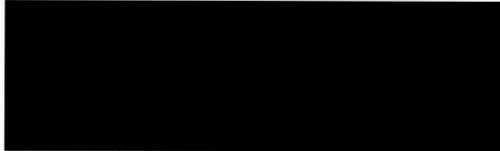


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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **JAN 04 2008**

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:



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 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 record reflects that the applicant is a native and citizen of Venezuela who was admitted to the United States in J1 nonimmigrant exchange status on August 29, 2004 to participate in graduate medical education training. He is thus 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 presently seeks a waiver of his two-year residence requirement, based on the claim that his U.S. citizen spouse would suffer exceptional hardship if she moved to Venezuela temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Venezuela.

The director determined that the applicant failed to establish that his spouse would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Venezuela. *Director's Decision*, dated March 27, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated May 24, 2007. The entire record was reviewed and 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, 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 establish that the applicant's spouse would experience exceptional hardship if she resided in Venezuela for two years with the applicant. To support this contention, the applicant states the following:

[the applicant's spouse] has always been very close to her mother... Last year her mother was diagnosed with breast cancer and underwent a mastectomy... being very close to her mother, would... be devastated and feel guilty for not being with her mother...

is very close to her brother . When was going through clinical depression, she moved in with her brother... There is great tension between brother and their parents, because Peter is homosexual... Because is so close to and because he provided her with support at a time when she most needed it, would suffer exceptional hardship to be separated from her brother for two years...

has worked in the high-end clothing store in Westport, Connecticut, for over 13 years and has consistently been promoted. She is incredibly dedicated to her job, and loves what she does. She is now a senior buyer, and plans to complete her Master's Degree in marketing. chances of continuing a career in Venezuela are non-existent. She does not speak Spanish... Additionally, the rate of unemployment in Venezuela has been estimated at 19% in recent years. Moving to Venezuela for two years would definitely set career back and limit her future opportunities in the high-end retail industry...

...There has been an increase of Cuban doctors migrating into the country in exchange for oil with Cuba... The influx of Cuban physicians to Venezuela continues to lower the average physician salary. If I am able to find a job at all, the salary I would earn in Venezuela would not allow me to meet all the expenses I currently have... The amount of money that I would be making would not even be a third of my current salary... I would not be able to live independently, and I would not be able to support my wife. Also, my family would not be able to help us financially, because my father is currently supporting his wife, two children, his ex-wife (my mother); a sister that is institutionalized for Schizophrenia, and a younger sister who just went through a difficult divorce. My decreased income, along with the high probability that will not find work, would represent an exceptional hardship...

Anti-American sentiment has intensified in Venezuela greatly in recent years under the rule of z... His hatred for the United States is well documented in the international media. s fair skin, light eyes, and ability to only speak English would make it difficult for her to blend in with the local population. Not

only would she stand out, she would be targeted as an American. This will have psychological consequences for [REDACTED], who will have to be very careful as an American living in Venezuela. She will make an easy target for kidnapers who often seek foreigners.

...[REDACTED] was clinically depressed for a long time, and she is likely to relapse...separated from her family...Depression is an on-going battle, and it is clear...that there is real concern for [REDACTED] well-being if she were to leave her family and move to Venezuela for two years...

Affidavit of Dr. [REDACTED], dated November 4, 2006.

Dr. [REDACTED], the applicant's spouse's treating physician since 1999, confirms the applicant's statements regarding his spouse's mental health. As stated by Dr. [REDACTED]

[REDACTED] [the applicant's spouse] is under my care since August 1999. She suffers from major Depression. Her family's emotional support has helped with her improvement tremendously, especially after her friend's tragic death that threw her into a deeper Depression and an almost suicidal state. I learned that she might be leaving the country for a two-years stay in Venezuela because of her husband's Visa status. I am extremely concerned about Kristen's mental and emotional health...

Letter from [REDACTED], dated September 25, 2006.

The Department of State, in its Consular Information Sheet for Venezuela, states, in pertinent part, the following:

Venezuela is a medium income country with a substantial oil industry. The political situation in Venezuela is highly polarized and volatile. Violent crime is a continuing problem. Assaults, robberies and kidnappings occur throughout the country...

Violent crime in Venezuela is pervasive, both in the capital, Caracas, and in the interior. The country has one of the highest per-capita murder rates in the world. Armed robberies take place in broad daylight throughout the city, including areas generally presumed safe and frequented by tourists. A common technique is to choke the victim into unconsciousness and then rob them of all they are carrying. Well-armed criminal gangs operate with impunity, often setting up fake police checkpoints. Kidnapping is a particularly serious problem, with more than 1,000 reported during the past year alone. According to press reports at least 45 foreigners have been kidnapped in the first eight months of 2007. Investigation of all crime is haphazard and ineffective. In the case of high-profile killings, the

authorities quickly round up suspects, but rarely produce evidence linking these individuals to the crime. Only a very small percentage of criminals are tried and convicted.

Maiquetía Airport, the international airport serving Caracas, is dangerous and corruption is rampant. Concerns include personal property theft, mugging, and "express kidnapping" in which individuals are taken to make purchases or to withdraw as much money as possible from ATMs, often at gunpoint. The Embassy has received multiple, credible reports that individuals with what appear to be official uniforms or other credentials are involved in facilitating or perpetrating these crimes. For this reason, American citizen travelers should be wary of all strangers, even those in official uniform or carrying official identification. There are also known drug trafficking groups working from the airport. Travelers should not accept packages from any persons and should keep their luggage with them at all times.

Because of the frequency of robberies at gunpoint, travelers are encouraged to arrive during daylight hours if at all possible. If not, travelers should use extra care both within and outside of the airport. The Embassy strongly advises that all arriving passengers make advance plans for transportation from the airport to their place of lodging. If possible, travelers should arrange to be picked up at the airport by someone who is known to them. The Embassy has received frequent reports recently of armed robberies in taxicabs going to and from the airport at Maiquetía. There is no foolproof method of knowing whether a taxi driver at the airport is reliable. The fact that a taxi driver presents a credential or drives an automobile with official taxi license plates marked "libre" is no longer an indication of reliability. Incidents of taxi drivers in Caracas overcharging, robbing, and injuring passengers are common. Travelers should take care to use radio-dispatched taxis or those from reputable hotels. Travelers should call a 24-hour radio-dispatched taxi service from a public phone lobby or ask hotel, restaurant, or airline representatives to contact a licensed cab company for them...

Harassment of U.S. citizens by pro-government groups, Venezuelan airport authorities, and some segments of the police occurs but is quite limited. Venezuela's most senior leaders, including President [REDACTED] regularly express anti-American sentiment. The Venezuelan government's rhetoric against the U.S. government, as well as American culture and institutions, is slowly affecting attitudes in what used to be one of the most pro-American countries in the hemisphere...

Based on the career disruption that the applicant's spouse would encounter were she to reside in Venezuela for a two-year period with the applicant, the concerns outlined above regarding the language barrier that the applicant's spouse would face, the problematic country conditions in Venezuela and the applicant's spouse's familial situation and the documented diagnosis of major depression, the AAO concurs with the Director that the applicant's U.S. citizen spouse would experience exceptional hardship were she to accompany the applicant to Venezuela for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if she remained in the United States during the two-year period that the applicant resides in Venezuela. In this case, counsel contends and documents that the applicant's spouse will experience emotional, psychological and financial hardship were the applicant to fulfill her two-year home residency requirement in Venezuela while his spouse remained in the United States. As stated by counsel,

...The record shows that [redacted] [the applicant's spouse] is very close to her family. This is illustrated in the several support letters from her mother, father, brother and grandmother. The record also shows that [redacted] mother is battling breast cancer, and that [redacted] has taken on the heavy responsibility of being her mother's and father's emotional support system. In an effort to cope with her mother's diagnosis, and in an effort [to] show support to her mother, [redacted] and her mother collaborated to start a non-profit that supports women with breast cancer. [redacted] has only been able to play these pivotal roles and endure the family stress of coping with breast cancer of a close loved one, with the support of Dr. [redacted] [the applicant]. Her emotional dependence on him is corroborated through the support letters from her family, and through a psychological examination. [redacted] economic dependence on Dr. [redacted] is also corroborated through the submitted monthly budget list with proof of living expenses. [redacted] would be unable to continue her non-profit work without Dr. [redacted] joint salary, and she would be unable to be her family's support without her own support of her husband...It would cause a clear exceptional hardship for [redacted], who already has an evidenced history of struggling with depression (and surrounding death, no less), to have to cope with her mother's breast cancer struggles on her own...

Brief in Support of Appeal, dated May 24, 2007.

The applicant echoes the sentiments outlined by counsel. As stated by the applicant,

...Shortly before I met my wife, she went through a very difficult personal time. She lost someone very close to her from suicide. This sent her into a major depression for more than a year...When I met her she was still on antidepressant medication. I supported her going off of the medication, and I was instrumental in her recovery. If I were to be separated from her for two years, I am fearful that she would relapse into depression.

Before moving to the United States, I was personally the victim of three separate acts of violence in Venezuela...Because I live in a tight-knit community, everyone will know that I am a physician. I am certain that I will be targeted, due to my perceived wealth, for additional attacks and violence. If I were to be attacked again while in Venezuela, my wife would be devastated. It would be an exceptional hardship for her if I were injured or killed. She would constantly fear for my life during our two-year separation, and given her frail state from a loss of a loved one, that would be more than she could handle...

Supra, at 2-4.

Dr. [REDACTED] corroborates the concerns outlined by counsel and the applicant with respect to the emotional and psychological hardship that the applicant's spouse would experience were the applicant to reside abroad for a two-year period. As Dr. [REDACTED] states,

...In 2000, [REDACTED] had a great tragedy in her life. She was involved in a very serious relationship with a man, who committed suicide by hanging himself. The impact of his suicide threw [REDACTED], herself, into a state of depression. She was placed on antidepressant medication for a very substantial period of time (more than a year and a half), and, in addition, went for psychological counseling. She was able to get off antidepressant medication because she met and developed a relationship with her husband, [REDACTED]

M.D.

.. [REDACTED] told me that she has become, once again, depressed and anxious because of her fear that, in the event [REDACTED] has to return to his native Venezuela for two years...that she will be forced to make an impossible decision. That decision is whether to remain in the United States and thus support her mother and brother, or to be with her husband in Venezuela. Her decision is, indeed, a no-win situation for her, and regardless of which decision she opted for, her depressive symptomatology would become seriously exacerbated.

She told me that at the present, as a result of her fear that she will become separated...from Antonio...she has become depressed and anxious. She has trouble falling asleep, and wakes up, repeatedly, during the night. Her physician has prescribed Atavan and Lunesta for sleep. Her appetite is poor, and she has lost approximately 5 pounds. She has difficulty focusing, concentrating, and paying attention, and is persistently sad, with crying spells...

Affidavit of [REDACTED], Ph.D., Licensed Psychologist, dated September 22, 2006.

The record establishes that the applicant's spouse has been diagnosed with major depression and has been under the care of a physician since August 1999. The applicant's spouse's mother was diagnosed with breast cancer and underwent a mastectomy and multiple reconstruction surgeries within the last year. The applicant's spouse's brother's sexuality has only been accepted by the applicant's spouse, causing tension with the rest of the family. Throughout these challenges, the record indicates that the applicant has played an integral part in the applicant's spouse's emotional, psychological and financial well-being. As such, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse emotional, psychological and financial hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

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 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 application must be approved. If, however, 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.