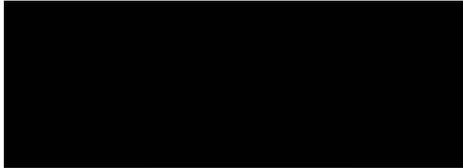


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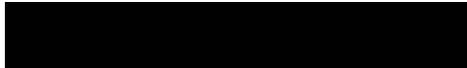


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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date:

**JUN 19 2008**

IN RE:



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 applicant is a native and citizen of Russia who obtained J-1 nonimmigrant exchange status in August 1993. She 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 U.S. Government financing. The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse and children, born in February 2005 and March 2002, would suffer exceptional hardship if they moved to Russia 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 Russia.

The director determined that the applicant failed to establish that her U.S. citizen spouse and/or children would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Russia. *Director's Decision*, dated October 9, 2007. The application was denied accordingly.

On appeal, the applicant requests oral argument. The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. CIS has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Consequently, the request is denied.

In support of the appeal, counsel for the applicant submitted, inter alia, a brief, dated December 5, 2007; photographs of the applicant and her family; letters from [REDACTED], M.D. with respect to the applicant's spouse's medical conditions, dated March 11, 2004 and November 29, 2007; documentation relating to the applicant's spouse's medical conditions; additional information about country conditions in Russia; letters from the applicant's spouse's parents; a letter from [REDACTED] Principal, Christ Fellowship Academy, with respect to the applicant's children and supporting documentation relating to their academics; medical documentation with respect to the applicant's daughter; letters from the applicant's and her spouse's employer; letters from community members and friends; evidence of the applicant's and her spouse's medical insurance; documentation relating to the applicant's and her spouse's finances; documentation relating to the applicant's medical conditions; and a copy of a no objection letter issued by the Consulate General of the Russian Federation, dated June 8, 1994. 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 children would experience exceptional hardship if they resided in Russia for two years with the applicant. To support this contention, counsel for the applicant states the following:

...In addition to his mental health issues, in September 2007, [the applicant's spouse] was diagnosed with having basal cell carcinoma (skin cancer). After having the carcinoma removed his doctor...requested that [redacted] return for regular check ups to monitor his condition....

It is unfathomable to conceive of how [redacted] would receive the medical treatment and medications he needs if forced to relocate to Russia. He does not speak the Russian language and the stress of having to adapt to a new environment with no job prospects warrants consideration of exceptional hardship. If [redacted] were faced with an emotional breakdown, there is little evidence that he could expect proper care in Russia....

Even if [redacted] did not join his wife and children in Russia, the [redacted] children face very real dangers resulting from the pervasive and unstable conditions in Russia today. Of course, if he traveled with them to Russia, he too would face these same dangers.

...because they are Americans, the [redacted] family would be at risk of problems of extortion, robbery, and kidnapping which are virtually common place in Russia but of particular concern for American's as indicated by direct warnings from the U.S. State Department....

Even the areas that are not mired in terrorist activities are dangerous for persons such as the [redacted] since the country is experiencing extreme problems with nationalist uprisings. As Americans, the [redacted] would face significant scrutiny. Because of their inability to speak Russian, the Pentons would have a hard time blending in and

the children will face the challenges of attending new schools in an unfamiliar and substandard educational system....

*Brief in Support of Appeal, dated December 5, 2007.*

[REDACTED], Principal, Christ Fellowship Academy, substantiates the concerns raised above with respect to the applicant's children's hardships were they to relocate to Russia for two years.

...I have been an educator for 23 years, and I am in my eleventh year as principal of the Academy. [REDACTED] and [REDACTED] [the applicant's children] have been students at Christ Fellowship Academy since August of 2007....

[the applicant's daughter] is a kindergarten student....During this semester, she has demonstrated exceptional abilities and has been a positive asset to our school. She is in the top 10 percent of her class. As educators, her teachers and I believe that her academic achievement would be hindered if she were to relocate with her family to Russia for the two year period.... It is likely that she would lose the academic and psychological advantages she now possesses. The potential would exist for language and speech delays, as well as overall academic delays for [REDACTED]. It almost always proves to be very difficult for students to enter or re-enter the U.S. educational system in the middle of elementary school when reading and writing is the primary focus. In such a situation, students often must repeat one or more grades to progress academically. This then creates emotional and psychological issues for children that can last a lifetime.

[REDACTED] [the applicant's son] is a student in our two-year-olds class. Upon entrance, he had difficulty adjusting to the school environment.... [REDACTED]'s progress report from the first quarter indicates that he needs help in many areas.... [REDACTED] would benefit from the stability and sense of security his present environment provides. He knows his caregivers and has adjusted well over time. In the event [REDACTED] would have to relocate to a new country, new language, as well as a new educational and social environment, we believe such a situation would stifle his academic, emotional, and social growth in these formative years....

...To make drastic changes in their learning and living environment would, of course, impact not only their emotional well being, but their academic achievement as well....

*Letter from [REDACTED], Principal, Christ Fellowship Academy, dated December 5, 2007.*

The U.S. Department of State, in its Country Specific Information-Russian Federation, states the following, in pertinent part, regarding Russia's problematic country conditions:

Acts of terrorism, including bombings and hostage taking, have occurred in Russia over the last several years. Bombings have occurred at Russian government buildings, hotels, tourist sites, markets, entertainment venues, schools, residential complexes, and on public transportation including subways, buses, trains, and scheduled commercial flights. Hostage-taking incidents have included a raid on a school that resulted in horrific losses of life of children, teachers, and parents.

There is no current indication that American institutions or citizens are targets, but there is a general risk of American citizens being victims of indiscriminate terrorist attacks. American citizens in Russia should be aware of their personal surroundings and follow good security practices. Americans are urged to remain vigilant and exercise good judgment and discretion when using any form of public transportation. When traveling, Americans may wish to provide a friend, family member, or coworker a copy of their itinerary. Americans should avoid large crowds and public gatherings that lack enhanced security measures. Travelers should also exercise a high degree of caution and remain alert when patronizing restaurants, casinos, nightclubs, bars, theaters, etc., especially during peak hours of business.

It is not uncommon for foreigners in general to become victims of harassment, mistreatment and extortion by law enforcement and other officials. Police do not need to show probable cause in order to stop, question or detain individuals.

Medical care in most localities is below Western standards; shortages of medical supplies, differing practice standards and the lack of comprehensive primary care all combine to make the medical system difficult to negotiate as well as suspect. The few facilities in Moscow and St. Petersburg that approach acceptable standards do not necessarily accept all cases (i.e., they may not be licensed to treat trauma, infectious disease or maternity cases). Access to these facilities usually requires cash or credit card payment at Western rates at the time of service.

Elderly travelers and those with existing health problems may be at particular risk. Elective surgeries requiring blood transfusions and non-essential blood transfusions are not recommended, due to uncertainties surrounding the local blood supply. Most hospitals and clinics in major urban areas have adopted the use of disposable IV supplies, syringes and needles as standard practice; however, travelers to remote areas might consider bringing a supply of sterile,

disposable syringes and corresponding IV supplies for eventualities. Travelers should refrain from visiting tattoo parlors or piercing services due to the risk of infection.

Outbreaks of diphtheria and Hepatitis A have been reported throughout the country, even in large cities such as Moscow and St. Petersburg. The U.S. Centers for Disease Control and Prevention recommend up-to-date tetanus and diphtheria immunizations before traveling to Russia and neighboring countries. Typhoid can be a concern for those who plan to travel extensively in the region. Rarely, cases of cholera have also been reported throughout the area. Drinking bottled water can reduce the risk of exposure to infectious and noxious agents. Tap water in Russia, outside of Moscow, is generally considered unsafe to drink. Travelers are strongly urged to use bottled water for drinking and food preparation. Tuberculosis is an increasingly serious health concern in Russia.

*Country Specific Information-Russia, U.S. Department of State, dated June 3, 2008.*

The record indicates that the applicant's spouse suffers from numerous serious medical conditions, most notably skin cancer, that may be exacerbated were he to reside in Russia, due to the country's substandard healthcare. Moreover, the record also establishes the turmoil and safety concerns with respect to being a U.S. citizen residing in Russia. In addition, the record confirms that the applicant's spouse does not speak, read, or write in Russian, and would thus encounter career and financial hardship were he to relocate to Russia as he would not be able to find employment in his area of expertise, namely, as a lawyer who has expertise in defending American manufacturers in aviation disasters. *See Letter from [REDACTED] dated November 19, 2007.*

Furthermore, the record indicates that the applicant's children are integrated into the U.S. lifestyle and educational system. They have never lived outside the United States and they do not speak, read or write in Russian. 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). Though *Matter of Kao and Lin* is a finding of extreme hardship related to a waiver of inadmissibility, the AAO finds the reasoning 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 a Russian-only environment would be a significant disruption that would constitute exceptional hardship. The hardship the applicant's U.S. citizen spouse and children would encounter were they to relocate to Russia 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. As such, based on a totality of the circumstances, the AAO concurs with the director that the applicant's U.S. citizen spouse and children would encounter exceptional hardship were they to relocate to Russia.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Russia. To support this contention, counsel states the following:

... [redacted] [the applicant's spouse] suffered in the past from depression after the breakup of a significant relationship some time ago and he would face hardship due to separation and worrying about the applicant's safety and well-being....Mr. [redacted] s medical doctor has indicated a concern for his health should he be separated from his wife and/or be expected to care for his children as a single parent....

The [redacted] are a dual income family with substantial financial obligations that can only be met through their joint employment....

By profession, [redacted] is a lawyer. He works in a very specialized field...his employer has expressed concerns with his ability to manage his case load if he were to become a single parent. Notwithstanding his professional degree, he is still a young attorney who in pursuing his career has amassed over \$100,000 in educational loan debt which he cannot pay back if he is a sole breadwinner....

*Supra* at 9-11.

Counsel has provided documentation to substantiate the assertions made above with respect to the exceptional hardship the applicant's spouse and children would encounter were the applicant to relocate abroad. Dr. [redacted] states as follows regarding the emotional and psychological hardship the applicant's spouse would encounter were the applicant to relocate abroad:

[redacted] [the applicant's spouse] is a 39-year old male that has been a patient in our office for over five years. He suffers from chronic headaches, high blood pressure and generalized anxiety.... The stress of being a single father and losing his wife is affecting his health.

[redacted] is currently on treatment, he is taking Klonopin 1 mg. for the headaches and Lisinopril 10 mg. for his high blood pressure. He has been treated in our office every two months to monitor his condition. In my opinion his health would only decrease if his wife is deported....

*Letter from* [redacted] MD, PA, dated November 29, 2007.

[redacted] s further elaborates:

.. [redacted] [the applicant's spouse] is currently under my care for psychological services..

Historically, [redacted] has experienced two significant losses. Both of these losses reportedly resulted in Major Depressive Episodes. His first experience with major depression was following the break-up of a four-year relationship after law school. In 1995, he lost his first job as an associate as a law firm and

this loss triggered a Major Depressive episode for approximately one year. The symptoms presently observed and reported by [REDACTED] suggest he has been experiencing a Dysthymia and Generalized Anxiety Disorder since approximately 2001....

Given [REDACTED] psychological history and previous reactions to loss, I strongly recommend homeostasis of the family environment. Exacerbation of stress, anxiety, and depression due to the hardship of family separation is more than likely to increase the severity of his present psychological condition. The results of this could be quite severe and devastating to the patient.

*Letter from J [REDACTED], PhD, Licensed Psychologist, dated June 7, 2007.*

[REDACTED] states the following regarding the exceptional professional hardships the applicant's spouse would face without the applicant's continued presence:

...There is no doubt that [REDACTED] [the applicant's spouse] will not be able to continue in his current position, despite our need for him, if he did not have his wife by his side assisting in the care of their children. As a skilled and experienced attorney [REDACTED] handled high value and high profile cases that required long hours at work, both during the work week and often on weekends. Notwithstanding the demand of our firm, [REDACTED] always manages to spend quality time with both children and his wife....

...I can assure you that it will not be possible for [REDACTED] to care for his children and continue his work at this firm given the demands on his time, professionally and personally, without the assistance of his wife....

*Letter from [REDACTED] dated November 19, 2007.*

Regarding the applicant's children's hardship were the applicant to reside in Russia for two years, [REDACTED] Principal, Christ Fellowship Academy, asserts as follows:

...As a seasoned educator, my professional opinion is that [REDACTED] and [REDACTED] [the applicant's children] are benefiting from and succeeding in their present environment.... I strongly recommend that both children remain with both parents in the United States....

*Supra at 1.*

Based on the documentation provided, the AAO concurs with counsel that the emotional and/or psychological ramifications of separating young children from their mother for a two-year period would cause the children exceptional hardship. Moreover, it has been established that the applicant's spouse would suffer exceptional

emotional and/or psychological, professional and financial hardship were he to remain in the United States with his children while the applicant relocates abroad for a two-year period.

The AAO finds that the applicant has established that her U.S. citizen spouse and children would experience exceptional hardship were they to relocate to Russia and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year period. 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 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 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.