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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 17 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:

SELF-REPRESENTED

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 applicant is a native and citizen of India who obtained J-1 nonimmigrant exchange status in June 2003 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 spouse, and his U.S. citizen child born in January 2007, 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 his two-year foreign residence requirement in India.

The director determined that the applicant failed to establish that his U.S. citizen spouse and/or child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in India. *Director's Decision*, dated January 16, 2008. The application was denied accordingly.

In support of the appeal, the applicant submits Form I-290B, Notice of Appeal or Motion and a written statement outlining the basis for the appeal. 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 spouse and/or child would experience exceptional hardship if they resided in India for two years with the applicant. To support this contention, the applicant states the following:

As far as [REDACTED] is concerned, India also has a dramatic child mortality rate (CMR). It is more than 12 times higher than that of the United States.... The World Health Organization found India to be one the most unsafe places in terms of environmental threats to children....

[REDACTED] has never visited India before.... I was born and brought up in a city called, Nagpur.... The main language is Marathi and less than 2% of people talk in English. [REDACTED] can not speak a word of Marathi. There are hardly any Americans or people from other countries living in that part of India. This would cause a lot of social anxiety and affect her day to day living....

[REDACTED] has a Bachelor of Science degree in nursing and is currently studying for her masters in nursing. Her life long dream of becoming an educator and researcher in the health care field will be fulfilled after she finishes her PhD in nursing.... This is a unique program aimed at people who are interested in teaching and advancing the field of nursing in the United States. This is a rapidly emerging field and it will be impossible to obtain this kind of training with any other program outside the United States. In India there is no such training available....

[REDACTED] is a born and raised Roman Catholic and I was born and raised Hindu. We got married in a Roman Catholic Church in a traditional mass ceremony and my parents refused to come to this event as she was not a Hindu girl.... We plan to raise our child in the Catholic faith. He recently received the sacrament of baptism.... Raising him Catholic would be very difficult for us to do in India with significant opposition to this religion from my family. There have been several reports of violence against Christians in India. This is specifically true for Christians who try to marry Hindus. Until this tension is relieved I would be afraid

even to visit India, let alone living there for two years. I am afraid our religious freedom will be taken away from us....

Statement of Reason for Hardship by [REDACTED]

The Country Report of Human Rights Practices-India corroborates the concerns raised by the applicant with respect to religious conflict in India:

Several human rights and religious freedom NGOs, including the All-India Christian Council and the All-India Catholic Union (AICU), expressed concern over continued anti-Christian violence in several states.... The AICU reported there were approximately 190 cases of persecution against Christians throughout the country and noted that the intensity of attacks on Christians increased.

Unlike previous years, NGO contacts reported that attacks against Christians occurred in more urban areas. On September 10, a group of approximately 35 people from the Hindu extremist group RSS beat the principal of a Bible college in Geddalhalli village on Hennur Road in Bangalore. On December 5, a group destroyed machinery at a Church construction site in north Delhi.

On December 24, a Hindu group led allegedly by a leader of the RSS shot at two Christian children in the Kandhamal district of Orissa. A VHP leader leading an anticonversion drive in the area was also injured. The events started a series of communal clashes in the tribal-dominated Kandhamal and Phulbani districts of eastern Orissa, provoking the Prime Minister to call for calm and a return to peace, and ask the state government to ensure security for Christians. A group of NGOs submitted a memorandum to the chairperson of the NHRC alleging that 5,000 persons had been affected by these attacks and about 600 houses had been damaged. They also alleged that the police had sided with the perpetrators of violence and dissuaded the victims from lodging complaints.

The Bangalore-based Global Council for Indian Christians (GCIC) reported a series of attacks against Christian groups in Karnataka following the founding of the short-lived BJP coalition with the Janata Dal. According to GCIC, on September 30, a group of alleged Bajrang Dal activists attacked a church at Kodlipet in Kodagu district, injuring several people. Similarly, on October 7 in Mayasandra village of Tumkur district, Hindu extremists attacked and seriously injured a Christian missionary while he was conducting a service.

Country Reports on Human Rights Practices-2007, Released by the Bureau of Democracy, Human Rights, and Labor, dated March 11, 2008.

Moreover, the AAO notes that the U.S. Department of State references the following, in pertinent part, regarding the problematic country conditions in India:

A number of anti-Western terrorist groups (some of which are on the U.S. Government's list of foreign terrorist organizations) are believed to be active in India including, but not limited to, Islamic extremist groups such as Harakat ul-Mujahidin, Jaish-e-Mohammed, Lashkar-e Tayyiba, and Harkat-ul-Jihad-i-Islami. While historically the state of Jammu & Kashmir has been a focal point of terrorist activity, bomb blasts resulting in deaths and injuries have occurred in public places such as markets, as well as on public transportation such as trains and buses throughout India. Examples of recent, major terror attacks include a coordinated series of bombings in market and temple areas of the tourist city of Jaipur, Rajasthan (May 2008), an attack on a government paramilitary facility in Uttar Pradesh (December 2007), coordinated bomb blasts at court facilities in three cities in Uttar Pradesh (November 2007), an explosives blast in a cinema hall in Punjab (November 2007), two explosions at a popular park and restaurant in Hyderabad, Andhra Pradesh (August 2007), an explosion at the main mosque in Hyderabad, Andhra Pradesh (May 2007), the detonation of explosive devices on a train northwest of Delhi (February 2007), simultaneous attacks on Mumbai commuter trains (July 2006), simultaneous attacks on a train station and places of worship in Varanasi (March 2006), and simultaneous attacks on several markets in New Delhi (October 2005). Terrorist incidents causing fewer casualties occur on a frequent basis, including a few in which American citizens were injured. The motive for many of these attacks has not been clearly established, although it is believed that U.S. citizens and foreigners in general were not specifically targeted in these attacks. Specific areas of concern are addressed below under "Areas of Instability."

Beyond the threat from terrorism, demonstrations often cause disruption. Local demonstrations can begin spontaneously and escalate with little warning, disrupting transportation systems and city services and posing risks to travelers' personal safety. In response to such events, Indian authorities occasionally impose curfews and/or restrict travel. U.S. citizens are urged to avoid demonstrations and rallies as they have the potential for violence, especially immediately preceding and following elections and religious festivals (particularly when Hindu and Muslim festivals coincide). In addition, religious and inter-caste violence is unpredictable and occurs occasionally. In some cases, demonstrators specifically block roads near popular tourist sites in order to gain the attention of Indian authorities; occasionally vehicles transporting tourists are attacked in these incidents. Mobs have, however, attacked Indian and American missionaries and social workers as such activity provokes strong reactions in some areas. Anti-Christian violence has seen a slight increase in recent years in certain areas of India, such as in Gujarat. U.S. citizens should monitor local television and print media and contact the U.S.

Embassy or the nearest U.S. Consulate for further information about the current situation in areas where they wish to travel...

U.S. citizens, particularly women, are cautioned not to travel alone in India. Western women continue to report incidents of physical harassment by groups of men. Known as "Eve-teasing," these incidents can be quite frightening. While India is generally safe for foreign visitors, according to the latest figures by Indian authorities, rape is the fastest growing crime in India. Among large cities, Delhi experienced the highest number of crimes against women. Although most victims have been local residents, recent sexual attacks against female visitors in tourist areas underline the fact that foreign women are also at risk and should exercise vigilance.

Women should observe stringent security precautions, including avoiding using public transport after dark without the company of known and trustworthy companions; restricting evening entertainment to well known venues; and avoiding walking in isolated areas alone at any time of day. Women should also ensure their hotel room numbers remain confidential and insist the doors of their hotel rooms have chains, deadlocks, and spy-holes. In addition, it is advisable for women to hire reliable cars and drivers and avoid traveling alone in hired taxis, especially during the hours of darkness. It is preferable to obtain taxis from hotels rather than hailing them on the street. If women encounter threatening situations, they can call 100 for police assistance.

Country Specific Information-India, U.S. Department of State, Bureau of Consular Affairs, dated May 29, 2008.

Based on the academic disruption the applicant's spouse would encounter were she to reside in India for a two-year period with the applicant, the problematic political and social conditions in India, the documented discrimination against Christians, the concerns outlined above by the U.S. Department of State with respect to U.S. citizen women and travel throughout India, and the applicant's spouse's unfamiliarity with the language, culture, and customs, the AAO concurs with the director that the applicant's U.S. citizen spouse and child would experience exceptional hardship were they to accompany the applicant to India for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's spouse and/or child would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in India. As stated by the applicant,

██████████ [the applicant's spouse] is currently enrolled in school for a graduate (master's) nursing program and has been able to juggle with school and taking care of ██████████ [the applicant's child].... Due to her excellent scores and keen interest in teaching and advancing the field of nursing, the faculties at University of Buffalo (State University of New York) have offered her a chance to pursue a doctoral degree in nursing.... If ██████████ doesn't jump on this opportunity and accept this

doctoral program now it will be almost impossible to get another opportunity like this....

Two or three years from now the dynamics of nurse educator shortage and possibility of her getting back to school might not be entirely the same....

If [REDACTED] undertakes the doctoral program, part time and works part time, the amount of money she will bring in will be very less and would drastically reduce her and Henre's standard of living....

[REDACTED] has not worked since March of 2006 when she was 3 months pregnant. She...found it extremely difficult to manage physically lifting patients and irregular shift patterns. Nurses are mandated to stay overtime if some incoming nurse calls in sick or they need nurses due to increase in patient load. This means that the working hours can be extremely long and unpredictable....

She likes taking care of [REDACTED] and wants to just go to school (to get her doctoral degree) and take care of [REDACTED]... However, if I were to leave the country she will be forced to go back to work. A full time job will not be feasible for her due to nursing mandate law....

You can understand how this will be impossible for [REDACTED]. She does not have any family members in the Buffalo area....

Due to the nursing overtime mandate law and unpredictable shift nature of nurse's work, [REDACTED] won't be able to put [REDACTED] in a day care center as most child care centers close at 5-6 pm. [REDACTED] also has been away from any clinical responsibilities since almost last 2 years and has total of less than 2 years of nursing experience in her life. This puts her in a lower pay scale and also gives her less opportunity to negotiate her shift.... She will be working odd shifts and might even work several night shifts a week due to her lack of nursing experience or lack of seniority. This would also mean that she will either be forced to find an in-house/live-in nanny or work part time. Either way it will be devastating financially...

I have been paying for health insurance for [REDACTED] and [REDACTED]. When we decided to move in together in Dec 2004, we bought a condo.... When we bought the condo we thought that we will be living together and paying the mortgage....the average annual salary of neurologist in India is less than US \$6000.... I won't be able to help [REDACTED] pay any of the bills and mortgage due to this discrepancy in current exchange....

We have been able to afford to keep our family intact and running due to equal contributions from both of us. [REDACTED] has been taking care of [REDACTED] at home and I have been working to pay the bills. The way our life/family is set, it will be impossible for us to survive without another making a physical/fiscal contribution to the house....

[REDACTED] is so used to me coming back from work and playing with him and being around him, it will be a shock for his young mind to see me disappear for 2 years.

Not only will [REDACTED] experience this sense of loss, but his life will be greatly affected by being forced to accept a much lower standard of living, less contact with parents and adapt to a new household routing. If [REDACTED] is forced to go to work full time and I have to leave to India, it would mean virtually no time for the young child with parents....

Basis for Appeal by [REDACTED]:

Based on the above statements and the documentation provided by the applicant, the AAO concludes that the applicant's spouse would encounter exceptional emotional, professional and financial hardship were the applicant to relocate abroad while she remains in the United States. Her hardship if she remained in the United States without the applicant would go significantly beyond that normally suffered upon the temporary separation of a spouse from her husband. Moreover, the AAO concurs with the applicant that separating the applicant's young child from his father for at least two years, without a reasonable ability to visit with his father on a regular basis due to the expense and distance associated with travel between the United States and India, would cause the young child exceptional emotional and/or psychological hardship

The AAO finds that the applicant has established that his U.S. citizen spouse and child would experience exceptional hardship were they to relocate to India and in the alternative, were they to remain in the United States 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 spouse and child 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.