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U.S. Citizenship  
and Immigration  
Services

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date: OCT 03 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.

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 obtained J-1 nonimmigrant exchange status in September 1999. He 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 government financing. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen child, born in April 1999, would suffer exceptional hardship if he moved to Venezuela temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Venezuela.<sup>1</sup>

The director determined that the applicant failed to establish that his U.S. citizen child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Venezuela. *Director's Decision*, dated February 25, 2008. The application was denied accordingly.

In support of the appeal, the applicant's representative provides a statement from the applicant, with referenced exhibits. 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

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<sup>1</sup> The record indicates that the applicant's spouse obtained J-2 nonimmigrant status based on her derivative status as the spouse of the applicant, a J-1 visa holder. As such, the applicant's spouse is also subject to the two-year foreign residence requirement.

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 child would experience exceptional hardship if he resided in Venezuela for two years with the applicant. To support this contention, the applicant states the following:

...Venezuela is not the same. It is not the same Venezuela where we grew up.

...My wife and I have heard many horror stories from our friends and families in Venezuela regarding the government changes. They are very unhappy with the rash behavior of the government and worry for their children.... Our son has known nothing but American democracy since birth. We hold strong to our beliefs. As a professor, a husband and a father, our beliefs are something we take very seriously.... I know that we can make sure that we preserve these values in our son, but the school curriculum in Venezuela will make this difficult.... He will also be in Venezuela at a very impressionable age. I also do not want Victor [the applicant’s child] to question his identity. He knows that we are Venezuelan and we do not instill any prejudice in our son towards our country or America. But how can we keep him open minded when his teachers and school mates are saying different....

If we were to return to Venezuela, there are three possible places where I may be able to find employment in education. Caracas is where most of my family lives and the best universities are there. Valencia is an option because we lived there for almost ten years and I went to school at the university there. Merida is an option because it is the only university that has the recognized field of Linguistics (my degree) in the country. We have serious problems with relocating to these cities. A job at a university is very tied to your political beliefs in Venezuela due to their ideology. Recently Colombia and Venezuela were considering war. They have repaired some of their relations, but these negotiations are fragile. Merida is along the Venezuelan-Colombian border, so this is no longer an option for us. We would not move to a city where war may soon break out.

I am from Caracas.... There have been five bombings in Caracas during the month of February alone. The Venezuelan military is located in Caracas. I have serious reservations about taking my son to Caracas despite my employment situation.

Valencia is our third option for work and residence in Venezuela. Our two friends offering affidavits have lived in Valencia. One has a pending asylum case here and the other has received asylum status here. In this city we have heard stories of several kidnappings for money. About five years ago when my brother in law lived

there, he witnessed the attempted abduction of the child of one of his neighbors. His neighbor was leaving their apartment complex with her son in a stroller. A car stopped and two men jumped out to grab the baby. My brother ran over with a bat after the men. They jumped back in their car and fled. Our son is young, but he will be seen as an American kid with an accent. His Spanish is not great and with a father who works as a professor, he may be a target. I am prepared to do whatever it takes to ensure his safety. However, I know that psychologically this may be hard for my son to understand why he may be in danger. I do not want him to live in fear or doubt.

We returned to Venezuela in 2002 and 2004 for three weeks each time. There is a very big difference between visiting a country for three weeks and living there for two years. Many things have changed since our visit. And still, during our visit there were things that disturbed me greatly. I could see that our country was changing. The extreme polarization was evident. We even sensed this with our families.... My wife and I were afraid to leave out of the home after 6pm without a member of our family accompanying us. It was uncomfortable and scary. Food was scarcer than we ever remembered. This was said to be the cause of the increased crime. My sister told us how she had been robbed at least twice on the bus. One time, she actually jumped off of the public bus and broke her leg. We also heard of people being robbed in their car in traffic. I would not go to the ATM alone.... I lost my wedding band because of this fear. My wife and I were taking the bus during the day and our family told us to take our jewelry off so that we would not be targeted. I put my ring in my pocket and I still lost it. We were advised not to wear our good shoes when traveling, so I put on a pair of sandals. When I was in the market that day, there was a man staring at my sandals! I did buy them in the US, but had not considered that they could be a target because they were different. Some people say that the increase in crime and violence has been caused by Chavez. Others say that it has been caused by the opposing party. Regardless of where it is coming from, it is evidence that it is there....

is a very calm, good natured and quiet child. Venezuela was very overwhelming for him during the visit.... Caracas is a very noisy city. The loud noises plus the different language really unnerved our son. He kept very close to us at all times. He would also receive comments from other children and even some in our family regarding his accent. This can be very hard for anyone much less a young child. I want my son to grow up feeling comfortable and embracing all of his qualities. I do not want him to feel he should change himself to fit in with other children or the beliefs of others.

The applicant has provided documentation that corroborates the statements made by him. In addition, the Department of State, in its Consular Information Sheet for Venezuela, states, in pertinent part, the following:

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

Travel to and from Maiquetia Airport, the international airport serving Caracas, can be dangerous and corruption at the airport itself is rampant. Travelers at the airport have been victims of personal property theft, as well as 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.

Cross-border violence, kidnapping, drug trafficking, smuggling, and cattle-rustling occur frequently in areas along the 1,000-mile long border between Venezuela and Colombia. Some kidnap victims have been released after ransom payments, while others have been murdered. In many cases, Colombian terrorists are believed to be the perpetrators. Colombia's National Liberation Army (ELN) has had a long history of kidnapping for ransom, and the Revolutionary Armed Forces of Colombia (FARC) are active in the kidnapping trade. Common criminals are also increasingly involved in kidnappings, either dealing with victim's families directly or selling the victim to terrorist groups.

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 Chavez, regularly express anti-American sentiment. The Venezuelan government's rhetoric against the U.S. government, its American culture and institutions, has affected attitudes in what used to be one of the most pro-American countries in the hemisphere.

Venezuela and its capital, Caracas, have one of the highest per capita murder rates in the world. Virtually all murders go unsolved. The poor neighborhoods that cover the hills around Caracas are extremely dangerous. These areas are seldom patrolled by police and should be avoided. Armed robberies are common in urban and tourist areas throughout Venezuela, even areas presumed safe and visited by tourists. Crimes committed against travelers are usually money-oriented crimes, such as theft and armed robbery. Incidents occur during daylight hours as well as at night. Many criminals are armed with guns or knives and will use force. Jewelry attracts the attention of thieves. Travelers are advised to leave jewelry

items, especially expensive-looking wristwatches, at home. Gangs of thieves will often surround their victims and use a chokehold to disable them, even in crowded market areas where there is little or no police presence. Theft from hotel rooms and safe deposit boxes is a problem, and theft of unattended valuables on the beach and from rental cars parked near isolated areas or on city streets is a common occurrence. A guarded garage or locked trunk is not a guarantee against theft. Pickpockets concentrate in and around crowded bus and subway stations in downtown Caracas. Subway escalators are favored sites for "bump and rob" petty thefts by roving bands of young criminals. Many of these criminals are well dressed to allay suspicion and to blend in with crowds using the subways during rush hour. Travelers should not display money or valuables.

"Express kidnappings," in which victims are seized in an attempt to get quick cash in exchange for their release, are a problem. Kidnapping of U.S. citizens and other foreign nationals, from homes, hotels, unauthorized taxis and the airport terminal has occurred. U.S. citizens should be alert to their surroundings and take necessary precautions.

Police responsiveness and effectiveness in Venezuela vary drastically but generally do not meet U.S. expectations. U.S. travelers have reported robberies and other crimes committed against them by individuals wearing uniforms and purporting to be police officers or National Guard members.

*U.S. Department of State, Consular Information Sheet for Venezuela, dated May 5, 2008.*

Based on the U.S. Department of State's position on travel by Americans to Venezuela, the social and political turmoil in Venezuela, strong anti-American sentiment, the applicant's family's own traumatic experiences in Venezuela and the ramifications of said events on the child's upbringing and psyche, and the concerns referenced by the applicant with respect to the language barrier and the academic curriculum in Venezuela, the AAO finds that the applicant's U.S. citizen child would experience exceptional hardship were he to accompany the applicant to Venezuela for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen child would suffer exceptional hardship if he remained in the United States during the two-year period that the applicant and his spouse reside abroad. As stated by the applicant,

...if we do not receive a foreign residence waiver, our son will not be able to stay here in the US without us. We have some family here in the US. However, we do not share all of their religious and moral beliefs and practices. Even if we did, we would not allow our eight year old child to be separated from us. [REDACTED], [the applicant's child] is the center of our family. We could never hurt our son in such a way. Boarding schools are too expensive and even if we could afford them, again, we would not do this to our family....

*Supra* at 1-2.

As the record indicates, the applicant and his spouse are previous J visa holders subject to the two-year foreign residency requirement. Such a requirement would leave a young child in the United States without his mother and father. This situation would constitute exceptional hardship to the applicant's child if he remained in the United States.

The AAO finds that the applicant has established that his U.S. citizen child would experience exceptional hardship were he to relocate to Venezuela and in the alternative, were the child 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 U.S. citizen 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.