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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 29 2006

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:

[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, 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 appeal will be sustained and 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 (WRD).

The record reflects that the applicant is a native and citizen of Russia 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 applicant was admitted to the United States as a J1 nonimmigrant exchange visitor on August 14, 2000. The applicant is married to a U.S. citizen and has a U.S. citizen child. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse and child.

The director determined that the applicant failed to establish exceptional hardship to her spouse or child if she fulfilled the two-year foreign residence requirement in Russia. *Decision of the Director*, dated March 24, 2006. The application was denied accordingly.

On appeal, counsel asserts that applicant's spouse and child will suffer exceptional hardship if she is denied admission into the United States. *Brief in Support of Appeal*, at 3, dated April 24, 2006.

The record contains, but is not limited to, counsel's brief, information on conditions in Russia and the applicant's spouse's statement. The entire record was considered in rendering this decision.

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
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> > (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 [now the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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 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 (BIA) 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 demonstrate that the applicant's spouse or child would suffer exceptional hardship upon relocation to Russia for two years. Hardship to the applicant's daughter will be addressed first. The record reflects that the applicant's spouse is currently incarcerated and his daughter visits him. *Applicant's Spouse's Statement*, at 1, dated April 9, 2006. Therefore, the applicant's daughter will not

be able to visit her father if she relocates to Russia. Counsel states that the applicant's daughter has never been to Russia and cannot speak, read or write the Russian language. *Brief in Support of Appeal*, at 9. Counsel states that the applicant's daughter has been completely integrated into the American lifestyle and cites *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001), in which the 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. *See id.* The AAO notes that the applicant's daughter is only four years old, therefore, *Matter of Kao and Lin* is not directly applicable to her and will only be given weight relative to the applicant's daughter's age.

Counsel asserts that there is no provision to provide English language instruction in the Russian school system and the applicant is having extreme difficulty in acquiring a Russian passport for her child, which is necessary for travel to Russia, medical treatment and educational enrollment. *Id.* at 10. The AAO notes that there is no substantiating evidence of these assertions.

The record reflects that the applicant's daughter is one-half African-American. Counsel states that the applicant would relocate to an area with no African-American population and there is societal discrimination against dark-skinned persons. *Id.* at 10. The record indicates that approximately one-thousand African students in Moscow were routinely subjected to assaults and abuse. *Department of State Country Reports on Human Rights Practice in Russia*, at 38, dated February 28, 2005. The report states that an informal study of Africans indicates that nearly two-thirds reported being attacked in Moscow due to their race and fifty-four percent were verbally insulted by police because of their race. *Id.* The report also details many other instances of discrimination and abuse in different Russian cities. Although the applicant's daughter will not be residing in Moscow, the report renders it plausible that she will be subject to problems based on her race. These problems would be particularly difficult to deal with based on her age.

Counsel states it is questionable whether the applicant would be able to obtain any gainful employment in Russia. *Brief in Support of Appeal*, at 10. However, there is no indication that she suffered financial hardship before entering the United States, therefore, it does not appear that she, and subsequently her daughter, would face financial hardship. Counsel also references the economic, political and social problems in Russia. *Id.* at 17-18. The record reflects that in general, the country conditions are less favorable than they are in the United States.

Considering the applicant's daughter's inability to visit her father, language and cultural issues, lower general country standards and in particular, discrimination issues, the AAO finds she would suffer exceptional hardship upon relocation to Russia for two years.

The second step required to obtain a waiver is to demonstrate that the applicant's spouse or child would suffer exceptional hardship upon residing in the United States during the two-year period. The applicant's daughter would not have a parent to care for her if she remained in the United States due to her father's incarceration. By default, remaining in the United States without the applicant constitutes exceptional hardship for the applicant's daughter.

As the AAO has found exceptional hardship to the applicant's daughter, there is no need to address the applicant's spouse's hardship case.

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 her 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 WRD. Accordingly, this matter will be remanded to the director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD 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 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.