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FILE:

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Office: CALIFORNIA SERVICE CENTER

Date: AUG 16 2006

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, 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 Palestine 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 January 1, 2002. The applicant's daughter is a U.S. citizen and the applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her daughter.

The director determined that the applicant failed to establish her daughter would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in Palestine. *Director's Decision*, dated December 29, 2005. The application was denied accordingly.

On appeal, counsel asserts that the director's decision is not supported by substantial evidence in that it's based on misstatements of the record and country conditions. *Form I-290B*, dated January 24, 2006.

The record includes, but is not limited to, counsel's brief, the applicant's statement and information on children in Palestine. 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.

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 the applicant's daughter would suffer exceptional hardship if she moved to Palestine for two years. Counsel asserts that the applicant's son has been psychologically scarred due to his experiences in the Palestine Occupied Territories and the applicant fears that her daughter will similarly suffer. *Brief in Support of Appeal*, at 2, dated February 21, 2006.

Counsel states that it is relevant to look at past experiences in inferring what would happen in the future, particularly to look at the experience of the applicant's son to determine potential problems for her daughter. *See supra*, at 3. Counsel refers to a report submitted by a mental health professional. The therapist met with the applicant's spouse several times, the applicant twice and the applicant's son once. *Letter from Megan E. Evans, M.S.* at 1, dated April 8, 2005. The letter details the applicant's son's nightmares, exposure to violence and exposure to destruction of homes. *Id.* The applicant states that her family witnessed many house demolitions, observed dead bodies and were residing close to the location of a missile attack. *Applicant's Statement*, at 1, dated April 9, 2005. The record also includes articles and a study which detail the constant, numerous hardships faced by Palestinian children under occupation and the resulting emotional and behavioral problems associated with trauma exposure in Palestine. Therefore, it is plausible that the applicant's daughter will face these same types of hardships and problems.

In addition, counsel contends that the recent election of Hamas members to the majority of parliament should be considered and the threat of economic aid being cut suggests a drastic decrease in the standard of living. *Id.* at 4. The AAO notes that these are relevant issues which will be considered in this decision.

Based on the past experience of the applicant's family and the dangers and hardships of residing in Palestine as detailed in the record, the AAO finds that the applicant has established that her daughter would suffer exceptional hardship if she moved with her to Palestine for the two-year period.

The second step required to obtain a waiver is to demonstrate that the applicant's daughter would suffer exceptional hardship if she remained in the United States during the two-year period. As the applicant's spouse's legal status is based on the applicant's legal status, both of them would have to return to Palestine. This would leave their young daughter in the United States without her parents. By default, this situation would constitute exceptional hardship to their daughter if she remained in the United States.

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.