Finally, counsel has provided documentation establishing the negative ramifications of separating a young child from a primary caregiver. The AAO concludes that based on the evidence submitted, the applicant's spouse and child would suffer exceptional hardship were the applicant to return to the [REDACTED] 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.

The AAO finds that the applicant has established that her U.S. citizen spouse and child would experience exceptional hardship were they to relocate to the [REDACTED] 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 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.