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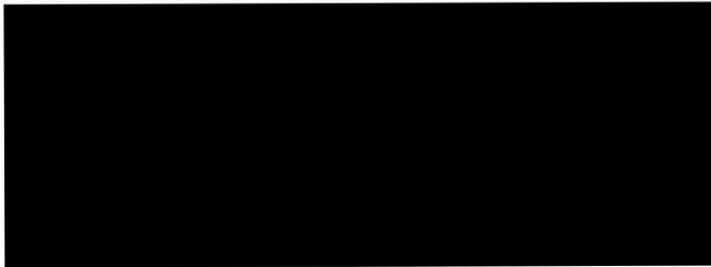
IN RE:



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:

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, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Nebraska Service Center, and is now before the AAO on a motion to reconsider. The motion will be granted and the previous decision of the AAO will be withdrawn and the application is approved.

The record reflects that the applicant is a citizen of Russia who 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 applicant was admitted to the United States as a J1 nonimmigrant exchange visitor on August 20, 1993. The applicant married a U.S. citizen on April 8, 2001. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse.

The director determined that the applicant failed to establish her spouse would suffer exceptional hardship. The application was denied accordingly. *See Decision of the Director*, dated May 13, 2004. The decision of the district director was affirmed on appeal by the AAO. *Decision of the AAO*, dated March 10, 2005.

On motion, counsel states that she is submitting evidence that establishes that a hardship waiver is warranted. *Motion for Reconsideration*, dated April 11, 2005.

In support of the motion, counsel has submitted a new psychological evaluation, a declaration from the applicant's spouse, a physician's letter and the applicant's spouse's 2004 federal tax return. The record also includes previously submitted documents such as an affidavit from the applicant, affidavits and medical records for the applicant's spouse's parents, financial records, letters of support and two psychological evaluations of the applicant's spouse. The entire record was considered in rendering this decision.

Section 212(e) of the Act states in pertinent part that:

(e) 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 [now, Waiver Review Division, WRD] 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 Director, 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 (ii), 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 demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to Russia for two years. The AAO previously found that the applicant's spouse met this requirement.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon remaining in the United States during the two-year period.<sup>1</sup> The initial AAO decision found that no evidence was submitted to establish the inability of the applicant's spouse to support two households, the psychological evaluation did not appear to address the applicant's spouse's emotional state if he remained in the United States and insufficient evidence was provided in regard to the treatment of the applicant's spouse. *Decision of the AAO*, at 5-6. Therefore, based on the evidence in the record at the time of the decision, the finding of a failure to establish exceptional hardship was properly made.

Counsel asserts that the new medical letters establish that the applicant's spouse would suffer extreme psychological and emotional hardship if he remained in the United States without his spouse. *Motion for Reconsideration*, at 2. The new doctor's letter states that the applicant's spouse has been diagnosed with depression and is being treated with Paxil. *Letter from Dr. Kenneth Carbone*, dated April 7, 2005. The physician also states that the applicant's spouse's depression has risen from stress in regard to his marriage and he has symptoms of insomnia, work performance problems and mood swings. *Id.* The record reflects that the applicant's spouse is an only child who cares for his parents along with the applicant. His parents have numerous medical problems and physical limitations. *Decision of the AAO*, at 4. The applicant's spouse would be solely responsible for their care without the applicant's assistance, while maintaining employment and dealing with his depression. The applicant's spouse states that the applicant has vascular headaches, insomnia and anxiety and that she is taking antidepressant medication. *Statement of the Applicant's Spouse*, at 1, dated April 11, 2005. Therefore, concern for her physical and mental state would add to his emotional burden upon separation.

The applicant's spouse states that without "residency registration", the applicant will not be able to obtain a legal job. *Id.* He states that St. Petersburg is the tenth most expensive city in the world and he will support her while she is there. *Id.* The AAO notes that separation entails inherent financial problems which are common to those involved in the situation.

Considering the applicant's spouse's current mental state, his concern for the applicant's mental state, his responsibilities towards his parents without the applicant's assistance and the common financial burdens of separation, the AAO finds that the applicant's spouse would suffer exceptional hardship if he remained in the United States without the applicant.

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. Accordingly, the previous decision of the AAO will be withdrawn. The AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the WRD.<sup>2</sup> Accordingly, this matter will be remanded to the director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD recommends that the application be approved, the Secretary may waive the two-year foreign residence requirement if admission of the applicant to the United

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The AAO notes that at the conclusion of her J-1 status, the applicant returned to Russia on July 7, 1994 and lived there until September 9, 1995. The 429 days that the applicant lived in Russia count towards fulfillment of the two-year residency requirement. Accordingly, the AAO's analysis of potential hardship to the applicant's spouse will be based on the ten months that he is required to reside in the United States without his spouse.

<sup>2</sup> On May 12, 2003, the WRD recommended against granting a waiver based on a "No Objection" letter. However, this recommendation was prior to the applicant's Form I-612 filing.

States is found to be in the public interest. However, if the WRD recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** The motion is granted. The decision dismissing the appeal is withdrawn and the application is approved.