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U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

H3

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 30 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.

Ellen C. Johnson

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 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 in J1 nonimmigrant exchange status on July 15, 2004. The applicant has a U.S. citizen spouse and 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 had failed to establish her spouse or child would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in Russia and the application was denied accordingly. *Director's Decision*, at 4, dated March 27, 2007.

On appeal, counsel asserts that applicant has established exceptional hardship to her qualifying relative and the decision is inconsistent with established law and Citizenship and Immigration Services (CIS) practice. *Form I-290B*, received April 24, 2007.

The record includes, but is not limited to, counsel's brief, information on Russia, statements from the applicant and her spouse, photographs of the applicant's family, a physician's letter for the applicant's daughter and financial documents for the applicant and her spouse. 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).

The first step required to obtain a waiver is to demonstrate that the applicant's spouse or child would experience exceptional hardship upon relocation to Russia for two years. The director found that the applicant had established this prong of the analysis for both the applicant's spouse and child. *Director's Decision*, at 3. The record reflects that the applicant's spouse was resettled as a refugee in the United States. As such, the AAO finds that the applicant's spouse would experience exceptional hardship upon relocation to Russia for two years.

In regard to the applicant's twenty-two month old daughter, she would be separated from her father for two years, as he would not be able to return to Russia. The applicant's spouse states that his daughter has been diagnosed with gastroesophageal reflux (heartburn), she takes medicine three times a day and she has been diagnosed with urachus. *Applicant's Spouse's Statement*, at 1, dated April 10, 2007. The applicant's child's physician states that her medical problems have improved with the appropriate treatment. *Letter from* [redacted] *M.D.*, at 1-2, dated April 4, 2007. The record reflects that appropriate treatment is difficult to find in Russia, quality medical care is expensive and usually requires payment at Western rates before treatment. *See Consular Information Sheet for the Russian Federation*, at 2, dated November 23, 2005. The country conditions information reflects that the overall medical situation for the applicant's daughter would be significantly more difficult than if she resided in the United States. Based on the record, the AAO finds that the applicant's daughter 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 remaining in the United States during the two-year period. The applicant's spouse states that his daughter has been diagnosed with gastroesophageal reflux (heartburn), she takes medicine three times a day, she has been diagnosed with urachus, the applicant is instrumental in caring for their daughter as he is at work and out of town for work, the applicant handles all of the medical paperwork, bills and claims, their daughter continues to wake up throughout the night crying and he would not be able to perform his software engineer job duties due to lack of sleep, he would not be able to travel on demand which is an essential part of his job, he would be forced to drop out of his Master's degree program, he cannot afford daycare and over-night babysitters, cannot rely upon his parents as they do not live near him and have medical problems, and the applicant would be in danger in Russia as she is married to a U.S. citizen and has a U.S. citizen child. *Applicant's Spouse's Statement*, at 1-4.

The applicant's child's physician states that her medical problems have improved with the appropriate treatment, but that she is a demanding baby and at times difficult to care for. *Letter from* [redacted] *M.D.*, at 1-2. The applicant states that her spouse does not have much in savings, he would be required to support two households and would experience severe financial hardship. *Applicant's Form I-612 Cover Letter*, at 3. The applicant's spouse details the discrimination that his family encountered in Russia, the murder of his grandfather and beating of his mother by skinheads in Russia, and his fear that the applicant and their child would be persecuted in Russia like he was. *Applicant's Spouse's I-601 Statement*, at 4, dated May 11, 2006.

Considering the totality of the circumstances, the AAO finds that the applicant's spouse and twenty-two month old child would face exceptional hardship if they remained in the United States without the applicant during the two-year period.

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.