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**U.S. Citizenship  
and Immigration  
Services**

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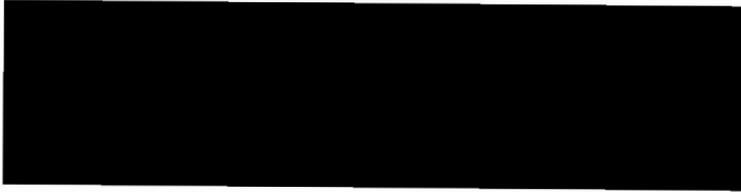


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 24 2008

IN RE: [REDACTED]

APPLICATION: Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:



**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The applicant is a native and citizen of India who was admitted to the United States to participate in graduate medical training in July 2004. 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).<sup>1</sup> 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 March 2005, would suffer exceptional hardship if he moved to India 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 India.

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 India. *Director's Decision*, dated December 4, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated January 17, 2008; documentation regarding violence against Kashmiri citizens in India; documentation evidencing discrimination against physicians in India; and evidence with respect to human rights practices in India. 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

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<sup>1</sup> The record indicates that the applicant's spouse entered the United States as a J-2 in July 2004, based on her derivative status as a spouse of the applicant, a J-1 visa holder. As such, the applicant's spouse is also subject to the two-year foreign residency requirement.

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

My American born child will be at risk of violence and terrorist attacks that are rampant throughout Kashmir. Moreover, as an American he is particularly vulnerable to such attacks. Kashmir has been in a state of siege and war for more than 10 years, and the U.S. State Dept. has continually warned Americans against traveling to Kashmir for any length of time due to the increasing number of attacks against civilians and American interests....

Since December 5<sup>th</sup>, 1989, Kashmir has been and is a war zone. Targeted violence against civilians and Westerners is rampant in the ongoing battle between the Indian army and Islamic militants belonging to more than 100 terrorist and rebel factions....

The Indian military has about 1,300,000 active personnel, the fourth largest in the world—about 650,000 of them are posted in Kashmir, the largest force India has ever fielded against a Muslim secessionist rebellion. Additionally, this makes Kashmir the most militarized area in the world.

Jammu and Kashmir is the only Indian state in which Muslims constitute a majority, representing nearly two-thirds of the population.... The State's political status as part of India is a matter of long-standing controversy. Kashmir has been the site of three border wars since the partition of British India into India and Pakistan in 1947, and since 1989, an insurgency of militant Muslim groups seeking independence from India.

Throughout the current conflict, Indian security forces have committed regular and deliberate violations of human rights and humanitarian laws in Kashmir, with large numbers of summary executions of suspected militants and increased killings of civilians in reprisal attacks. Government forces continue to use lethal force against peaceful demonstrators and engaging in widespread and arbitrary arrests of persons suspected of sympathizing with the militants, and detaining them for extended periods without charge or trial. Torture and rape of detainees is also high.... Shopkeepers, university professors, doctors, lawyers, business people and others continue to complain of routine cruelty exercised by Indian forces during searches for Muslim militants....

As a physician in Kashmir, I would face serious and real threats of physical violence, kidnapping and potential death due to the targeting of members of the medical community by the insurgents in Kashmir. Should I be injured or killed, my U.S. citizen child will face extraordinary hardship as I would be unable to provide for his needs....

While in Kashmir, my family and I have been personally targeted, persecuted, and threatened with death by militants on several occasions, as summarized below.

On many occasions, militants have invaded our family home and have attempted to take shelter in our residence, and take our property—threatening our family with grave physical harm and kidnapping if we did not comply with their demands.

Militants have repeatedly extorted money from us threatening us with death and kidnapping at gun point if we did not comply.

In my third year of medical school militants lined up senior students including myself and beat us.

Militants stopped my bus from medical school and made all the riders get off, threatened us and shot out the bus tires.

I have been the victim of so-called ‘crack-downs’ where Indian Security forces make all the men and boys gather in a given place and where they are made to stand for long periods of time, regardless of the weather or temperature, or must sit in awkward positions and are hit if they move; when I asked to leave for my duties in the Emergency room, I was severely beaten and threatened with being shot.

The ongoing conflict in Kashmir has devastated basic health services in the State....

Immunization programs and maternal and child healthcare programs have suffered significantly during the conflict, with even basic preventive care often being unavailable....

My American infant son continues to be in need of proper immunizations and preventive medical care. Due to the longstanding conflict in Kashmir, such medical care isn’t readily available....

Muslims in Kashmir, Gujarat and elsewhere throughout India face the daily threats of physical violence by Hindu mobs.

Over the past few years, there have been multiple instances of Hindu mobs attacking Muslims throughout the country solely for religious reasons....

By living in Kashmir, Gujarat or elsewhere in India, our family will face further risks of violence and persecution since we are part of the Muslim minority. Our American son will be doubly at risk—American and part of the Muslim minority. In addition, because my family and I are part of the Muslim minority it would be incredibly difficult for me to find work outside of Kashmir, despite my superior training in the U.S. Therefore I could not move to a different region in India to avoid the violence in Kashmir because I would not be able to support my family and we would be the victims of extreme persecution as members of the religious minority....

*Affidavit of* [REDACTED], dated March 21, 2007

As counsel further states:

Kashmir remains a very dangerous region in India....

If the U.S. citizen child returns to India with his parents, he will face extraordinary hardships through persecution and the risk of violence in Kashmir....

The officer who issued the adverse decision claimed that [REDACTED] [the applicant] would not be required to return to Kashmir and could fulfill the two-year home residency requirement anywhere in India.... [REDACTED] and his family must indeed return to Kashmir if required to return to India, for the following reasons:

1. Kashmiri people are viewed as traitors by Indian citizens—hence Kashmiris face persecution and threats of violence by moving outside Kashmir....
2. Kashmiri people speak their own language (Kashmiri) and do not speak or understand the local/national languages of other States in India—hence communication (and deception of origin) would be impossible. The national language of India is Hindi. Kashmiris do not speak Hindi—they speak Kashmiri. By moving to other parts of India, Dr. [REDACTED] and his family would suffer the additional problem of being unable to speak or understand the main national language. This would create future hardship....
3. Kashmiri Muslims would face even greater persecution due to the rampant anti-Muslim violence that has occurred throughout India.... [REDACTED] and his family will face substantial persecution and risks of violence due to their ethnic/religious heritage.
4. Kashmiri people are discriminated against by the Indian government which makes it nearly impossible for Kashmiri people to live and/or work outside of Kashmir. Kashmiri physicians, for example, are unable to sit for the Indian medical residency examinations, thereby restricting them to practice their profession only in Kashmir.

In addition to the typical health problems an American 3 year old would face in Kashmir, Dr. [REDACTED] has submitted substantial documentation to confirm his son's previous asthmatic/allergic episodes as well as his son's genetic pre-disposition to suffer from asthma and allergies. [REDACTED] submitted letters from physicians verifying his son's medical condition as well as verifying that both his wife and his wife's father suffered from breathing problems associated with asthma and/or allergies.... [REDACTED] son is certainly at risk for asthma/allergies, which would be compounded by the poor environmental conditions in Kashmir.

*Brief in Support of Appeal*, dated January 17, 2008.

To corroborate the applicant's statements, a letter in support is provided from [REDACTED] a senior leader of Jammu & Kashmir People's Democratic Party. As Mr. [REDACTED] states:

I am [REDACTED], father-in-law of [REDACTED] [the applicant]. I am an ex-bureaucrat and have served as Deputy Commissioner, Srinigar city for 4 years. I have held multiple posts of distinction including being the joint financial commissioner of J & K state besides presently being the senior most leader of ruling political party....

I have been a victim of multiple attempts at my life and have escaped several assassination bids on my life for the last decade and continue being on hit list of the militants and am being protected round the clock by security personnel. During the last decade my family has suffered immensely on this account and has been vulnerable to militant attacks. Militants have made several bids to kidnap my only son. They even blasted my earlier residence twice and luckily nobody was at the house both times. I had to sell off my property and move to a high security location.... [REDACTED], as my son-in-law and his family, particularly, his American born son will face the same threat and be vulnerable to militant attacks. His son, being American born, could be an easy target. He could be easily kidnapped to settle political scores or even for ransom.

The current situation in Kashmir is such that even the educational institutions are not free from the attacks of militants and there have been instances when the militants have lobbed grenades aimed at schools and critically wounded scores of kids. The parents live in constantly fear for the safety of their kids. The children in Kashmir suffer from a number of psychological ailments due to the reason of being victims of violence and living under the constant fear of death. There is a total lack of recreational activities here. There is a breakdown of good education system in Kashmir. If my grandson comes here will be deprived of quality education that he is capable of getting in the US....

*Letter from [REDACTED], Jammu & Kashmir People's Democratic Party*, dated February 23, 2007.

The AAO notes that the U.S. Department of State, in its Country Specific Information-India, references numerous concerns with respect to country conditions in India. As stated, in pertinent part:

Multiple, simultaneous bombings in crowded public places in India over the past three years represent an increasing threat to American citizens traveling in India. While U.S. citizens are not being directly targeted by the perpetrators of such acts, the U.S. government is concerned that the risk of Americans becoming random victims of terrorism in India is rising. Because the targets have included trains, train stations, markets, cinemas, mosques, and restaurants in large urban areas, it is becoming more difficult to modify one's behavior to lessen the growing risk.

A number of anti-Western terrorist groups (some of which are on the U.S. Government's list of foreign terrorist organizations) are 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.

Jammu & Kashmir: The Department of State strongly recommends that U.S. citizens avoid travel to the state of Jammu & Kashmir, with the exception of visits to the eastern Ladakh region and its capital, Leh. A number of terrorist groups operate in the state, targeting security forces that are present throughout the region, particularly along the Line of Control (LOC) separating Indian and Pakistani-controlled Kashmir, and those stationed in the primary tourist destinations in the Kashmir Valley: Srinagar, Gulmarg, and Pahalgam.

Since 1989, as many as 60,000 people (terrorists, security forces, and civilians) have been killed in the Kashmir conflict. Many terrorist incidents take place in the state's summer capital of Srinagar, but the majority of attacks occur in rural areas. Foreigners are particularly visible, vulnerable, and definitely at risk. In the summer of 2008, serious communal violence left the state mostly paralyzed, due to massive strikes and business shut downs. In addition, there have been attacks specifically targeted at civilians. For example: in October 2007 five soldiers and two civilians were killed in an IED blast carried out by militants in the Baramulla district of Kashmir; in August 2007 terrorists lobbed a grenade at the venue of an Independence Day function in the Bandipora district; in July 2007 a blast on an out-of-state tourist bus killed six and injured 20 civilians in the capital, Srinagar. The Indian government prohibits foreign tourists from visiting certain areas along the LOC (see the section on Restricted Areas, below). U.S. Government employees are prohibited from traveling to the state of Jammu & Kashmir (except for Ladakh) without permission, which is only granted in exceptional circumstances, from the U.S. Embassy in New Delhi. When traveling to Kashmir, U.S. official travelers attempt to lower their profiles, limit their lengths of stay, and exercise extreme caution.

*Country Specific Information-India, U.S. Department of State, dated September 30, 2008.*

Moreover, in the Country Report on Human Rights Practices-India, the following is stated, in pertinent part, regarding abuses against the Kashmiris:

Serious internal conflicts affected the state of Jammu and Kashmir, as well as several states in the north and east.

Separatist guerrillas and terrorists in Kashmir, the northeast, and the Naxalite belt committed numerous serious abuses, including killing armed forces personnel, police, government officials, judges, and civilians. Insurgents also engaged in widespread torture, rape, beheadings, kidnapping, and extortion.

Although government complicity was not always confirmed and numbers of those disappeared varied widely, numerous persons disappeared in insurgency-torn areas during the year. Additionally, insurgents in Jammu and Kashmir and the northeastern states continued to use kidnappings to terrorize the population, obtain the release of detained comrades, and extort funds.

Muslims in some Hindu-dominated areas continued to experience intimidation and reported a lack of government protection, resulting in their inability to work, reside, or send their children to school. In some areas, primarily in Gujarat, Hindutva groups displayed signs stating "Hindus only" and "Muslim-free area." Hindutva is the ideology that espouses politicized inculcation of Hindu religious and cultural norms above other religious norms. There were also allegations of prohibitions on the Muslim call to prayer.

*Country Reports on Human Rights Practices-India, Bureau of Democracy, Human Rights, and Labor, released March 11, 2008.*

Extensive documentation has been provided by counsel to support the assertions made above with respect to the problematic country conditions in India. As such, based on the documented problematic country conditions and security concerns for U.S. citizens residing in India, the religious and social turmoil, the financial hardship due to the applicant's status as a Kashmiri, and the applicant's and his family's past traumatic experiences in India and their effect on their child, the AAO concludes that the applicant's U.S. citizen child would experience exceptional hardship were he to accompany the applicant to India for a two-year period. The hardship the applicant's U.S. citizen child would encounter were he to relocate to India for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year foreign residency requirement.

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 resides in India. The applicant asserts that it would be impossible for the applicant's child to remain in the United States for two years while the applicant returned to India because no one would be available to care for his child. As stated by the applicant:

My wife and I have one American born infant son ( [REDACTED]—25 months old—born March 17, 2005) Since my wife is an Indian citizen and currently on J2 visa, she would be required to return to India with me should I be required to fulfill the two-year home residency requirement;

In view of the very young age of our child, he is completely dependent on us, and it would simply be impossible for him to support or take care of himself in the U.S. without us. The hardships he would face in the U.S. by himself would be extraordinary and unthinkable....

*Supra* at 3.

As the record indicates, both the applicant and his wife are J visa holders subject to the two-year foreign residency requirement. Such a requirement would leave their 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 India and in the alternative, were he to remain in the United States without the applicant, for the requisite two-year term. 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.