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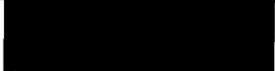
U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

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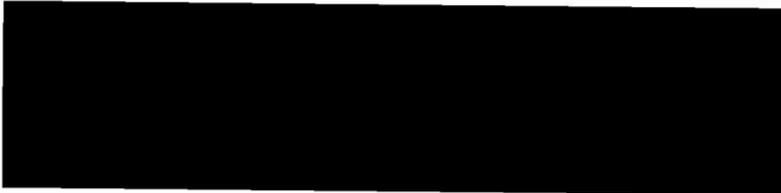
IN RE:



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, 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 is a native and citizen of India. The record establishes that she was admitted to the United States in J-2 nonimmigrant status, as the derivative spouse of [REDACTED] a J-1 visa holder, in November 1993 and 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 applicability of the Exchange visitor skills list. The applicant presently seeks a waiver of her two-year residence requirement, based on the claim that her U.S. citizen spouse and son, born in 1994¹ would suffer exceptional hardship if they moved to India temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in India.

The director determined that the applicant failed to establish that her spouse and child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in India. *Director's Decision*, dated September 12, 2007. The application was denied accordingly.

In support of the appeal, counsel provides a brief, dated October 11, 2007. 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

¹ Counsel makes numerous references to the hardships the applicant's step-son, [REDACTED] will face due to the applicant's foreign residency requirement. However, the Form I-612, Application for Waiver of the Foreign Residence requirement, signed by the applicant, does not list [REDACTED] as a qualifying relative for purposes of a hardship waiver. Moreover, no documentation has been provided that establishes [REDACTED]'s age and/or nationality. As such, the AAO is unable to consider any hardships that may be faced by [REDACTED] due to the applicant's foreign residency requirement.

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 India for two years with the applicant. To support the contention that the applicant's child would experience exceptional hardship were he to reside abroad for two years, the applicant states the following:

...The applicant is divorced from the primary J-1 visa holder, [REDACTED].... [REDACTED] in compliance with his 2 year residency requirement has returned and is living in India.... The Applicant divorced...due to the physical and mental abuse that she and her son suffered.

The Applicant and her US Citizen child have suffered tremendously. They were the victims of abuse which began on July 1991....After several years of enduring the abuse, the Applicant finally took the necessary steps and left her home with her child and temporarily moved into a shelter for battered women. She also took restraining orders out on [REDACTED] and eventually filed for divorce....

...The Applicant first met her current husband while she was helping her current husband, [REDACTED] [the applicant's spouse], take care of his son, [REDACTED]s....

Eventually, the Applicant and [REDACTED] began to develop a very strong relationship and began dating and their relationship has lasted for several years....

The Applicant's son has finally been able to find stability with his permanent family....

...Both children do not speak Hindi and would have a very difficult time adjusting to attending school in India....

Memorandum in Support of the Waiver Application, dated June 11, 2007

Counsel further states,

...Since [REDACTED] and [REDACTED] are in such delicate stages of their lives, it is very important that they remain in the United States with the same friends and in the same school....

Brief in Support of Appeal, dated October 11, 2007.

Counsel has also provided a letter from Jeff Wolf, Attorney, Community Legal Services and Counseling Center, stating the following:

.. [redacted] [the applicant's ex-husband] has been extremely abusive and violent to [redacted] [the applicant] and her son. As a result she and the child have been and are living in a battered women's shelter. [redacted] has attempted to use and abuse the legal process to gain access to [redacted] [redacted] [redacted] has an abuse prevention order which prohibits all contact and attempts at contact by [redacted] to [redacted] and the child. Because of the violence, the court has denied his request for access to the child....

Letter from Jeff Wolf, Staff Attorney, Community Legal Services and Counseling Center, dated August 13, 1996.

Based on the documentation provided, the AAO concurs with the director that the hardship the applicant's child would encounter were he to relocate to India for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year home residency requirement. The record indicates that the applicant's child is integrated into the U.S lifestyle and educational system. He has never lived outside the United States and he would not be able to speak, read or write in the native language of India. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO finds *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern. To uproot the applicant's child at this stage of his education and social development, bearing in mind the past abuses he suffered in the hands of his father who now resides in India, and relocate him to India would be a significant disruption that would constitute exceptional hardship.

The second step required to obtain a waiver is to establish that the applicant's child would suffer exceptional hardship if he remained in the United States with his step-father during the two-year period that the applicant resides in India. As stated by counsel,

...Despite the fact that the Applicant's minor child [redacted] was separated from his abusive father at an early age; he was exposed to seeing his mother's abuse and suffered abuse himself for a long time.... Having been a victim of abuse, such as being locked for several hours in the restroom and hit by his father, [redacted] with the support of his step-father and the constant care of his mother, has been able to be an 'A' average student. The unity of this new family and the father figure that he has enjoyed since the divorce of his parents has been critical of Parth's recovery. This unity is the only way that [redacted] will grow up to learn that aggression is not the correct response towards any of his family members or even society.

...It is very important for [REDACTED] development to stay in a stable environment in order to re-gain his self-esteem and increase the probabilities of growing up to be a productive member to society.....

...Staying in the United States without the presence and support of their mother will impose extreme hardship....

also needs a stable family unit to provide for him. Based on the abuse that he suffered from his father, it is extremely important that [REDACTED] keeps stable figures and support in his life. [REDACTED] is more likely than any other child to become violent and a threat to society given his previous experiences....Two years of separation is hardship for a child. Knowing that his mother is again exposed to the risk of violence and abuse by his Father will re-traumatize [REDACTED].

Supra at 2-3, 8-9.

The applicant's child has a unique and tragic past, having been subjected to trauma and violence in the hands of his father at a young age, which lead to living in an emergency shelter, having an abuse prevention order issued against his father by his mother, and ultimately, the divorce of his parents. The applicant's child has an emotional need to remain with his mother, his primary caregiver and the source of stability for him. Living with his step-father, who married his mother only a year and a half ago, while his mother resides thousands of miles away, would create hardship that would go significantly beyond that normally suffered upon the temporary separation of families. The AAO thus concludes that the applicant's child would experience exceptional hardship were he to be separated from his mother for a two-year term.

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.