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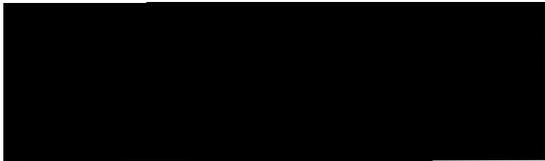
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE:



Office: SALT LAKE CITY, UT

Date:

SEP 18 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 Field Office Director, Salt Lake City, Utah, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Field Office 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 citizen of Russia who obtained J-1 nonimmigrant exchange status in 1993 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 child, born in August 2000, would suffer exceptional hardship if she moved to Russia temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Russia.

The field office director determined that the applicant failed to establish that her U.S. citizen child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Russia. *Field Office Director's Decision*, dated November 7, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits the following, *inter alia*: a brief, dated November 30, 2007¹; a letter from the applicant, dated November 19, 2007; additional documentation regarding country conditions in Russia; two AAO decisions; copies of cases referenced in counsel's brief; and a copy of an article regarding hardship waivers. 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

¹ Counsel asserts in his brief that the Field Office Director's Decision referenced an incorrect Alien number for the applicant. Based on a review of the record, the applicant's A files have been consolidated. As such, the correct Alien number for the applicant is [REDACTED], as referenced in the Field Director's Decision and in the instant decision.

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

With modern extreme anti-American propaganda in Russia on all levels from Russian President to regular people the hardship to my daughter Katherine will be more than exceptional, it will be dramatic. She didn't deserve any hate, because she is an American. Russia continues to oppose any US initiative against terrorist states like Iran, its President meets with leaders of US enemy countries and terrorist groups like Hamas. US Department of States continues to warn Americans against travel to different areas in Russia.

I'm terrified to go to Russia, because KGB is running this country now, more than 75% of top country officials, including president Putin have KGB past. I left this country 17 years ago, when it still was USSR. I'm afraid of persecution now, because I'm well aware of the mentality and methods of this people. They will raise a question why I came back after 17 years, with my daughter who is an US citizen.... Is it because United States recruited me to spy? This will be very suspicious to their criminal minds. What hardship can be more exceptional to my daughter as persecution of her father by KGB?

...I got a clear notice from Russian Authority in charge of postgraduate medical specialization that I can't practice in Russia. I left USSR, and now it is a different country, I never practiced there and have no connection to Russian medical system. To be able to practice, I'll have to go through at least 2 years of training and then be eligible to apply for license. It will put exceptional hardship to my daughter to have an unemployed parent....

The social and cultural environment in Russia is really terrible. Alcoholism, epidemic spread of AIDS and tuberculosis, children abuses—this is just the short list of shocking reality she will face.... she [the applicant's child] is a 2nd grade student at Butler Elementary School. She has never been outside the United States, and now you are pushing her out to hostile country, where she has to go to local school with totally different curriculum without knowing how to read, write and speak....

Letter from A [REDACTED] M.D., Ph.D., dated November 19, 2007

As the applicant's spouse further details:

... We do not **have a place** to live in Russia. Without a place to live, it is impossible to get local registration. [redacted] [the applicant's] parents have a two-bedroom apartment, and we would have to stay with them in order to get registered. There would be five people in a two-bedroom apartment. Our parents are elderly and need their quiet. For [redacted] [the applicant's child], it would be shocking to live in such conditions. My mother lives in a small student and would not be able to help with accommodation and registration.

We have been outside of Russia for many years and do not have medical insurance. Therefore, [redacted] would not be able to get medial help if necessary. The healthcare in Russia is **horrible**. From my own experience, I can tell you that local hospitals are short of basic supplies. For example, patients are asked to bring their own exam gloves when they go to see a gynecologist. My friend's father had back surgery recently, and he was asked to bring his own pain medication and dressing materials. Doctors are not well qualified and the medical system allows it. More than ten years ago, I went to see a doctor because my menstrual cycle was a few months late. I was told I had an ovarian dysfunction and was placed on antibiotics and intrauterine injections. I woke up one night with severe bleeding and had a miscarriage. It was a baby boy. I did not know I was around four months pregnant and nobody checked to find out. Instead, I was prescribed with a poisonous therapy that killed an unborn baby and almost killed me.

For the last four years, [redacted] has been attending American schools.... She does not understand Russian well and can barely speak it. She is a U.S. citizen and all her friends are Americans. English is her language, and she can already read and write. In Russia, [redacted] would have to go to a local school and deal with the Russian education system. She speaks very primitive Russian and would be unable to keep up with the academic program....

It is very difficult to find a job in Russia, especially when you are 46 years old like me and do not have valuable qualifications. The company I worked for in Russia went bankrupt. I could probably sell something in the market, but [redacted] **would be left without supervision**. This would be very dangerous for her because of the criminal environment in Russia.... Andrei would not be able to practice in Russia because he does not have a medical license and registration. We would be unable to provide basic needs for our daughter.

Life in Russia is a life of constant fear: fear of being killed by terrorists, fear of being taken hostage, and fear of being kidnapped for ransom, especially if people know that you came from the United States. Our daughter would be the easiest target. Russia is now moving to its darkest past. Having a KGB officer as a president and his former secret service co-workers eliminates the last signs of democracy we all hoped for when the Communist regime collapsed....

Counsel has provided extensive documentation to corroborate the statements made by the applicant and his spouse regarding conditions in Russia. In addition, the U.S. Department of State, in its Country Specific Information-Russian Federation, states the following regarding Russia's problematic country conditions:

Due to continued civil and political unrest throughout much of the Caucasus region, the Department of State continues to warn U.S. citizens against travel to Chechnya and all areas that border it: North Ossetia, Ingushetia, Dagestan, Stavropol, Karachayevo-Cherkessiya, and Kabardino-Balkariya. The U.S. Government's ability to assist Americans who travel to the northern Caucasus is extremely limited. Throughout the region, local criminal gangs have kidnapped foreigners, including Americans, for ransom. U.S. citizens have disappeared in Chechnya and remain missing. Close contacts with the local population do not guarantee safety. There have been several kidnappings of foreigners and Russians working for media and non-governmental organizations in the region. Due to the ongoing security concerns, U.S. Government travel to the area is very limited. American citizens residing in these areas should depart immediately as the safety of Americans and other foreigners cannot be effectively guaranteed.

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.

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. For further information, please consult the CDC's Travel Notice on TB at <http://wwwn.cdc.gov/travel/yellowBookCh4-TB.aspx>.

Rates of HIV infection have risen markedly in recent years. While most prevalent among intravenous drug users, prostitutes, and their clients, the HIV/AIDS rate in the general population is increasing. Reported cases of syphilis are much higher than in the United States, and some sources suggest that gonorrhea and chlamydia are also more prevalent than in Western Europe or the United States. Travelers should be aware of the related health and legal risks.

Country Specific Information-Russia, U.S. Department of State, dated June 20, 2008.

Based on the documentation provided, the AAO finds that the hardship the applicant's U.S. citizen child would encounter were she 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 foreign residency requirement. The record establishes the turmoil and safety concerns with respect to being a U.S. citizen residing in Russia. Moreover, the record establishes that the applicant's child would suffer financial hardship due to the troublesome economic conditions in Russia. Furthermore, the record indicates that the applicant's child is integrated into the U.S. lifestyle and educational system. She has never lived outside the United States and does 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 child at this stage of her education and social development and relocate her to a Russian-only environment would be a significant disruption that would constitute exceptional hardship. As such, based

on a totality of the circumstances, the AAO finds that the applicant's U.S. citizen child would encounter exceptional hardship were she to relocate to Russia.

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

Fulfilling my J-1 foreign residence requirement would force my wife, daughter, and me to travel together to Russia for two years. My wife would have to come with me, because she has no independent legal status in the United States. [redacted] [the applicant's child] would also have to come with me, because we have no relatives in the United States who could care for her in this country....

Affidavit of [redacted] M.D., dated June 3, 2006.

As the record indicates, the applicant is subject to the two-year home residency requirement based on section 212(e) of the Act and his spouse has no legal authorization to remain in the United States at this time, as her B-1 nonimmigrant visa expired in January 24, 1999. As such, the AAO concludes that the applicant's foreign-residency requirement would leave a young child in the United States without her parents. This situation would clearly constitute exceptional hardship to the applicant's child if she remained in the United States.

The AAO finds that the applicant has established that his U.S. citizen child would experience exceptional hardship were she to relocate to Russia and in the alternative, were she 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 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 field office director so that he 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 field office director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.