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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 20 2005

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.

Robert P. Wiemann, Director  
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, United States Department of State Waiver Review Division (WRD).

The record reflects that the applicant is a native and citizen of Palestine. She was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on August 11, 1994. The applicant 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). The record reflects that the applicant married [REDACTED] a United States Citizen (USC), on November 12, 1999, and that they have a USC son, [REDACTED] (born April 28, 2004). The applicant seeks a waiver of her two-year residence requirement in the West Bank, based on the claim that her husband and son would suffer exceptional hardship if they accompany her to the West Bank, or if they remain in the United States.

The director concluded that the hardships set forth by the applicant do not constitute exceptional hardship and denied the application accordingly. *Decision of the Director, California Service Center*, dated October 12, 2004.

On appeal, counsel contends that the California Service Center erred in:

- 1) Finding that the applicant would not face danger in the West Bank;
- 2) Finding that the applicant's spouse and child would not suffer as a result of having to remain in the United States;
- 3) Making assumptions about the applicant's intentions upon marriage;
- 4) Stating that this application is another attempt to avoid and disregard United States immigration laws pertaining to the J Visa;

In support of the appeal, counsel submitted a brief; information on separation anxiety from babycenter.com; information on breastfeeding from the World Health Organization; an article on separation anxiety by Dr. [REDACTED] and a copy of the renewal of the applicant's O-1 Visa. In support of the original waiver application, counsel submitted the *United States Department of State Travel Warning on Israel, the West Bank and Gaza*, dated April 28, 2004; various reports on country conditions in the West Bank; statements from the applicant and her husband; verification of employment for the applicant and her husband; Rami's birth certificate; and a variety of other documents. The entire record was 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 at 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 the Immigration and Naturalization [now, the Director of 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 *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.)

### **I. Potential Hardship to the Applicant’s Husband and Son if They Accompany the Applicant to the West Bank**

First analyzed is the potential hardship that Mr. [REDACTED] and [REDACTED] will experience if they move to the West Bank with the applicant while she fulfills the two-year residency requirement. The director concluded that the documents submitted by the applicant describing the dangerous situation in the West Bank establish that the applicant’s husband and son would experience hardship if they live with the applicant for two years in the West Bank.

The record contains extensive documentation, including the April 28, 2004 *United States Department of State Travel Warning on Israel, the West Bank and Gaza*, of the dangerous living conditions in the West Bank. Accordingly, counsel has established that the applicant’s husband and son will experience exceptional hardship if they accompany the applicant to the West Bank for two years.

### **II. Potential Hardship to the Applicant’s Husband and Son if They Remain in the United States**

Next analyzed is the potential hardship that Mr. [REDACTED] and [REDACTED] will experience if they stay in the United States while the applicant lives in the West Bank for two years. Counsel maintains that the applicant’s husband and son will experience exceptional hardship if they are separated from the applicant while she lives in the West Bank for two years. The AAO finds that the totality of the circumstances establish that Mr. [REDACTED] and [REDACTED] will experience exceptional hardship if they remain in the United States while the applicant lives in the West Bank. First, the dangerous living conditions in the West Bank place the applicant in a situation that could cause more than the common emotional stress accompanying such a separation. Mr. [REDACTED] stated “for my wife to live under such conditions where no calm could be foreseen in the horizon increases the possibility of her getting in the middle of crossfire that will endanger her life, and renders me constantly worried.”

Second, separating the applicant from her infant son would deprive the child of his mother’s care during a crucial period of childhood development. Counsel cited a 1997 report from the Families and Work Institute entitled “The Importance of Attachment” *Rethinking the Brain: New Insights into Early Development*:

The psychological and psychoanalytic literatures contain a substantial body of work, notably classic studies by [REDACTED] emphasizing the importance and complexity of an infant’s attachment to her mother or primary caregiver, and the traumatic effects of the experience of loss or long-term separation from the mother. But children are not only affected by a breach of attachment; research launched in the 1970s that followed children over time showed that qualitative differences in attachment can have long-term psychological consequences.

The separation of mother and child for two years could have further adverse consequences because the applicant is breastfeeding her son. Counsel cited the World Health Organization concerning the benefits of breastfeeding for both the child and the mother.

### **III. Conclusion**

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 Director, U.S. Department of State WRD. Accordingly, this matter will be remanded to the director so that he may request a United States Department of State WRD recommendation under 22 C.F.R. § 41.63. If the United States Department of State WRD recommends that the application be approved, the application must be approved. If, however, the United States Department of State WRD recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** The record of proceedings is remanded to the director for further action consistent with this decision.