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

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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAY 21 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:

SELF-REPRESENTED

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 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 India who obtained J1 nonimmigrant exchange status in August 2003. 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 child, born in February 2002, would suffer exceptional hardship if she moved to India temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled her two-year foreign residence requirement in India.

The director determined that the applicant failed to establish that her child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in India. *Director's Decision*, dated October 15, 2007. The application was denied accordingly.

In support of the appeal, the applicant provides the following documentation: updated letters from [redacted], MD, dated October 25, 2007 and [redacted], MD, dated October 31, 2007. In addition, on December 14, 2007, the AAO received a supplemental letter from the applicant, dated December 11, 2007; duplicate copies of medical letters with respect to her child's medical condition; and additional information about country conditions in India. 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
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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
>
> (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 child would experience exceptional hardship if she resided in India for two years with the applicant. To support this contention, the applicant states the following:

> ...I have a five-year old daughter, [redacted]. [redacted] is a US citizen by birth and has a diagnosis of Down's Syndrome. This child shows developmental delays and cannot speak, understand and walk properly. She is suffering from mental and physical handicaps and always needs constant attention and supervision. Her doctors for her ears, eyes, chronic allergies and heart murmur problems periodically follow her. She is also being taken care of by a physiotherapist, a speech therapist, an occupational therapist, and a Child Development organization. With these services and treatments she is showing tremendous improvements and progress....
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> If she [the applicant's child] goes to India with me her life there would be on a greater risk due to the prevailing health care, transportation, child care and child development conditions. She may not even be accepted in the schools there. We live in a small Himalayan town in India....Transportation and hospitals are not adequate....

Statement of [redacted]*i*, dated February 6, 2007.

The applicant further states,

> ...In India, we live in a small Himalayan town...which is far away from major population centers. I also mentioned that at my place of residence in India we do not have sufficient health care services, transportation, childcare, and child development facilities....Also, there are no early intervention schools at my place of residence. India lies far blow (sic) in human developmental index as compared to the USA....These conditions will give her [the applicant's child] exceptional and extreme hardships....in the decision letter it is mentioned that I claimed non-existence of early intervention schools and child development programs for children with Down syndrome in India, which is not in line with what I had written. In the decision letter it is mentioned about an early intervention institute in Chennai. According to their website it is the only institute of this kind in whole south India and that place is about 1600 miles away from my place in India. This is thus highly impractical to take her to such distant places for the treatment she needs on a daily basis. On the other hand, the US has such facilities at almost all places....

Statement, dated December 11, 2007.

Numerous letters are provided by the applicant's child's treating physicians that further outline her serious medical conditions. Dr. [redacted], the applicant's child's pediatrician since June 2004, states the following

> .. [the applicant's child] has had recurrent ear problems with some hearing loss requiring multiple sets of surgically placed myringotomy tubes. In the evaluation for her chronic ear infections and ear fluid, she has been diagnosed with a milk, egg, soy, chocolate, corn, potato, apple, baker's yeast, orange, peanut, and strawberry food allergies. The family has undergone a significant food elimination diet....She is currently seeing her ear, nose, and throat specialist every 3 months for close observation, evaluation of her hearing, management of her food allergies and as

needed care. This is a significant food elimination diet, which is very difficult to adhere to, and would be difficult in other cultures....

[redacted] is followed by...a pediatric cardiologist, for trivial mitral valve insufficiency and persistent heart murmur....

[redacted] has a history of esotropia, which has required 2 eye surgeries to date. She is seen by a specialist in pediatric ophthalmology...and wears specialty glasses. If this goes untreated it can lead to long-term vision problems.

[redacted] is receiving physical therapy, occupational therapy, and speech therapy through the local school systems. She does have significant speech delay and currently is speaking 5 to 10 words. She will continue to need additional therapies beyond what is offered in a basic educational system for years to come....

[redacted] has significant medical problems...It is important that she is able to seek ongoing medical care from pediatric specialists on a routine basis in order to continue to provide the high level of medical care that she has been receiving since birth....

Letter from [redacted] *FAAP, Portage Health Medical Group,* dated October 31, 2007.

Dr. [redacted] further elaborates on the applicant's child's medical conditions:

.. [the applicant's child] has some severe, ongoing, chronic medical conditions that are serious and require continued medical care. This patient has Down's syndrome, a genetic disorder causing multiple health problems, including the need for ongoing specialty eye care, ongoing specialty nasal-sinus and ear, nose, and throat care, as well as sub-specialty pediatric care to monitor her congenital heart disease and thyroid disorders, as well as growth and intellectual delays. The patient's health is quite poor and requires ongoing medical treatments and surgery.

This patient has been diagnosed with food allergies and requires ongoing dietician management, including food allergy to milk, egg, soybean, corn, potato, apple, baker's yeast, orange, chocolate, peanut, and strawberry, as well as dust mite. These allergies have been quite severe and do require ongoing management to treat the chronic, severe, medical conditions that they are causing.

The patient has had multiple sets of ear tubes requiring surgery in the operating room to treat fluid in the middle ear and hearing loss. It is quite clear that this patient requires extensive medical management coordinated by multiple physicians, and more importantly, the patient's mother and father.

Letter from [redacted], *Ear, Nose and Throat Associates of Marequette, PC,* dated October 25, 2007.

Due to the applicant's child's diagnosis of Down's syndrome and its incurability, the gravity of the medical problems caused by Down's syndrome, the requirement that she receive special education based on the intellectual delays associated with Down's syndrome, the short and long-term ramifications for those afflicted, and the need for those suffering from Down's syndrome to be treated by medical and academic professionals familiar with the syndrome and its treatment, the AAO concludes that the applicant's child would suffer exceptional hardship were she to relocate to India. Separating the applicant's child from specialty physicians who have been treating her for years and are familiar with her mental and physical conditions, and relocating her to a country that has very limited or unavailable medical care in many areas, as reported by the U.S. Department of State, would cause her hardship beyond that normally associated with a temporary relocation abroad.[1]

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen child would suffer exceptional hardship if she remained in the United States during the two-year period that the applicant resides in India. As stated by the applicant,

> ...If I need to return back to India our whole family would go with me. In case my husband, who is on H1B visa till October 2007, stays here (which otherwise is very unlikely), he wouldn't be able to work and take care of her [the applicant's child] at the same time. As she cannot understands (sic) things properly she may hurt or endanger herself if left unattended or with someone who do not understand her behavior and nature. Also, she needs to be taken to local and specialty far-away hospitals frequently, stays home when ill or no school day. All this will be extremely difficult for a single parent to handle. We always make sure that someone keeps vigil on her....

Supra at 1.

Due to the applicant's spouse's nonimmigrant status and its temporary and revocable nature, it has not been established that the child would be able to remain in the United States during the two-year period that the applicant has to return to India. As such, were the applicant's spouse required to depart the United States at some point in the future, such a predicament would leave the young child in the United States without her parents. By default, this situation would constitute exceptional hardship to the applicant's child.

In this alternative, were the applicant's spouse able to remain in the United States with a valid nonimmigrant status, caring for the child during the requisite two-year period, the AAO concurs with the applicant that the child would suffer exceptional hardship as she would be separated from her mother for a prolonged period during a critical stage of her academic and social development. Moreover, she would not have her mother's emotional, physical and psychological care while dealing with the mental and physical handicaps that require both of her parent's constant attention and supervision. Such a separation would constitute exceptional hardship to the applicant's child.

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[1] "...The quality of medical care in India varies considerably. Medical care is available in the major population centers that approaches and occasionally meets western standards, but adequate medical care is usually very limited or unavailable in rural areas...." *Country Specific Information-India, U.S. Department of State,* dated March 25, 2008.

The AAO finds that the applicant has established that her child would experience exceptional hardship were she to relocate to India 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 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 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.