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U.S. Citizenship
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Services

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#3



FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUL 28 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 that reads "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 applicant, a native of Kuwait and a citizen of Pakistan and Canada, was admitted to the United States as a J-1 exchange visitor in July 1995 to participate in graduate medical 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 foreign residence requirement, based on the claim that his U.S. citizen children, born in October 1999 and November 2003, would suffer exceptional hardship if they moved to Pakistan temporarily with the applicant and in the alternative, if they remained in the United States or Canada, their mother's home country, while the applicant fulfilled his two-year foreign residence requirement in Pakistan.

The director determined that the applicant failed to establish that his children would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Pakistan. *Director's Decision*, dated November 16, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following: a brief, dated December 14, 2007; a letter from the applicant, dated December 12, 2007; additional documentation regarding country conditions in Pakistan; support letters from the applicant's friends and family; case law and an article with respect to hardship waivers; copies of two decisions issued by the AAO; and evidence of the applicant's Canadian citizenship, obtained after entering the United States as a J-1. 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 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 children would experience exceptional hardship if they resided in Pakistan for two years with the applicant. To support this contention, the applicant summarizes the hardships his children would face in Pakistan:

...In a recently published article in Newsweek magazine, Pakistan was considered the most dangerous country in the world, even more than Iraq and Afghanistan. Department of State has issued travel advisory for the Citizens of United States to avoid travel to Pakistan. We belong to Shia minority sect and are considered by Sunni majority as infidels. Hundreds of Shia doctors have been killed during last few years.... My name...is an unmistakable badge of our identity as a member of Shia minority. If I move back to Pakistan with my wife and children, then this move will definitely put all of us in the harms way and at life threatening risk. This is not a theoretical concern and this risk cannot be equated to living anywhere in the world. These are undeniable facts recognized by other US immigration officers in similar circumstances and are supported by published articles and reports in the leading National and International newspapers describing number of heinous crimes committed against Shia minority in Pakistan. My sons have never visited Pakistan and are in the age group that they are not street smart, will be easily identifiable as Shia (by their name) and are therefore susceptible to all sorts of crimes.

In addition, besides their religious backgrounds they will be immediately identified as foreign born due to their inability to speak native language. Their identification as American Citizens put them at exuberant risk of life threatening situation....

Shia doctors are considered as easy targets as their work hours are predictable and physicians and place of work easily identifiable. Being a bone marrow transplant physician, it would be hard for me to keep a low profile as this is the field that is non-existent in Pakistan. There are only three hospitals in the entire country starting to perform bone marrow transplants. If...we assume that they will hire me, a physician moving from the USA will certainly get attention in the media and would be considered an easy target. I would be considered an ideal target for being a Shia and someone with strong ties with the United States. Taking the risk of loosing three lives or even my own would result in exceptional hardship on my family....

My sons have never traveled outside North America and lack the immunity required to fight the communicable and infectious diseases prevalent in Pakistan.

As evident from the supporting documentation provided with the application both my sons suffer from severe allergies and require antibiotics and regular follow up treatment....

If they [the applicant's children] accompany me to Pakistan then they are definitely at much higher risk of life threatening complications including worsening of their allergies and dangerous respiratory complication. Due to no job prospects for me and even with a job there is a lack of health care coverage by employers in Pakistan, they will be unable to receive quality care required to treat their chronic medical condition....

...There are no prospects of improvements in the current conditions in Pakistan....

Letter from [REDACTED] dated December 12, 2007.

To corroborate the above, counsel has provided extensive documentation regarding the problematic political, religious and social situation in Pakistan, anti-American sentiment in Pakistan, and the targeting of physicians and their families living in Pakistan. In addition, numerous letters in support of the applicant's waiver request have also been provided. As [REDACTED] states,

...I am currently working at the Aga Khan University (AKU) [in Pakistan], Medical College and Hospital.... I can relate to him [the applicant] as I have recently moved to Pakistan from USA with my wife and three US born children. There is a severe anti-US sentiment amongst the people. Local Physicians have animosity towards the US trained Physicians due to their clinical acumen and training. Despite the fact that [REDACTED] [the applicant] has strong credentials, his job opportunities are extremely limited in Pakistan....

Hospital employers in Pakistan are aware of the two year home country physical presence requirement and look at this very unfavorably. They have the unfair advantage when negotiating the salary as they know that the options are fairly limited for potential candidates....

The salary offered is in the range of US \$1,500 to 2,500 per month. If you do not have strong family ties in Pakistan and if your family is not well-connected, it is almost impossible to survive on these limited funds. Prices are exorbitant for housing; and basic amenities are scarce in supply.

Above all we are fearful for our life due to deteriorating law and order situation. There is a travel warning for foreign travelers and US citizens in particular to avoid visiting Pakistan. The AKU faculty in the past have been the target of kidnapping and car thefts. One of the faculty members was kidnapped and killed as he was suspected to be a Shia. There have been hundreds of Shia Physicians

killed over last few years. Physicians are working under a constant threat and fear. Being a Shia, definitely puts [REDACTED] and his family in a significantly increased risk category....

Letter from [REDACTED] Division Head, Otolaryngology Head & Neck Surgery, Associate Professor, Department of Surgery, Aga Khan University, Karachi, Pakistan, dated May 15, 2007.

The applicant's children's pediatrician, [REDACTED] further outlines the applicant's children's medical conditions and the hardships they would face were they to relocate to Pakistan. As [REDACTED] attests:

I am the pediatrician of both [REDACTED] and [REDACTED] the children of [REDACTED] [the applicant]....

Both children were born pre-mature and as a result have multiple health issues. [REDACTED] was born at 33 weeks of gestation and weight 4 lbs. 6 oz. He was delivered emergently due to fetal distress, as a result of pressure on umbilical cord. Eruj remained in the special care nursery for 2 weeks and required feeding through a nasogastric tube. His prematurity predisposed him to airway reactivity and recurrent infections.

Upon his discharge [REDACTED] developed abdominal colic from the hospital and was unable to tolerate feedings when brought home.... When he was introduced to daycare, he had severe infections that required multiple visits to the emergency room. At birth, a routine blood screening identified him as having the sickle cell trait. Although sickle cell trait is usually asymptomatic, a few affected children may show some symptoms in very stressed situations. [REDACTED] complains of leg cramps intermittently. He may also be prone to other complications....

Later, [REDACTED] was diagnosed to have a congenital abnormality of his right thumb, trigger finger, in which the tendon needs to be released through a surgical procedure.... He required a surgical procedure...to correct this abnormality. He may need occupational therapy to help him with his fine motor function. He has recurrent sinus allergies for which he underwent a formal allergy panel test with an Allergist/Immunologist. The findings indicated that he is allergic to mice, rats, dust, molds of various kinds, grasses and pollen. Controlling his environment is very necessary for his overall well-being. Going back to Pakistan will certainly affect his health adversely when one considers the environment in that part of the world. I know that [REDACTED] had to spend a substantial amount of money to make their home environment hypoallergenic including the use of special filters and humidifiers.... Due to [REDACTED] allergies his clothes need to be washed in scent-free detergent and his pillows need to be covered with dust covers. He requires prescription medications when his symptoms are worse....

He has asthma which is very sensitive to environmental triggers.... He is increasingly susceptible to upper and lower respiratory infections and infections which have needed treatment with antibiotics.

brother was also born at 32 weeks...which required him to be monitored in the Special Care Nursery and hospitalized for 2 weeks after birth.... also has recurrent respiratory infections requirement multiple antibiotic courses periodically. He also has a similar congenital abnormality of his right thumb, like his brother....

also is allergic to mosquito and other insects. He develops bruise-like marks after a bit, sometimes requiring antibiotics to prevent infections. He has also been treated for cellulitis on this foot. He has reflux issues....

had very low birth weight due to premature birth. This puts them at a disadvantage in many areas. The areas affected include a) growth b) fine and gross motor development c) cognitive development and d) behaviour in the areas of attention deficit hyperactivity disorder and oppositional defiant disorder.

Eruj and his brother have very significant medical problems that need long term follow-up and management. Going back to Pakistan will definitely put them at a great disadvantage in terms of what the future holds for them....

Letter from [redacted] Pediatrician, dated May 21, 2007.

[redacted] a pediatrician in Pakistan, states the following regarding medical conditions in Pakistan:

I am a Pediatrician practicing in Pakistan for [15 years]. I write this letter as an attestation to the high rate of childhood illnesses due to environmental pollution such as poor air and water quality. I am the only pediatrician within a 15 mile radius to Karachi. Pakistan suffers from an endemic problem of having too few pediatricians for the millions of children that need adequate treatment.

I have had the opportunity to review the medical files of both [redacted] and [redacted] [the applicant's children]. Because both children were born pre-mature it is no surprise that they also have multiple health issues, which would be compounded to dangerous levels should they be forced to live in Pakistan....

...Spending two or more years in a very highly polluted environment during the developmental period of a child's body can have long-term adverse effects. As a

pediatrician, this is not something I can recommend in caring for the health of any child. I especially cannot recommend it for [REDACTED] children, who have not built up any immunity to fight off the numerous infections caused by poor air and water in Pakistan....

Letter from [REDACTED] KCHS, Medical Centre, Karachi, Pakistan.

The AAO notes that a Travel Warning, issued by the U.S. Department of State, Bureau of Consular Affairs, dated September 21, 2007, states, in pertinent part, the following:

This Travel Warning updates information on security incidents and reminds U.S. citizens of ongoing security concerns in Pakistan. This Travel Warning supersedes the Travel Warning dated December 5, 2006.

The Department of State continues to warn U.S. citizens against non-essential travel to Pakistan in light of the threat of terrorist activity.

The presence of Al-Qaida, Taliban elements, and indigenous sectarian groups poses a potential danger to American citizens, especially along the porous border with Afghanistan. Continuing tensions in the Middle East also increase the possibility of violence against Westerners in Pakistan. Terrorists and their sympathizers have demonstrated their willingness and capability to attack targets where Americans are known to congregate or visit, such as hotels, clubs and restaurants, places of worship, schools, or outdoor recreation events. American fast food restaurants and other companies in Karachi were bombed in late 2005, resulting in several deaths and multiple injuries among Pakistani employees and customers. On March 2, 2006, an American diplomat, his locally employed driver, and three others were killed when a suicide bomber detonated a car packed with explosives in front of the U.S. Consulate in Karachi. Fifty-two others were wounded.

Fatal bomb attacks have occurred in Islamabad, Karachi, Peshawar, Quetta, Lahore, and other Pakistani cities in 2006 and 2007. Some of the attacks have occurred outside major hotels, market areas and other locations frequented by Americans. Other recent targets have included Pakistani government officials and buildings, and international NGOs.

Travel Warning, U.S. Department of State, Bureau of Consular Affairs, dated September 21, 2007.

Based on the documented political, religious and social turmoil in Pakistan, anti-American sentiment and the emotional and psychological ramifications of such sentiments on a young, U.S. born child, the U.S. Department of State's position on travel to Pakistan by U.S. citizens, the targeting of physicians in Pakistan,

financial hardship and the serious health concerns referenced above which would be exasperated in Pakistan, the AAO finds that the applicant's U.S. citizen children would experience exceptional hardship were they to accompany the applicant to Pakistan for a two-year term. Moreover, the record establishes that the applicant's U.S. citizen children are integrated into the U.S. lifestyle and educational system. The Board of Immigration Appeals (BIA) found that a fifteen-year-old child who lived her entire life in the United States, who was completely integrated into the American lifestyle, and who 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 children at this stage of their education and social development and relocate them to Pakistan would be a significant disruption that would constitute exceptional hardship. As such, based on a totality of the circumstances, the AAO finds that the applicant's children would encounter exceptional hardship were they to relocate to the Pakistan.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen children would suffer exceptional hardship if they remained in the United States and/or Canada, their mother's home country, during the two-year period that the applicant resides in Pakistan.

With respect to the applicant's children remaining in the United States while the applicant relocates to Pakistan for a two-year period, the record indicates that the children's mother, a Canadian citizen, has no legal status in the United States. She would not be able to reside with the children in the United States while the applicant relocates to Pakistan. As such, their father's home residency requirement and their mother's inability to reside in the United States due to her lack of status would leave the young children in the United States without their parents. This situation would constitute exceptional hardship to the applicant's children if they remained in the United States.

With respect to the applicant's children residing in Canada with their mother while the applicant relocates to Pakistan for two years, the applicant discusses the hardships the children would encounter in regards to such a scenario:

...If our waiver petition is denied, my wife and I will both have to move to Pakistan with our two U.S. citizen children. My wife and I had to live separately for two years when our oldest son became ill and they moved to Canada. That also meant I was not able to see my oldest son very much for a period of two years. This already adversely affected my son and we cannot subject him to yet another two-year separation from me without repercussions. Leaving both [redacted] and Furzaan [the applicant's children] behind is...not possible since we do not have other family members who could take care of them for two years. As mentioned before, my wife's parents, who live in Canada, cannot assist with childcare in their old age and with their poor health.... My wife has not worked since 2004 and will now have great difficulty finding work in her field. For this reason, she will not be able to sustain a household in my absence, especially because she would have to bear the very high expense of keeping our home allergen free for our sons.... My wife has already applied for jobs in Canada and

in the US, and she has only received rejections. Additionally, because we cannot place our children in childcare due to their heightened allergic responses, one parent needs to remain home with the children. I am the only breadwinner, and thus, my wife would have to accompany me to Pakistan were I required to return for two years, so that she could look after the children....

Affidavit of [REDACTED] dated August 13, 2007.

[REDACTED] attests to the emotional and psychological hardships the applicant's U.S. citizen children would face were they to be separated from their father for a two-year period:

...During [REDACTED] [the applicant's] first separation from [REDACTED] [the applicant's child], at which time he was in Saskatoon, both parents spoke of [REDACTED] being very anxious and manifesting symptomatology of a separation anxiety disorder. If [REDACTED] is forced to return to Pakistan under the terms of his J-1 visa, it would represent the second two year separation that [REDACTED] would have to endure. Progress that [REDACTED] has made since his father returned to the family would be seemingly eliminated, and his separation anxiety issues would become severely exacerbated. Again, given the fact that such a separation would represent the second, these issues would likely become a permanent feature of his character development....

Because of their age, developments, awareness of events, and previously manifested symptomatology, both [REDACTED] and [REDACTED] will likely suffer more if again separated from their father. The prominent psychiatrist [REDACTED] had clearly demonstrated that children separated from a parent for a significant period of time are at risk for the development of separation anxiety disorders, depressive symptomatology, and symptoms of isolation....

...The matters concerning [REDACTED] being of the [REDACTED] and a [REDACTED] also highly increase the likelihood for kidnapping and death, and the possibility of the two boys growing up without a father....

Psychological Evaluation prepared by

Ph.D., LP, dated April 15, 2007.

Evidence has been provided by counsel to substantiate the above statements regarding the negative ramifications of separating a parent from a child, and the inability of the applicant's spouse to obtain gainful employment in Canada due to her long absence from the workplace to care for her young children, both with serious medical conditions that require at-home care. As such, due to the documented emotional and psychological hardships the applicant's children would face were they to be separated from their father, the applicant's spouse's inability to properly sustain the household in Canada while the applicant resides abroad, and due to the fears and anxieties the children would face with respect to their father returning to a country where he could be injured and/or killed, as discussed in detail above, due to his occupation, his religion and

his ties to the United States, the AAO concludes that the applicant's U.S. citizen children would experience exceptional hardship were they to remain in the United States alone or in Canada with their mother while their father relocates to Pakistan for two years to fulfill his home residency requirement.

The AAO finds that the applicant has established that his U.S. citizen children would experience exceptional hardship were they to relocate to Pakistan and in the alternative, were they to remain in either the United States or Canada without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's U.S. citizen children would suffer if the applicant temporarily departed the U.S. for two years would go 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 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.