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

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2008

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 matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The record reflects that the applicant is a citizen of the West Bank (now part of the Occupied Territories). The applicant was admitted to the United States in J1 nonimmigrant exchange status in August 1997. Since the applicant received government funding as a J1 exchange visitor, he 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).[1] The applicant presently seeks a waiver of his two-year residence requirement, based on the claim that his U.S. citizen child, born in April 2006, would suffer exceptional hardship if she moved to the West Bank or Israel[2] 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 the West Bank.

The director determined that the applicant failed to establish that his child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in the West Bank. *Director's Decision*, dated March 21, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated May 3, 2007; copies of the applicant's and his spouse's J visas, identity cards, and most recent passports; a copy of the applicant's marriage certificate; a copy of the applicant's child's U.S. birth certificate; and numerous articles about country conditions and human rights practices with respect to Israel and the Occupied Territories. The entire record was reviewed and 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, 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

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[1] The record indicates that the applicant's spouse entered the United States as a J2 in July 1998, based on her derivative status as a spouse of the applicant, a J1 visa holder. As such, the applicant's spouse is also subject to the two-year home residency requirement.

[2] The record indicates that the applicant's spouse is a permanent resident of Israel.

> (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."

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 child would experience exceptional hardship if she resided in the West Bank or Israel for two years. To support this contention, the applicant states the following:

> ... I was born in the city of Jayyous in the West Bank...My wife was born in East Jerusalem, Israel...We are both Palestinian...My J-1 status and my wife's J-2 status will expire on December 15, 2006...If my wife and I are forced to return to Israel and the Occupied Territories, my daughter would face exceptional hardship because our family would be forced to separate. My wife and I would be unable to keep our family together due to the fact that we are considered to be residents of different territories. Because I was born in the West Bank, I am a resident of the Occupied Territories and I carry a passport issued by the Palestinian Authority. I am not considered a resident of Israel. Although my wife was born in Israel, she is not a citizen of Israel either...she only holds permanent resident status in Israel.
>
> Because I am a Palestinian from the West Bank and my wife is a Palestinian from Israel, she and I will not be able to reside in Israel together. Israeli law prohibits Palestinians from the Occupied Territories from being granted residency or citizenship in Israel despite being married to Israeli citizens or permanent residents...my family will be forced to split up. I will have to live in the West Bank while my wife lives in Israel. Our daughter would certainly be negatively affected by not having the benefit of living with both of her parents.
>
> ...my daughter would face exceptional hardship by living in either Israel or the Occupied Territories because the constant hostility between Israelis and Palestinians has caused a very volatile atmosphere and dangerous environment to emerge in both areas...
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> Living in Israel, my daughter would also face discrimination due to her Palestinian heritage and Muslim religion. The government of Israel routinely discriminates against Arabs...

Additionally, even if we decided that it would be better for my daughter to live with my wife in Israel rather than with me in the West Bank, it is unclear whether my daughter would actually be permitted to reside in Israel with my wife...If a child is born outside of Israel, the resident must apply for family unification in order for the child to be granted residency...Family unification is extremely hard to obtain and it may take years before a decision is reached. Moreover, because I am from the West Bank, my daughter's application would be regarded with additional scrutiny.

To make matters worse, it is unclear whether my wife's permanent resident status in Israel is valid. According to Israeli law, if a permanent resident leaves Israel and settles in a foreign country, his or her status expires. A permanent resident is considered to have settled in foreign country if he or she lived there for more than seven years...Since my wife has lived in the United States for eight years and has not traveled to Israel for six years, her permanent resident status can be revoked at any time.

If my wife's permanent resident status is revoked, she will be effectively stateless. She would not be able to reside in Israel because she would no longer be considered a permanent resident of Israel. Furthermore, she would not be able to reside in the Occupied Territories. She has never lived in the Occupied Territories and has no identification issued by the Palestinian Authority...

...Cleary if my wife is rendered stateless my daughter would be negatively impacted. If my wife has custody of [redacted] while stateless, [redacted] will be forced to move from country to country and will lack any stability in her life. If I have custody of [redacted] while my wife is stateless, it will be impossible to determine when [redacted] will have the opportunity to visit her mother...

Living in the West Bank would also cause my daughter to suffer exceptional hardship. She would be forced to live in an environment replete with constant violence as well as a plethora of social problems...

Additionally, the possibilities of a serious health crisis looms in the Occupied Territories. According to the World Health Organization, lack of funding has caused the Palestinian Authority to be unable to effectively deliver healthcare services and maintain public health programs for Palestinians...Lack of freshwater, declining water quality, and insufficient sanitation and sewage systems are posing serious health threats...

Letter from [redacted], dated November 10, 2006.

Counsel contends that the applicant's child would have to live with either the applicant in the West Bank or the applicant's spouse in Israel. Counsel further contends that the applicant's spouse is likely unable to return to Israel as she has been living in the United States for many years and has presumably lost her permanent resident status in Israel, effectively making her stateless. The applicant's child would thus be required to relocate with her mother to a country that accepts those who are stateless, causing great uncertainty with respect to the applicant's child's well-being and future and her ability to see the applicant, or in the alternative, the applicant's child will have to reside with the applicant in the West Bank, a country with political and social turmoil.

The U.S. Department of State, in its Consular Information Sheet, dated May 9, 2007, states that for safety and security reasons, "...U.S. Government American personnel and dependents are prohibited from traveling to any cities, towns or settlements in the West Bank..." *U.S. Department of State Consular Information Sheet,* dated May 9, 2007.

Counsel has not established to the satisfaction of the AAO that the applicant's spouse would be unable to relocate to the Occupied Territories to reside with the applicant for the requisite two-year period, thereby ensuring that the family remains intact. Nevertheless, based on the U.S. Department of State's position on travel by Americans to the West Bank and the social and political turmoil in the West Bank that was documented by counsel, the AAO concludes that even if both the applicant and his spouse were able to reside together in the Occupied Territories for the requisite two-year period, exceptional hardship to the applicant's child would exist. As such, based on the concerns outlined above by the applicant and the documentation provided in support of the appeal, the AAO concludes that the applicant's child would face hardship beyond that normally expected of one facing relocation abroad based on the temporary relocation of a parent.

The second step required to obtain a waiver is to establish that the applicant's child would suffer exceptional hardship if she remained in the United States during the two-year period that the applicant and his spouse reside abroad. The applicant asserts that it would be impossible for the applicant's child to remain in the United States for two years while the applicant and his spouse relocated abroad for a two-year period because no one would be available to care for her child. As stated by the applicant,

> ...On August 14, 1997, I arrived in the United States with a J-1 visa in order to obtain a Doctorate Degree. My wife received a J-2 visa as my derivative beneficiary and came to the United States on July 8, 1998...My J-1 status and my wife's J-2 status will expire on December 15, 2006. Because I received a Fulbright scholarship from the United States government, my wife and I are subject to the J-1 two year home residency requirement...

Id. at 1.

As the record indicates, both the applicant and her husband are J visa holders subject to the two-year home residency requirement. Such a requirement would leave their young child in the United States without her parents. By default, this situation would 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 child would experience exceptional hardship were she to relocate to the West Bank 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 director so that she may request a DOS recommendation under 22 C.F.R. § 514. If the DOS recommends that the application be approved, the application must be approved. If, however, 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 Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.