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U.S. Citizenship  
and Immigration  
Services

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[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: AUG 15 2006

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver 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, 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 appeal will be sustained and 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 (WRD).

The record reflects that the applicant is a citizen of Colombia 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 in J1 nonimmigrant exchange status on August 9, 1998. The applicant has a U.S. citizen spouse and child. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse and child.

The director determined that the applicant failed to establish her spouse or child would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in Colombia. *Director's Decision*, dated March 23, 2006. The application was denied accordingly.

On appeal, counsel asserts that the director failed to consider all of the evidence submitted and the director cited evidence to contradict claims of the political circumstances in Colombia while omitting important facts. *Form I-290B*, dated April 24, 2006.

The record includes, but is not limited to, counsel's brief and memorandum, information on Colombia, a psychological report on the applicant and her spouse, photos of the applicant's family, an affidavit from the applicant, an affidavit and statement from the applicant's spouse, articles related to the tenure-track, an affidavit from the applicant's mother, information on the applicant's spouse's funding and a support letter for 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 the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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.

Counsel asserts that a grant of the waiver is in the public interest. *Brief in Support of Appeal*, at 7, undated. The AAO notes that subsequent to a finding of exceptional hardship, the WRD director must recommend that the application be approved and then the DHS 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. The issue of public interest will not be addressed in this decision as exceptional hardship is the issue at hand. The case will be evaluated based on the factors related to exceptional hardship.

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."

Counsel states that the director reprimanded the applicant and her spouse for their marriage and decision to have a child. *Brief in Support of Appeal*, at 2. The record does not reflect that the director reprimanded the applicant, rather the director's quote cited by counsel is that the two-year requirement was a known issue that should have been discussed at great length. The director's statement is relevant to the couple's expectations at the time of marriage, which is that they may have to relocate or separate for two years, not that they should have not gotten married or not had a child.

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 the applicant's spouse or child would experience exceptional hardship upon relocation to Colombia for two years. The AAO will first address hardship to the applicant's spouse. Counsel states that Colombia is politically unsafe, the director placed emphasis on older news articles regarding kidnapping that were submitted and the director failed to note the 2005 date on the Department of State travel warning. *Brief in Support of Appeal*, at 4. Counsel notes that the director cites the 2006 travel warning which states that violence has decreased markedly in the home cities of the applicant, but that the director omitted information from the travel warning regarding kidnapping incidents in the country. *Id.* The travel warning states that violence by narcoterrorist groups and other criminal elements affects all parts of the country and U.S. citizens continue to be victims of threats, kidnappings and other criminal acts. *U.S. Department of State Travel Warning, Colombia*, dated January 18, 2006. The travel warning also states that official Americans and their families may not use bus transportation and are not permitted to travel by road outside of urban areas at night. *Id.*

Counsel states that the director discredits the applicant's mother's affidavit as merely "some past violence" and failed to note that the specific violence was targeted murder of the Minister of Education's family based on her position in the government. *Brief in Support of Appeal*, at 5. The record includes articles detailing the murder of three of the Minister of Education's family members. Counsel states that the applicant's mother is a close advisor to the Minister of Education and the applicant would be placed in a dangerous situation based on this. *See Memorandum in Support of I-612 Application*, at 4, dated December 9, 2005. As such, the applicant's spouse would appear to be in a similar situation as the applicant. Counsel also notes that the mother of the applicant's half-brothers has a sister whose sister-in-law was assassinated. *Brief in Support of Appeal*, at 6. The record includes supporting documentation with respect to issues of safety and these issues are amplified by the applicant's mother's position in the government.

Counsel states that the applicant's spouse does not have Spanish skills, all of his research has been in the United States and it would be impossible to carry out his research if he were not in the United States. *Id.* at 6-7. The applicant's spouse's research interests include improving health and reducing mortality in poor countries and the impact of family-planning programs in developing countries. *Stanford Online Profile of the Applicant's Spouse*. The applicant's spouse states that if he relocated to Colombia, he would be unable to teach or conduct his research and would certainly lose his position. *Applicant's Spouse's Statement*, dated May 14, 2006. The record reflects that the applicant's spouse's lifelong dream was to obtain a tenure-track position at Stanford University. *Psychological Evaluation*, at 4, dated September 30, 2005. The opportunity for tenure would be lost if he relocated to Colombia for two years. *See Letter from* [REDACTED]

*Stanford University*, at 2, dated June 18, 2005. The applicant's spouse states that it would be an incredible disappointment if he was unable to do the work he feels compelled to do after all of the time, money and effort that was invested in his schooling. *Applicant's Spouse's Affidavit*, at 3, dated November 1, 2005.

In light of the potential danger in Colombia, both generally and specifically to the applicant's family based on her mother's position, and the applicant's loss of his tenure-track position which has emotional, financial and career implications, the AAO finds that the applicant's spouse would suffer exceptional hardship upon relocation to Colombia for two years.

The second step required to obtain a waiver is to demonstrate that the applicant's spouse or child would suffer exceptional hardship upon remaining in the United States during the two-year period. In regard to the applicant's spouse, counsel states that he would face the enormous pressure of being a tenured professor in addition to the stress of being without his spouse. *Brief in Support of Appeal*, at 8. The AAO notes that the applicant's spouse would also have to raise their child without the applicant. The applicant is currently at home raising the child full-time. *See Applicant's Affidavit*, at 2, dated November 1, 2005. The record includes articles detailing the pressure, family issues and time commitment of a tenure-track position. In addition, the applicant's spouse states that he will live with fear for the applicant's safety. *Applicant's Spouse's Affidavit*, at 5. Prior discussion in this decision indicates that this is a legitimate fear. The psychological evaluation, which is based on a year of therapy, states that the applicant's spouse has been suffering from recurrent episodes of depression, has received individual psychotherapy and the primary stressor exacerbating his depression is related to compliance with the two-year requirement. *Psychological Evaluation*, at 2. The evaluation details the applicant's spouse's difficult upbringing which indicates that the emotional impact of separation from the applicant would be greater than the common emotional hardship of a two-year separation.

Based on the aforementioned factors, the AAO finds that the applicant's spouse will face exceptional hardship if he remains in the United States without the applicant during the two-year period.

As the AAO has found exceptional hardship to the applicant's spouse, there is no need to address the applicant's child's hardship case.

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 WRD. 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 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 appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.