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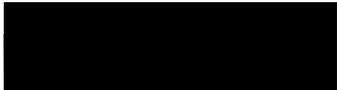
U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY



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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**FEB 29 2008**

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Venezuela 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 5, 2000. The applicant's daughter is a U.S. citizen and the applicant seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his daughter. The applicant also seeks a waiver of the two-year foreign residence requirement based on political persecution. The AAO notes that the applicant has spent approximately 18 months in Venezuela since his last entry on a J-1 visa. Therefore, this time would be deducted from the two-year foreign residence requirement.

The director found that the applicant failed to establish that he would be subject to persecution on account of race, religion or political opinion if he returned to Venezuela.<sup>1</sup> *Director's Decision*, dated March 7, 2007. The applicant's waiver application was denied accordingly.

On appeal, counsel asserts that the director has not applied current U.S. law in determining whether the applicant would face persecution if he returned to Venezuela. *Form I-290B*, received April 5, 2007.

The record includes, but is not limited to, counsel's brief, the applicant's statements, articles and letters related to the applicant's political persecution claims and country conditions information on Venezuela. 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

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<sup>1</sup> The AAO notes that the applicant's U.S. citizen daughter was not born at the time that he filed his waiver application, therefore, hardship to her was not addressed in the director's decision.

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).

In regard to the applicant's persecution claim, counsel states that the applicant entered the United States on a J-1 visa as an employee of Petroles de Venezuela, a Venezuelan government-owned oil and gas company known as PDVSA; he returned to Venezuela; a political rally against Venezuelan President Hugo Chavez took place with PDVSA employees; and these employees were subsequently fired and blacklisted. *Brief in Support of Appeal*, at 1, undated. The applicant states that the work stoppage in which he participated was a nationwide strike, an expression of political dissent with regard to many abuses and constitutional violations by the government. *Applicant's Appellate Statement*, at 3, undated. The applicant states that a list of ex-PDVSA workers has been published in newspapers and websites and distributed among Chavez followers in order to target them as Chavez opponents and to exclude them from benefits and rights. *Id.* at 4-5. The applicant's research advisor at the University of Tulsa states that in the spring of 2003, the applicant informed him that he was in trouble with the Venezuelan government for his political opposition and he expected to be fired as others had been. *Letter from [REDACTED] PhD.*, at 1, dated March 20, 2007. According to the applicant's research advisor, the applicant's name subsequently appeared in the newspaper along with others who had been fired. *Id.*

The record includes a letter from the secretary of communication affairs for the National Union of Oil, Gas, Petrochemical and Refinery Workers (UNAPETROL) who states that the applicant was unfairly and illegally dismissed from PDVSA due to his participation in a national work stoppage between December 2002 and February 2003; he has been persecuted by the government on the basis of his political dissent; his savings and pension funds were confiscated by PDVSA; he has been banned from working or contracting with state companies and agencies, and oil industry private companies and contractors; his family was left without life and medical insurance; and other UNAPETROL members have been victims of physical assaults, unfounded arrest warrants, and eviction. *Letter from [REDACTED]*, dated August 3, 2006. The applicant has also submitted a certification from the national coordinator of the Civil Association of Petroleum Workers who identifies the applicant as an Association member and states that Association members have been subject to persecution and are often threatened by militia groups affiliated with the Chavez government. *Certification from [REDACTED]* dated August 2, 2006.

The record also includes a PDVSA-published list of the individuals fired from the Instituto Tecnológico Venezolano Del Petróleo (INTEVEP), the research and development and technology development center for PDVSA that names the applicant; articles about former PDVSA managers and employees that describe the types of problems that the applicant has encountered; and a June 4, 2006 article from the *Philadelphia Inquirer* that indicates that the Chavez government has compiled a computerized list of 14 million Venezuelans that identifies its opponents and supporters and that CDs of the list are sold on the streets of Venezuela. Individuals interviewed for the article report that everything in Venezuela is tied to the list, including social benefits and pensions, and that those most affected by the blacklist are former PDVSA employees. "*Opposition supporters say they have been frozen out of jobs, pensions, scholarships*" *Philadelphia Inquirer*, at 2, dated June 4, 2006. The national coordinator for the Civil Association of Petroleum Workers is quoted as saying, "It's like there's apartheid for the people who went on strike." *Id.* The record reflects that there is continued mistreatment of political opponents by the Chavez government with vocal government critics being denied basic government services, being forced from their jobs and excluded from government contracts. *U.S. Department of State, The State of Democracy in Venezuela*, at 2, dated

December 1, 2005. A review of the record reflects that the applicant would face persecution based on his political opinion.<sup>2</sup>

In regard to the applicant's hardship claim, the first step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to Venezuela for the remaining six months of the two-year period. As mentioned previously, the applicant's savings and pension funds were confiscated by PDVSA; he has been banned to work or contract with state companies and agencies, oil industry and private contractors; and his family was left without life and medical insurance. *Letter from*

Therefore, it appears that the applicant's daughter would face significant financial hardship and she would not have medical insurance. In addition, there is a threat of the applicant being subject to physical assaults, unfounded arrest warrants, and eviction. *See id.* The AAO notes that the applicant's daughter is a derivative in relation to the applicant's persecution claim. Based on these factors, the AAO finds that the applicant has established that his daughter would suffer exceptional hardship upon relocation to Venezuela.

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. As the applicant's spouse's legal status is based on the applicant's legal status, both of them would have to return to Venezuela. This would leave their eleven month old 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 his burden. 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.

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<sup>2</sup> Counsel contends that the applicant has established a "well-founded fear of persecution." *See Brief in Support of Appeal*, at 5. The AAO notes that the legal standard in section 212(e) waiver proceedings is "would be subject to persecution" and it is higher than the "well-founded fear" legal standard in asylum cases.