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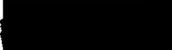
U.S. Citizenship  
and Immigration  
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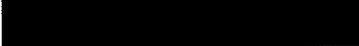
**PUBLIC COPY**

*HB*

MAR 23 2005

FILE: 

Office: NEBRASKA SERVICE CENTER Date:

IN RE: 

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:



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, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of India. He was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on November 2, 2000 to receive hotel management training. The applicant 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 married [REDACTED] a United States citizen (USC), on March 13, 2002, and that they have a daughter [REDACTED] who was born on November 30, 2002. Ms. [REDACTED] has a son from a previous marriage. The applicant seeks a waiver of his two-year residence requirement in India, based on the claim that his daughter will experience exceptional hardship if she is separated from the applicant.

The Director concluded that the circumstances of a two-year separation of the family with accompanying anxiety, loneliness and altered financial circumstances are the hardships to be anticipated by compliance with the two-year residence requirement, not exceptional hardships. The application was denied accordingly. *Decision of the Director, Nebraska Service Center, Lincoln, Nebraska, dated February 12, 2004.*

In August, 2004 the applicant and Ms. [REDACTED] separated. The record contains no evidence that they have filed for divorce. The applicant alleges that Ms. [REDACTED] abused him. The record contains an October 8, 2004 Temporary Order and Temporary Parenting Plan (TPP) from the Superior Court of Washington, Grant County. The basic terms of the TPP are as follows. The applicant and M [REDACTED] have joint custody of [REDACTED] lives with the applicant on weekdays and Ms. [REDACTED] on weekends. The applicant and Ms. [REDACTED] will jointly make major decisions regarding [REDACTED] Ms. [REDACTED] not allowed to remove [REDACTED] from the state of Washington. If the applicant intends to move, he must provide proper notice to every person entitled to court ordered time with [REDACTED] A person entitled to court ordered time with [REDACTED] can file an objection to the relocation.

In December 2004 the applicant, as a Self-Petitioning Spouse of an Abusive USC, filed an I-360 Petition for Amerasian, Widower, or Special Immigrant. The applicant simultaneously filed an I-485 Application to Adjust to Permanent Resident Status.

On appeal, counsel originally contended that the denial of the waiver would cause exceptional hardship to Ms. [REDACTED] and the applicant's stepson. After the applicant and Ms. [REDACTED] separated, counsel submitted a supplemental brief that limits the hardship claim to [REDACTED] In support of the updated appeal, counsel submitted the aforementioned supplemental brief; the Temporary Order and TPP from the Washington Court; the applicant's statement; and filing receipts for the I-360 and I-485. The entire record was 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 at 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 the Immigration and Naturalization [now, the Director of 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, "[E]ven 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)."

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.)

At the outset, the AAO notes that given the provisions of the TPP, the applicant cannot realistically be expected to take [REDACTED] to India for two years. Under the TPP, anyone who is entitled to court ordered time with [REDACTED] can object to moving her. The applicant and Ms. [REDACTED] separated under apparently strained circumstances. It appears unlikely that Ms. [REDACTED] would agree to allow [REDACTED] to move to India with the applicant for two years. Accordingly, the AAO will not address the potential hardship to [REDACTED] if she accompanies the applicant to India.

Next examined is the potential hardship to [REDACTED] if she remains in the United States while the applicant lives in India for two years. Counsel asserts that because the Washington court found it to be in the best interests of the child to reside primarily with her father, separating [REDACTED] from the applicant will cause her to experience exceptional hardship. Counsel maintains that this separation would deprive [REDACTED] of the affection, emotional security and direction of her father, which are critical during her formative years.

The applicant alleges that M. [REDACTED] abused him. Aside from the applicant's statement, the record contains no other evidence addressing the alleged abuse. The TPP provides for joint custody [REDACTED] and makes no reference to the suitability of either parent. Counsel has not established that Ms. [REDACTED] cannot adequately care for [REDACTED] during the two years the applicant would live in India.

Aaliyah will experience some hardship because of the two-year separation; however, counsel has presented no evidence to establish that the effects go beyond those normally associated with such a separation.

The AAO finds that the evidence in the record fails to establish that the applicant's daughter would experience exceptional hardship if she remained in the United States while the applicant returned temporarily to India.

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 not met her burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.