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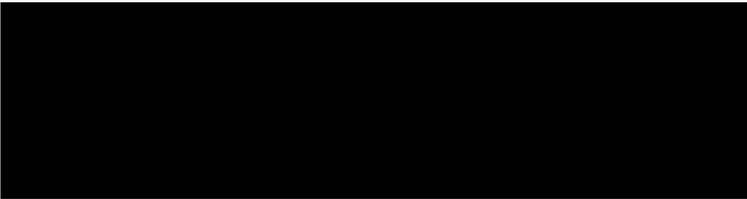


FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: OCT 07 2008

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 citizen of Russia who was admitted to the United States in J-1 nonimmigrant exchange status to participate in a program funded by the U.S. government. She is thus 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 presently seeks a waiver of her foreign residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to Russia temporarily with the applicant and her daughter and in the alternative, if he remained in the United States while the applicant and her daughter fulfilled her foreign residence requirement in Russia.¹

The director determined that the applicant failed to establish that her U.S. citizen spouse would experience exceptional hardship if the applicant fulfilled her foreign residence requirement in Russia. *Director's Decision*, dated March 26, 2008. The application was denied accordingly.

In support of the appeal, the applicant provides a letter, dated May 22, 2008, with referenced exhibits. 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

¹ The applicant's daughter, [REDACTED], born in January 1994, entered the United States as a J-2, based on her derivative status as the daughter of the applicant, a J-1 visa holder. As such, the applicant's daughter is also subject to the two-year foreign residency requirement. Pursuant to the record, [REDACTED]'s biological father is deceased.

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 “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)...”

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 AAO notes that the record contains numerous references to the hardship that the applicant and/or her daughter would suffer if the 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 U.S. citizen spouse is the only qualifying relative, and hardship to the applicant and/or her daughter cannot be considered, except as it may affect the applicant’s spouse.

The first step required to obtain a waiver is to establish that the applicant’s U.S. citizen spouse would experience exceptional hardship if he resided in Russia with the applicant while she fulfills her foreign residency requirement. To support this contention, the applicant’s spouse states the following:

My first and major concern is for my step daughter, [REDACTED] is a wonderful and bright 13 year old girl. She is involved at the school in sports and music programs. [REDACTED] is also a brilliant artist. She has lived in the United States for nearly 7 years. I have lived with [REDACTED] and have been her co-parent since she was 9 years old. In those years [REDACTED] and I have become close. It has taken everything I have to get her to this level of trust with another human being besides her mother. [REDACTED] comes from a history of damage caused by a broken family. My fear is that all the work [REDACTED] and I have invested into [REDACTED] will disappear if she is to leave....

[REDACTED] is also suffering from depression. We all see a psychiatrist to help with [REDACTED]’s trouble. [REDACTED] has been acting out her aggression on herself by cutting her arms with sharp objects. This is also a major concern of mine for _____. Without the proper care through her physician and psychiatrist, I believe [REDACTED] will suffer much depression and potential harm....

The stress of my family leaving is something that will affect all of us. [REDACTED] is too fragile socially to withstand this move. Even though it is temporary it will undermine all the work we have done to this point: [REDACTED] is living in a very delicate situation. She is in need of much structure and parental guidance.... I do not want [REDACTED] to live in an unstable environment. She needs to be here with her mother and I in a secure lifestyle where the supervision and family structure is not compromised.....

It is my belief that there will not be adequate psychiatry for [REDACTED] in Russia. Her doctor is here and we have a very positive environment to work from. [REDACTED] has been showing such progress in the last year, but it is still too easy for her to slip into bad decisions and dangerous attitudes....

There is no possibility of me following them for their allotted stay because I do not speak Russian and there is no chance for employment for me in Russia. My employer in the United States will also not hold my job for me if I were to go to Russia. My job means a lot to me. As you can see from the Dean’s letter, they value my employment there.... I have worked very

hard to earn a Master's Degree so that I could work at a community college doing what I love most.... I have obtained my dream job and I cannot imagine losing it.

I work and live in an area that I consider home. I have lived in Ames for nearly 11 years and do not want to leave. My family is 30 miles away, in Des Moines, and that is my hometown. My friends, relatives, and peers all live in the area. This is where I have made my home. The loss of my job would destroy my entire life as I know it. Everything I have built is in this town....

In addition to the problem of employment, I have high blood pressure and I cannot travel for extended periods of time. My blood pressure reacts to travel, stress, fatigue, and the routine my home provides is ideal for my medical condition.... This is also where I can see my physician whom I have been seeing for the past 3 years. Because I am not a citizen of Russia I will not have any medical insurance to pay for my medication which I take daily to control my high blood pressure. I will have no employment in Russia and I will have no insurance to cover medical costs....

Letter from [REDACTED], dated October 1, 2007.

Numerous documents have been provided to corroborate the statements made by the applicant's spouse with respect to his medical condition, his inability to obtain gainful employment and health care coverage in Russia, his stepdaughter's mental health situation and the lack of psychological care in Russia, and the reality that the applicant's spouse will lose his job in the United States were he to relocate abroad as his employer is unable to support an extended leave of absence. As such, the AAO concludes that based on the substandard medical care in Russia, the problems the applicant's spouse would encounter in terms of finding gainful employment with health care coverage, the language barrier, professional disruption, and the applicant's spouse's grave concerns relating to his stepdaughter's mental health care while in Russia, the applicant's spouse would encounter hardship that would go significantly beyond that normally suffered upon the temporary relocation based on a spouse's foreign residency requirement. As such, it has been established that the applicant's U.S. citizen spouse would experience exceptional hardship were he to relocate to Russia with the applicant while she fulfills the foreign residency requirement.

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

We all work very hard to maintain a healthy and supportive family. [REDACTED] [the applicant's daughter] is going through a very difficult time as a teenager. I believe that many of her issues have roots in her previous life in Russia, which was not easy. [REDACTED] [the applicant's spouse] and I are very concerned about her health and emotional stability, and work together with psychological services, to help [REDACTED]. In this situation, [REDACTED], as a husband and a step-father, believes that he needs to be constantly present in [REDACTED]'s life, to provide her a stable and safe environment. He takes [REDACTED]'s situation so close to his heart that I cannot imagine how he could manage not seeing her if she goes to Russia with me and worrying about her life and health every single day. [REDACTED] is aware that there won't be any adequate medical help for [REDACTED]

particular case, since in the town where we'll have to reside there are no any psychological services. This situation makes him worry even more. He is in the process of officially adopting [REDACTED] and in my personal opinion he is the best father I could ever wish for my daughter.

[REDACTED] also worries about our financial situation if we have to go to Russia. After my first trip to the U.S. in 2000-2001 on an exchange program, I lost my teaching job because my former boss did not like the new ideas of critical thinking and active learning that I brought with me from a U.S. university, to teach to my students.... All these years in school did not allow me to save money for an emergency situation. Similarly, [REDACTED] had spent three years in graduate school himself and started his full-time career only a year and a half ago. Therefore, he does not have savings either and won't be able to support me financially if I go to Russia. In that case, since I will be going there only for a certain period of time, it will be virtually impossible for me to find employment, as employers in Russia would prefer to hire permanent workers. This situation bothers [REDACTED] greatly and he is afraid that his family will suffer in Russia without any financial support....

Letter from [REDACTED], dated October 16, 2007.

As the applicant further contends, on appeal:

My husband has high blood pressure, and the condition has worsened lately. This condition is linked to many factors, including stress.... my leaving the U.S. with our daughter M [REDACTED] would mean terminating her treatment by Dr. [REDACTED], which will have an extreme negative effect on the family dynamics and [REDACTED]'s wellbeing. Knowing the level of [REDACTED] [the applicant's spouse's] **commitment and concern about [REDACTED]'s health**, as well as the degree of stress these problems have caused him in the past, I am in great fear for his health, since it is a medical fact that constant and great stress makes the condition of high blood pressure worsen. The uncertainty and fear for his stepdaughter's life will surely become a source for chronic stress for [REDACTED] during the time I have to be in Russia with [REDACTED]. I have witnessed the direct connection between the level of stress he experiences and his high blood pressure; other people, including his colleagues and supervisors, have witnessed this connection as well. My husband even had to be rushed to the Emergency room straight from his work, on one occasion, when his condition worsened. Moreover, we all witnessed that [REDACTED] wellbeing is of paramount concern for my husband, and her relapses cause him significant stress.

Additionally, my departure to Russia will cause [REDACTED] a very extreme financial hardship. While in Russia, I'll have to stay in my parent's town, Neftegorsk, where, according to an official statement from the local State Employment Agency, I won't be able to find employment. I similarly won't be able to relocate to a different town because the generally high price for rental apartments in Russia that are not much different from costs of staying in a hotel. Therefore, my husband will have to bear the burden of supporting himself and his wife and stepdaughter with only one income—his own.

As a result my U.S. citizen spouse will have to carry ALL financial responsibilities that we normally share as a family, and also provide financial support for his family while they are in Russia. Since it is a virtually impossible task to accomplish with [REDACTED] income, this financial hardship will add to his chronic stress, in addition to the constant worry about his family's wellbeing in Russia....

Letter from [REDACTED], dated May 22, 2008.

A letter has been provided by [REDACTED], Ph.D., Licensed Psychologist, to further elaborate on the applicant's step-daughter's mental health situation. As Dr. [REDACTED] states,

and her mother have continued to attend sessions on a weekly or every-other-week basis, with [REDACTED] stepfather, [REDACTED], attending sessions....

Due to progress [REDACTED] [the applicant's daughter], [REDACTED] [the applicant], and [REDACTED] [the applicant's spouse] have made in being a family, the improvements [REDACTED] has made academically and socially at school, and with peers, and due to her continued emotional struggles, I would recommend that [REDACTED] and her parents make every effort to provide as much consistency as possible in their move and keeping the family together would be very important for [REDACTED] her sense of family, her sense of safety, and for her relationship with [REDACTED].... It will be important for them to continue to work together as a family to help [REDACTED] academically and socially and to help continue to address her depression and anxiety....

Letter from S [REDACTED] Ph.D., Licensed Psychologist, Central Iowa Psychological Services, dated April 16, 2008.

Based on the applicant's spouse's stepdaughter's mental health situation and the consequences of separating her from her stepfather during this critical time of social development and psychological treatment, the financial hardships the applicant's spouse will face due to the applicant's relocation abroad and the maintenance of two households and his fears and anxieties with respect to his wife's and stepdaughter's anticipated return to Russia, in light of the bleak financial situation and the lack of appropriate mental health coverage for his stepdaughter, the AAO concludes that the applicant's U.S. citizen spouse would suffer exceptional hardship were he to be separated from his spouse and stepdaughter while the applicant fulfills her foreign residency requirement.

Upon review of the totality of the circumstances in the present case, the AAO finds the evidence in the record establishes that the applicant's U.S. citizen spouse would experience exceptional hardship were he to relocate to Russia and in the alternative, if he were to remain in the United States without the applicant, for the requisite 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 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 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.