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U.S. Citizenship
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Services

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413

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: **MAY 22 2008**

IN RE:

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 Guatemala. The record establishes that she was admitted to the United States in J-1 nonimmigrant status in August 1994 and 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 government financing. The applicant presently seeks a waiver of her foreign residence requirement, based on the claim that her U.S. citizen spouse and three children, born in 1997, 2005 and 2006, would suffer exceptional hardship if they moved to Guatemala temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her foreign residence requirement in Guatemala.

The director determined that the applicant failed to establish that her spouse and/or children would experience exceptional hardship if the applicant fulfilled her foreign residence requirement in Guatemala. *Director's Decision*, dated October 15, 2007. The application was denied accordingly.

In support of the appeal, the applicant provides Form I-290B, Notice of Appeal or Motion and an attachment with referenced exhibits, dated October 29, 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 record contains references to the hardship that the applicant would suffer if her waiver request were denied. Section 212(e) of the Act provides that a waiver is applicable solely where the applicant establishes exceptional hardship to his or her citizen or lawfully resident spouse or child. In the present case, the applicant’s spouse and children are the only qualifying relatives, and hardship to the applicant cannot be considered, except as it may affect the applicant’s spouse and/or children.

The first step required to obtain a waiver is to establish that the applicant’s U.S. citizen spouse and/or children would experience exceptional hardship if they resided in Guatemala with the applicant while she fulfilled her foreign residence requirement. To support this contention, the applicant’s spouse states the following:

My wife [the applicant] came as a Student on a J Visa and married a United State [sic] they had a child. But the marriage did not work out. He was very abusive and my wife obtain a restraining order after being a victim of abuse, he was arrested.

My wife continued to have problems and was forced to obtain a restraining order. Thereafter there was a custody battle over the child. My wife obtained full legal and physical custody but father was awarded visitation. Lastly, the court allowed visits out of the United States but for only 28 days, other than that the child may not be removed from California to establish residency elsewhere....

...I am a United States Citizen. All of my family resides in the United States. I have never been to Guatemala nor do I have any contact with Guatemala other than through my wife....

...To go with her is a very unpleasant and painful option in which I am a burden to my wife. In addition, the problems mentioned herein will be multiplied by the fact that we would have to travel with our two children. They would suffer even more than us. As young children, they will be effected by the water, and sanitation which will not only endanger their health but could also endanger their lives. Moreover, the [sic] will suffer change of living conditions for now and in the future loose [sic] of opportunities and educational options.

Also, my wife’s child from her pervious [sic] marriage cannot no go to Guatemala by court orders, this would mean that the child would have to be left to the custody of his abusive father. With the father’s history of violence and unstable nature, it is certain that the child would suffer not only from the loss of a happy and stable home but to be put in an unfamiliar setting with such an unstable father would certain [sic] cause him emotional trauma....

...Guatemala is very violent now, there is an upsurge of crime and the gang problem is great....

Declaration of [REDACTED] dated February 28, 2007.

The Department of State, in its Consular Information Sheet for Guatemala, states, in pertinent part, the following:

A peace accord, signed in 1996, ended a 36-year armed conflict. Violent crime, however, is a serious concern due to endemic poverty, an abundance of weapons, a legacy of societal violence, and dysfunctional law enforcement and judicial systems.

Violent criminal activity continues to be a problem in Guatemala, including murder, rape, and armed assaults against foreigners. The police force is inexperienced and under-funded, and the judicial system is weak, overworked, and inefficient. Well-armed criminals know there is little chance they will be caught or punished. Traditionally, Guatemala experiences increases in crime before and during the Christmas and Easter holiday seasons.

Large demonstrations occur throughout Guatemala, often with little or no notice, and can cause serious traffic disruptions. Although most demonstrations are peaceful, they can turn violent, and travelers should avoid areas where demonstrations are taking place. The use of roadblocks and/or blocking of public facilities, including the international airport, has increased and demonstrators may prevent tourists caught behind the blockades from leaving.

In 2007 particularly virulent rumors of child stealing and of murder for organ harvesting have been reported in several different areas of Guatemala frequented by American tourists. This year numerous Guatemalan citizens have been lynched for suspicion of child stealing, and three local women who allegedly facilitated foreign adoptions were attacked by a mob that accused them of kidnapping and killing a girl whose mutilated remains were found near Camotan, Chiquimula (near the Honduran border on the main road leading to the Copan Mayan ruins). In reaction to unconfirmed reports of babies being kidnapped in the El Golfete area of the Rio Dulce (near Livingston, Izabal), residents of small villages in the area remain mobilized and suspicious of all outsiders, including foreigners.

Also in 2007, two foreigners (including an American citizen) and a Guatemalan kayaking on a river near Chicaman, Quiche were accused of stealing children and seized by a mob estimated at 500 persons. Although threatened, the individuals were not physically attacked. The incident occurred after the group talked and

joked with a local boy on the river bank. In Sayaxche, Petén, child stealing rumors escalated into mob action against a Guatemalan couple believed to be involved in child stealing. The husband was beaten and burned to death, and the wife threatened, but eventually turned over to the police. A local American resident was also seized and threatened with death when he tried to intervene with the mob. A family of American tourists, along with several Guatemalan motorists, was held overnight at a road blockade in the same area for possible use as human shields. Mobs have also targeted police, resulting in delayed or ineffective responses by law enforcement.

Due to uncontrolled drug and alien smuggling, the Guatemalan border with Mexico is a relatively high-risk area, in particular in the northern Peten Department. The most dangerous area in that region is on the northwestern border in the area that includes the Sierra de Lacandon and Laguna del Tigre National Parks. Extra precautions are required when U.S. Government personnel travel to the region.

The following recommendations will help residents and visitors alike to increase their safety:

Avoid gatherings of agitated people. Frustration over crime and a lack of appropriate judicial remedies has led to violent incidents of vigilantism, including lynchings, especially in more isolated, rural areas. Attempting to intervene may put you at risk of attacks from mobs.

Avoid close contact with children, including taking photographs, especially in rural areas. Such contact can be viewed with deep alarm and may provoke panic and violence.

Keep informed of possible demonstrations by following the local news and consulting hotel personnel and tour guides. Avoid areas where demonstrations are occurring.

The number of violent crimes reported by U.S. citizens and other foreigners has remained high in recent years. Incidents include, but are not limited to, assault, theft, armed robbery, carjacking, rape, kidnapping, and murder. Criminals often operate in groups of four or more and are confrontational and violent. Gangs are a growing concern in Guatemala City and rural Guatemala. Gang members are often well armed with sophisticated weaponry and they sometimes use massive amounts of force. Emboldened armed robbers have attacked vehicles on main roads in broad daylight. Travel on rural roads always increases the risk of a criminal roadblock or ambush. Widespread narcotics and alien smuggling

activities can make remote areas especially dangerous. Though there is no evidence that Americans are particularly targeted, criminals look for every opportunity to attack, so all travelers should remain constantly vigilant.

Most tourists and visitors travel throughout Guatemala without mishap. However, violent criminal activity on the highways continues, and tourists, among others, have been targeted. Many of the robbery attempts have occurred in daylight hours on main highways. Carjacking incidents and highway robberies are often violent. Four Americans were killed in highway robbery attempts in 2002 and three killed and one wounded in 2003. In 2004 one American tourist was murdered, and women and children were raped in highway assaults. Several highway assaults of American citizens also took place in 2005, but without serious injury to the victims. In 2006, there were 19 incidents of assault against Americans in motor vehicles reported to the Embassy, none of which involved death or injury. In nine of these incidents, the victims were arriving at Guatemala City's airport.

In 2007 there has been an increasing number of carjacking incidents and armed robberies of travelers who have just arrived on international flights, most frequently between 6:00 a.m and 10:00 am, but also in the evening (see list of Recent Crime Incidents Involving Foreigners on the Embassy website for more specifics). In the most common scenario tourists or business travelers who land at the airport around 7:00 am are held up by armed men as their vehicle departs the airport. Private vehicles, taxis and shuttle buses have been attacked. Typically, the assailants steal money, passports, and luggage, and in some but not all cases, the assailants steal the vehicle as well. Recently, many of these attacks have taken place far from the airport, just as travelers arrived at their homes, or in less busy areas of the city. Laptops are frequently targeted, so carry them inconspicuously in a backpack or other carryon luggage. Victims who did not resist the attackers were not physically injured. The Embassy advises its own employees to seek alternative routes for exiting the airport.

In some cases, assailants have been wearing full or partial police uniforms and have used vehicles that resemble police vehicles, indicating that some elements of the police might be involved. Armed robberies have occurred within minutes of the tourist's vehicle being stopped by the police. U.S. Embassy personnel continue to observe heightened security precautions in Guatemala City and on the roads outside the capital city. U.S. tourists are urged to be especially aware of safety and security concerns when traveling on the roads in Guatemala. Rather than traveling alone, use a reputable tour organization. Stay in groups; travel in a caravan consisting of two or more vehicles; and, stay on the main roads. Ensure that someone not traveling with you is aware of your itinerary. Resist the temptation to stay in hotels that do not have adequate security. Travel after dark anywhere in Guatemala is extremely dangerous. It is preferable to stay in the main tourist

destinations. Do not explore back roads or isolated paths near tourist sites. Pay close attention to your surroundings, especially when walking or when driving in Guatemala City. Refrain from displaying expensive-looking jewelry, large amounts of money, laptop computers, or other valuable items. Finally, if confronted by criminals, be aware that resistance may provoke a more violent response.

Avoid low-priced intra- and inter-city buses (recycled U.S. school buses); they are often attacked by armed robbers and are poorly maintained and dangerously driven. More than 100 bus drivers and passengers died in 2006 in robberies staged by holdup gangs that target public transportation, both urban and inter-city. The use of modern inter-city buses somewhat improves security and safety. There have been, however, several attacks on travelers on first-class buses on highway CA-2 near the border areas with both Mexico and El Salvador and on highways CA-1 and CA-9 near the El Salvador border and in the highlands between Quetzaltenango and Sololá. Be cautious with personal items such as backpacks, fanny packs, and passports while riding buses, because tourists' possessions are a favorite target of thieves.

Foreign residents of Guatemala have special concerns. Since December 1999, when the Government of Guatemala appointed a Special Prosecutor to investigate all American citizen murders, twenty-four American citizen residents and six American citizen tourists have been murdered, and suspects have been convicted in only two cases. There have been "express" kidnappings in recent years, primarily in Guatemala City, in which a relatively small ransom that can be quickly gathered is demanded. U.S. citizens have been kidnapped in recent years. At least one incident of a random kidnapping, in which the victim was grabbed off the street in an affluent neighborhood of the city, occurred in December 2003 and resulted in a physical and sexual assault.

Pickpockets and purse-snatchers are active in all major cities and tourist sites, especially the central market and other parts of Zone 1 in Guatemala City and the city of Antigua. In a common scenario, an accomplice distracts the victim, while an assailant slashes or simply steals a bag or backpack while the victim's attention is diverted.

As in other countries, criminals also use a number of scams to steal money and possessions from tourists in Guatemala. In one popular scam, robbers place a nail in a parked vehicle's tire. The vehicle is then followed by the robbers who pose as "good Samaritans" when the tire becomes flat and the victims pull to the side of the road. While "help" is being rendered, the contents of the car are stolen, often without the knowledge of the victims. However, in some cases, the robbers have

threatened the tourists with weapons. Parking areas in and around the Guatemala City International Airport are particularly prone to this crime. In another scam, victims are approached in a hotel, restaurant or other public place by an individual claiming there is some sort of problem with his or the would-be victim's automobile in the parking lot. On the way to investigate the "problem," usually in a remote or concealed area near the parking lot, the robber pulls a gun on the victim demanding cash, credit cards and other valuables. A third popular scam involves various attempts to acquire a victim's ATM card and PIN number. Some sophisticated criminals have even placed boxes outside ATM kiosks that record PIN numbers when unsuspecting victims believe they must enter their PIN number to gain entry to the ATM foyer. After recording PIN numbers, robbers then steal the owner's ATM card to complete their crime. There are dozens of techniques scammers can use to rob victims of money and possessions. While most people mean no harm, always be cautious when strangers approach you for any reason or make unusual requests.

The main road to Lake Atitlan via the Inter-American Highway (CA-1) and Solola is safer than the alternatives, though attacks in recent years have made traveling in a caravan highly recommended, even on the Inter-American Highway. Robbery and assault have been frequently reported on secondary roads near the lake with the highest number of incidents occurring on the RN-11 (Las Trampas road) parallel to the east side of the lake. Robbers have used mountain roads advantageously to stop buses, vans and cars in a variety of ways.

Armed attacks have occurred on roads from Guatemala City to the Peten. Visitors to the Mayan ruins at Tikal are urged to fly to nearby Flores and then travel by bus or tour van to the site. Violent attacks have occurred in the Mayan ruins in the Peten, including in the Cerro Cahui Conservation Park, Yaxha, the road to and inside Tikal Park, and in the Tikal ruins. Tourist police (POLITUR) patrols inside the park have significantly reduced the violent crime incidents inside the park, but travelers should nevertheless remain in groups and on the principal trails leading to the Central Plaza and the Temple IV complex, and avoid remote areas of the park.

POLITUR (a joint police/Guatemalan Tourism Institute initiative) is present in all major tourist destinations. They should be contacted in case of any criminal incident in such areas, even if minor.

Consular Information Sheet –Guatemala, U.S. Department of State, dated October 12, 2007.

Based on the problematic country conditions in Guatemala, the concerns outlined above regarding the applicant's spouse's and their children's unfamiliarity with Guatemala, the problematic economic environment, and the applicant's eldest child's inability to relocate to Guatemala to be with his mother due to

the custody agreement between the applicant and her ex-husband, the AAO concludes that the applicant's U.S. citizen spouse and children would experience exceptional hardship were they to accompany the applicant to Guatemala for the requisite period.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or children would suffer exceptional hardship if they remained in the United States during the requisite period that the applicant resides in Guatemala. As stated by the applicant's spouse:

If a waiver is not granted, I would suffer great economic hardship. I depend upon my wife's support to maintain our economic unit. My wife has a good job and works full time her income is essential for our way of life. I only earned 5,600.00 last year and not much more this year. My wife earns about \$12,000.00 a year which is the majority of our income. We struggle now, and it is hard but we can and are making it. If my wife leaves, we would suffer a great economic blow....

My wife also would need me to send money to her in Guatemala since the current job market in Guatemala is such that she could not even help support us, but she would need assistance to get by....

If a waiver is not granted, I would suffer psychologically, different from emotional harm, psychological harm of being away from the one you love. The psychological harm in the worrying of not knowing how you [sic] spouse is doing day in and day out....

Our children will clearly suffer significantly being without their mother. Her child [redacted] of the previous marriage will suffer even more being returned to his unstable father....

... Without my wife here, our kids will not have a happy home, being a single father with two job will not leave time to follow them up in school, take them to their sports activities and to be around and love them....

Supra at 3-5.

With respect to the applicant's spouse, no documentation from a mental health professional has been provided that describes the ramifications that the applicant's spouse would experience were he to be separated from the applicant for the requisite period. In addition, it has not been established that the applicant is unable to obtain gainful employment in Guatemala, thereby assisting with the maintenance of the U.S. household. Moreover, no documentation has been provided that confirms that the applicant, a native and citizen of Guatemala, would be in danger in her home country, thereby causing the applicant's spouse exceptional hardship. Finally, no documentation has been provided that establishes that the applicant's spouse is unable to arrange his work schedule in such a way that would allow him to properly care for his children and maintain the U.S. household. 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)). While the applicant's spouse may need to make alternate arrangements with respect to his finances and the care of his children, it has not been established that such arrangements would cause the applicant's spouse exceptional hardship.

With respect to the applicant's children, however, the AAO notes that the applicant's young children have an emotional need to remain with their mother, their primary caregiver. The eldest child in particular needs his mother, due to the custody agreement and the fact that he would have to live with his father if the applicant relocates abroad. The hardships felt by the children would go significantly beyond that normally suffered upon the temporary separation of families. The AAO thus concludes that the applicant's children would experience exceptional emotional and/or psychological hardship were they to be separated from their mother for a two-year term.

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 Guatemala with the applicant for the requisite period, the applicant has not established that her spouse would suffer exceptional hardship were he to remain in the United States while the applicant relocates to Guatemala for the requisite period. 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, with respect to the applicant's children, the AAO concludes that they would suffer exceptional hardship if they moved to Guatemala with the applicant for the requisite period, and in the alternative, they would suffer exceptional hardship were they to remain in the United States while the applicant relocates to Guatemala.

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.