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U.S. Citizenship
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FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

FEB 29 2008

IN RE:

[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, Chief
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 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 former citizen of Belarus 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 in J-1 nonimmigrant exchange status in 1995 while a citizen of Belarus. The applicant's daughter is a U.S. citizen and the applicant seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to his daughter. The applicant also seeks a waiver of the two-year foreign residence requirement based on political persecution. The AAO notes that the applicant has spent time in Belarus since his last entry on a J-1 visa. Therefore, this time would be deducted from the two-year foreign residence requirement.

The director found that the applicant failed to establish that his daughter would suffer exceptional hardship or that he would be subject to persecution if he returned to Belarus. *Director's Decision*, dated January 31, 2007. The applicant's waiver application was denied accordingly.

On appeal, counsel asserts that the director improperly dismissed the affidavits and medical evidence presented, improperly required proof of incarceration, and made other improper findings. *Form I-290B*, received March 5, 2007.

The record includes, but is not limited to, counsel's brief, an expert affidavit, the applicant's court record, the applicant's medical records, supporting affidavits, the applicant's notice to appear in court, a newspaper article on the applicant and country conditions information on Belarus. 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
 - (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 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*. (Quotations and citations omitted).

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).

In regard to the applicant's persecution claim, counsel states that the applicant returned to Belarus in 2005, gave money to political opponents, and was arrested, beaten and jailed. *Brief in Support of Appeal*, at 2. The record includes a court judgment which states that the applicant distributed illegal printed materials, 234 leaflets were discovered in his possession, the leaflets had anti-state contents and insulted the honor and dignity of the Belarusian president, a sergeant and senior sergeant testified against the applicant, and he was sentenced to five days in the city detention center. *Belarus Court Decision*, dated August 2, 2005. The record also includes a court notice to appear on August 20, 2005 regarding an administrative offense. *Notice to Appear*, undated. The record includes a newspaper article which states, in pertinent part, that:

came back to his native country from the USA, he tells us, "to do everything that is possible to bring back freedom and democracy to Belarus." His active political involvement resulted in a beating by a group of unknown people in civil clothes at the entrance to s house. Young men...started beating him saying: "Haven't we warned you that if you continue with the BPF (Belarusian Popular Front), we'll destroy you...Time has come..." managed to escape with a brain concussion and heavy bruising...Secret service hasn't stopped at that. KGB agents harassed other opposition activists, too. *Article from [redacted] titled '[redacted]*, dated July 2005.

On July 6, 2005, the applicant was admitted to the emergency room at the 2nd City Hospital in Minsk. *Applicant's Medical Records*, dated July 6, 2005. He was diagnosed with multiple wounds from a beating, contusions of the face and chest, hematomas over his body and a moderate brain concussion. *Id.* A former classmate of the applicant states that the applicant actively participated in opposition activities, that soon after his June 2005 return he was brutally beaten by the police or KGB agents that work for Belarus President Lukashenko and that he was subsequently arrested for distributing illegal anti-Lukashenko literature. *Letter from [redacted] dated March 2, 2007.* A friend of the applicant states that the applicant's family has always been politically active, the police often visited them because of their political activities, they were threatened and they are members of the Belarusian Popular Front. *Letter from [redacted] dated March 2007.*

A broadcaster from Radio Free Europe/Radio Liberty states that the applicant comes from a politically active family, his family became targets for abuse when Lukashenko came to power and he receives reports all the time that people like the applicant are persecuted upon returning to Belarus. *Letters from [redacted] dated October 10, 2006.* A Belarus expert states that the applicant will face persecution and likely face physical abuse if deported to Belarus; anyone returning from the United States after a prolonged stay will be suspected of being a spy; the Belarusian government is known to selectively target threatening political opponents; the applicant's failure to appear for his court hearing would likely be known by Belarusian border inspectors and the MVD and/or the KGB, or he will come to the attention of the authorities when he resumes living there; the applicant would be arrested upon return to Belarus for failing to respond to the summons and placed in detention; he will be interrogated about his background, life in the United States and opposition work; and torture by the Belarusian authorities is pervasive and he expects that the applicant will face such methods in custody. *Affidavit of [redacted]*, at 4-6. The record reflects that the Belarusian

government has a poor human rights record and it has detained citizens for political reasons, imprisoned citizens for criticizing officials, and abused and occasionally tortured prisoners and detainees. *U.S. Department of State, Country Reports on Human Rights Practices, Belarus*, at 1, dated March 8, 2006. Based on the record, the AAO finds that the applicant would face persecution based on his political opinion.

In regard to the applicant's hardship claim, the first step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to Belarus for two years. The applicant's psychologist states that the applicant's daughter only speaks English, she would not have adequate language capability to be in school in Belarus, she would be unable to interact easily with her peers and she suffers from attention deficit hyperactivity disorder. *Psychological Evaluation*, at 3, dated December 3, 2007. Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter is based on a single interview between the applicant's spouse and the psychologist. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's child or any history of treatment for the alleged disorder suffered by the applicant's child. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of exceptional hardship.

The record reflects that medical care in Belarus is limited and there is a severe shortage of basic medical supplies. *U.S. Department of State, Consular Information Sheet, Belarus*, at 3, dated October 20, 2006. The AAO notes that the applicant's daughter is a derivative in relation to the applicant's persecution claim. It is plausible that the applicant's daughter would face hardship based on the applicant being persecuted. As such, the AAO finds that the applicant has established that his daughter would suffer exceptional hardship upon relocation to Belarus.

The second step required to obtain a waiver is to demonstrate that the applicant's daughter would suffer exceptional hardship if she remained in the United States during the two-year period. As the applicant's spouse's legal status is based on the applicant's legal status, both of them would have to depart the United States. This would leave their four-year old daughter in the United States without her parents. By default, this situation would constitute exceptional hardship to their daughter if she remained in the United States.

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 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.