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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: JUN 04 2008
(WAC 07 182 52760 relates)

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:

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 applicant is a native and citizen of Peru who obtained J-1 nonimmigrant exchange status in December 2000. She 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) based on the Exchange Visitor Skills List. The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse, and her U.S. citizen child born in April 2003, would suffer exceptional hardship if they moved to Peru temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Peru.

The director determined that the applicant failed to establish that her spouse and/or child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Peru. *Director's Decision*, dated September 12, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated October 11, 2007; a notarized letter from the applicant's spouse, dated October 10, 2007; an updated psychological examination, dated October 11, 2007; a list of the applicant and her spouse's income and expenses and copies of monthly bills; a letter from the applicant's spouse's employer, dated October 9, 2007; a letter from the applicant's spouse's school, dated October 4, 2007; a letter from the applicant and her family's church, dated September 19, 2007; letters from the applicant's child's school officials regarding the ramifications of separating a child from a parent; and a letter from the applicant's child's pediatrician, dated October 10, 2007. The entire record was reviewed and 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 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 U.S. citizen spouse and/or child would experience exceptional hardship if they resided in Peru for two years with the applicant. To support this contention, the applicant’s spouse states the following:

...my wife [the applicant] work very hard to support our household. At this time I am a student at Suffolk Community College and if I leave I will not be able to complete my degree....

...I think that just the thought of moving with her to Peru is impossible. I will not be able to obtain a job right away and provide for my family. The living conditions are not as the one in the United States. Much of the population lives in extreme poverty and the living conditions are crowded and unsanitary, we are not used to live like that. My daughter will not have the same medical nor educational benefits. They will see me and my daughter as immigrants or even as tourists. Lima is not safe.... I even have nightmares that my daughter would be kidnapped over there. I will not feel safe and more importantly, I do not want my daughter to grow up in this violent and dangerous environment....

Letter from [REDACTED] dated April 26, 2007.

The U.S. Department of State, in its Country Specific Information-Peru, states the following regarding country conditions, in pertinent part:

Of the approximately 260,000 Americans who visit Peru each year, a small but growing number have been victims of serious crimes. The information below is intended to raise awareness of the potential for crime and suggest measures visitors can take to avoid becoming a victim.

Violent crime, including carjacking, assault, and armed robbery is common in Lima and other large cities. Resistance to violent crime often provokes greater violence, while victims who do not resist usually do not suffer serious physical harm. "Express kidnappings," in which criminals kidnap victims and seek to obtain funds from their bank accounts via automatic teller machines, occur frequently. Thieves often smash car windows at traffic lights to grab jewelry, purses, backpacks, or other visible items from a car. This type of assault is very common on main roads leading to Lima's Jorge Chavez International Airport, specifically along De la Marina and Faucett Avenues and Via de Evitamiento, but it can occur anywhere in congested traffic, particularly in downtown Lima. Travelers are encouraged to put all belongings, including purses, in the trunk of a car or taxi. Passengers who hail taxis on the street have been assaulted.

Following the April 2007 armed robbery of a U.S. Embassy employee by a taxi driver, the Embassy's Regional Security Officer advised all Embassy personnel not to hail taxis on the street. It is safer to use telephone-dispatched radio taxis or car services associated with major hotels. Travelers should guard against the theft of luggage and other belongings, particularly U.S. passports, at the Lima airport.

The threat of street crime is greatest in areas that attract large crowds, particularly crowds of tourists or wealthy Peruvians. A crowd allows a thief (or thieves, since petty thieves often operate in a group) the opportunity to select and approach the potential victim without attracting attention.

Crime also occurs on roads, particularly at night and outside of urban areas. Clandestine, impromptu roadblocks can appear on even major highways, where bus and automobile passengers are robbed. The risk is even greater on rural roads after dark. A number of Americans have been robbed on the road between Tarapoto and Yuriguaymas in recent months. In addition, numerous Americans have reported the theft of passports, cameras, and other valuables on overnight bus rides, by thieves who take advantage of sleeping passengers.

Country Specific Information-Peru, U.S. Department of State, dated November 21, 2007.

It has not been established that the applicant and/or her spouse would be unable to obtain gainful employment in Peru. In addition, no documentation has been provided regarding the current economic situation in Peru, to substantiate the claims made by the applicant's spouse that he and his child will suffer exceptional financial hardship were they to reside in Peru. Moreover, the applicant has provided a letter documenting that the applicant's spouse will graduate in December 2008; it has not been established that a two-year relocation abroad would significantly impact his ability to graduate on time, shortly after returning from the United States, or while abroad, by making alternate arrangements with the college to meet his degree requirements while living in Peru. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Nevertheless, based on the documented country conditions in Peru and concerns for U.S. citizens' safety, as confirmed by the U.S. Department of State, the AAO concurs with the Director that it has been established that the applicant's spouse and child would encounter exceptional hardship were they to temporarily relocate to Peru while the applicant fulfills her two-year foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's spouse and/or child would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Peru. As stated by the applicant's spouse,

...We work for the same company, but she has a higher salary. It would be impossible for me to support our daughter and me only with my salary. My wife owns the house in which we live. If she were forced to return to Peru she might lose

the house because I will not be able to afford it plus the utility bills only with my income.

...If she [the applicant] were forced to leave the United States and return to Peru it will cause me extreme emotional and financial hardship. If I stay here with my daughter, my 4-year-old will grow up without her mother at her side. A child that age needs her mother.... I want to see my daughter grow surrounded by both of her parents in a safe environment.... At this time I am a student at Suffolk Community College and...if she goes alone I will not be able to finish it any way because I will be forced to work more hours.

Finishing my degree is essential for me and my family's future. My employer had offered me a better position upon obtaining my degree....

I consider my wife a wonderful mother and there is no one that can replace her. I certainly cannot work and take care of my young daughter at the same time. If my wife were forced to return to Peru, my daughter will suffer extreme hardship. I have not (sic) relatives in Long Island that can help me taking care of my daughter....

I can not see my self as a single father. I go to work a lot earlier than school time and come home later. Who would place my daughter in the school bus and take care of her when she returns? I get out of work and go straight to school, who is going to pick up my daughter at the bus stop? I get home late at night, who is going to feed and bathe my daughter? Who is going to help her with her school work or who is going to read her a bedtime story.... I will be unable to do all those things for my daughter since I would have to work extremely really long hours to try to support us financially. In other words, I feel that my daughter will lose her mother and her father at the same time....

Letter from [REDACTED] dated October 10, 2007.

Counsel has provided numerous letters from school officials which substantiate that a separation of a young child from a parent can have life-long ramifications on a young child. As stated by [REDACTED] Psychologist:

...As school psychologist and professional expert in human behavior, cognitive functioning, mental disorders and others domains of psychology, I know that family separation leads to serious problems and distress. Research has supported that children who are separated from their parents at an early age are more likely to have more negative self-concepts, to experience more frustration, depression, anxiety and other psychological disorders. It is inaccurate to state that temporary separation from a family member does not represent a hardship. This is a legal statement and does not reflect the actual stress, grief, and emotional pain that

children and families have to endure. The ramifications of these separations are multiple and devastating.

Throughout my ten years of experience in working with children and families, I have seen how family separation has had negative implications in so many aspects. These situations create more financial and social burden for our society. In many instances, students develop psychological disorders that require psychiatric treatment...behavior disorders which require of special education services, and housing problems.

Parents are the primary source of support, love and feedback for young children. Separating a Mother from her young daughter may lead to disturbance in her physical, social, and psychological development. These children cannot focus in school and hampers their ability to learn....

Letter from [REDACTED], Psychologist, Central Islip Public Schools.

LMSW, School Social Worker, further elaborates on the hardships the applicant's child will face if separated from her mother for a two-year period:

...As a school social worker, I often work with children who have experienced separation and loss from a parent for various reasons. The absence of a parent is very detrimental to the child's well being. Children often experience symptoms of anxiety, trauma and have difficulty concentrating in school. The separation and loss of a parent affects academic, social and emotional development....

Letter from [REDACTED], LMSW, School Social Worker, Central Islip Union Free School District, dated October 10, 2007.

With respect to the applicant's spouse, it has not been established that the applicant would not be able to obtain employment in Peru, thereby assisting with the maintenance of the U.S. household, as previously referenced. Moreover, no documentation has been provided to demonstrate that the applicant's spouse would suffer exceptional hardship were he to obtain child care for his daughter during the hours he is required to remain at work or in school. Finally, it has not been documented that the applicant's spouse would be unable to re-arrange his school and/or work schedule to ensure that he is able to continue his employment while working towards his degree in a timely manner. While the applicant's spouse may need to make adjustments with respect to his finances, his schooling and the care of his daughter, it has not been documented that such alternate arrangements would cause him exceptional hardship.

As for the applicant's child, the AAO concurs with counsel that a separation of a young child from her parent for a two-year period would cause the child exceptional hardship. The hardship the applicant's young 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 record, reviewed in its entirety, does not support a finding that the applicant's spouse will face exceptional hardship if the applicant's waiver request is denied. Although the applicant has established that her spouse would suffer exceptional hardship if he moved to Peru with the applicant for the requisite two-year period, the applicant has failed to establish that her spouse would suffer exceptional hardship were she to relocate to Peru while he remained in the United States. The record demonstrates that the applicant's spouse faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a spouse temporarily relocates abroad based on a foreign residence requirement.

However, the AAO finds that the applicant has established that her child would experience exceptional hardship were she to relocate to Peru and in the alternative, were she to remain in the United States without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes that 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 record, reviewed in its entirety, supports a finding that the applicant's child will face exceptional hardship if the applicant's waiver request is denied. 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 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 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 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.