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U.S. Citizenship and Immigration Services

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NOV 23 2004

[redacted]

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

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of 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:

[redacted]

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, Director
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 appeal will be sustained and the matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, Waiver Review Division, U.S. State Department Visa Office (WRD).

The applicant is a native of the Russian Federation, Republic of Chechnya (Chechnya), who 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). The record reflects that the applicant was admitted into the United States on August 13, 1995, as a J1 nonimmigrant educational exchange visitor, pursuant to section 101(a)(15)(J) of the Act, 8 U.S.C. § 1101(a)(15)(J). The applicant's J1 status ended on June 30, 1996, and she obtained an F-1 student visa, which ended when she graduated from college in 1998. The record reflects that the applicant applied for asylum in the United States in August 1998. Her asylum application was referred to an immigration judge in September 1998. The applicant's asylum claim was subsequently denied by an immigration judge on May 26, 2004. The record reflects that the applicant married a U.S. citizen on August 25, 2001, and she and her husband have a U.S. citizen child, born April 17, 2003. The applicant presently seeks a waiver of her section 212(e) two-year foreign residence requirement, based on the claim that her husband and child will suffer exceptional hardship if they remain in the United States and she returns temporarily to Chechnya.

The director concluded that the applicant's husband and child would suffer exceptional hardship if they accompanied the applicant to her country. However, the director determined that the applicant had failed to establish that her husband and child would suffer exceptional hardship if they remained in the U.S. while the applicant fulfilled her two-year foreign residence obligation. The application was denied accordingly.

Counsel asserts on appeal that the director's decision did not address current country conditions in the applicant's country of origin, Chechnya. Counsel asserts the evidence establishes that Chechnya is a war-torn and unsafe place, and that although the Republic of Chechnya is part of the Russian Federation, the applicant would be unable to return to, or resettle in any other part of the Russian Federation. Counsel asserts further that the director's decision failed to assess the emotional and financial effect the applicant's return to Chechnya would have on her husband, who suffers from depression, and her infant child.

Section 212(e) of the Act states in pertinent part that:

> (e) 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 . . . shall be eligible to apply for an immigrant visa, or for permanent residence . . . 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 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 . . . 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 *Keh Tong Chen v. Attorney General of the U.S.,* 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

> Courts deciding 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).

In *Huck v. Attorney General of the U.S.,* 676 F. Supp. 10 (D.D.C. 1987) the U.S. District Court, District of Columbia stated that:

> Courts have recognized that the "exceptional hardship" standard must be stringently construed lest the waiver exception swallow the salutary two-year residence rule . . . . Forceful application of the standard also guards against attempts by applicants to manufacture hardship in order to come within its terms. (Citations omitted).

The U.S. District Court stated further that the Immigration and Naturalization Service (Service, now U.S. Citizenship and Immigration Services, CIS) must consider the totality of circumstances when making a 212(e) waiver exceptional hardship determination. *Id.* (citing *Slyper v. Attorney General,* 576 F.Supp. 559, 560 (D.D.C. 1983) and *Ramos v. INS,* 695 F.2d 181, 189 (5th Cir. 1983)).

The AAO finds that the totality of evidence in the record demonstrates that the applicant's compliance with her J1 visa, foreign residence requirement would cause her husband and child to suffer a degree of hardship that is greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad.

The record contains several news articles and reports discussing conditions in Chechnya, including the 2003 U.S. Department of State, Country Reports of Human Rights Practices, Russia (DOS Report). The DOS Report states that the Russian government's:

> [R]ecord remained poor in the continuing struggle with separatists in Chechnya, where federal security forces demonstrated little respect for basic human rights. There were credible reports of serious violations, including numerous reports of unlawful killings, and of abuse of civilians by both the Government and Chechen fighters in the Chechen conflict."

See DOS Report, exhibit H at page 89. The DOS Report states further that "[t]here also were credible reports that the armed forces used indiscriminate force at various times in the Chechen conflict in areas with significant civilian populations, resulting in numerous deaths." *Id.* at 90. In addition, the DOS Report states that:

> [C]hechen rebel fighters also committed serious human rights abuses. According to various reports, they killed civilians who would not assist them, used civilians as human shields, forced civilians to build fortifications, and prevented refugees from fleeing Chechnya . . . . During the year, Chechen rebels carried out several bombings, and terrorist acts, including suicide bombings, increased.

Id. at 103-104. The DOS Report states further that the Chechen conflict has resulted in widespread civilian casualties, massive destruction of property and infrastructure and the displacement of hundreds of thousands of persons. *Id.* at 101.

In addition to the DOS Report, the record contains a Freedom House, "Special Report to the 59th Session of the United Nations Commission on Human Rights, Geneva, 2003", excerpt from the "Freedom in the World 2003" Annual Report (Freedom Report) stating in part that:

> More than 100,000 Chechen refugees continue to seek shelter in the neighboring republic of Ingushetia, often living in appalling conditions in tent camps, in abandoned buildings, or in cramped quarters with friends or relatives. Despite assurances from the Russian government that refugees will not be forcibly returned, Human Rights Watch reported that migration officials were placing enormous pressure on displaced persons to leave in late 2002.

See Freedom Report, exhibit H at 81. The Freedom Report states further that:

> Travel both within and to and from the republic is severely restricted. After the resumption of war, the Russian military failed to provide safe exit routes for many

> civilians out of the conflict zones. Bribes are usually required to pass the numerous military checkpoints.

Id. at 81. The AAO notes that the DOS Report states that, "[t]here were credible reports that security forces regularly continued to single out persons from the Caucasus for document checks, detention, and the extortion of bribes." *See* DOS Report, exhibit H at 95. The record also contains an article on the use of "propiskas" (residency stamps) in the Russian Federation. The article indicates that although the "propiska" was officially abolished in 1991, it is often difficult for groups including refugees, asylum-seekers, or anyone who happens not to look Slav, to migrate or register to live in many parts of the Russian Federation. *See* Exhibit H at 87.

In addition to the country condition evidence contained in the record, the AAO notes that the record contains a letter from stating her conclusion that the applicant's husband meets diagnostic criteria for Dysthymia and Major Depressive Disorder based on a session with him on February 29, 2003, and his report to her of a long history of depression. The record also contains general medical articles about the effect in babies of emotional separation and attachments to parents, and a letter from the applicant's son's pediatrician stating the opinion that a long separation of the family would be disruptive and possibly harmful to the applicant's child.

The AAO finds that for purposes of the present decision, it is unnecessary to assess whether the medical letters and documentation submitted by the applicant, prove the applicant's husband and son are prone to suffering an increased level of emotional hardship due to medical or psychological conditions. Rather, the AAO finds that in the present case, the country condition evidence alone establishes that the applicant would face great difficulty in being able to return to a place other than Chechnya if she returned to the Russian Federation. The evidence establishes further that the applicant would face a high risk of being harmed if she returned to Chechnya for two years in order to comply with section 212(e) foreign residence requirements. The AAO finds that the applicant has established Chechnya is a war-torn and unsafe country. The AAO finds further that the applicant has established that her return to Chechnya would cause her husband and child to suffer a degree of hardship that is greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad. Accordingly, the applicant has established that her husband and child would suffer exceptional hardship if she returned to Chechnya to fulfill her two-year foreign residence requirement.

Regardless of the above exceptional hardship determination, however, the AAO notes that a waiver under section 212(e) of the Act may not be approved by U.S. Citizenship and Immigration Services (CIS) without the favorable recommendation of the Waiver Review Division (WRD), U.S. State Department Visa Office (WRD). Accordingly, this matter will be remanded to the director for request of a WRD recommendation under 22 C.F.R. § 514. If the WRD recommends that the application be approved, the application must be approved. If, however, the WRD recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.