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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

H₃

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **OCT 24 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:

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 record reflects that the applicant is a native and citizen of Colombia who obtained J-1 nonimmigrant exchange status to participate in graduate medical education training. 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 two-year foreign residence requirement, based on the claim that her lawful permanent resident spouse and U.S. citizen child, born in December 2006, would suffer exceptional hardship if they moved to Colombia temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Colombia.

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 Colombia. *Director's Decision*, dated April 3, 2008. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a letter, dated May 5, 2008. 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 spouse and/or child would experience exceptional hardship if they resided in Colombia for two years with the applicant. To support this contention, the applicant states the following:

As a country, Colombia is in the midst of an ongoing, violent civil war and a breakdown of civic authority. There is a strongly worded travel ban by the U.S. State Department advising U.S. citizens to refrain from travel to Colombia owing to the pervasive violence there.... Leftist guerillas have frequently announced that they consider American citizens to be valid 'military objectives.' I believe this means the guerillas feel that American citizens are 'legitimate' targets of their violent actions. I cannot in good conscience allow my U.S. citizen child and my husband to live under such dangerous conditions....

The allure of my husband, child, and myself to the criminal elements in Colombia is threefold: 1) I am a physician; 2) my husband and I are professionals who would be perceived as having money to pay large ransoms, and 3) my son is an American citizen and my husband has a green card. Any one of these would make us a valuable target in their own right, but the three characteristics together exponentially increase the chances that [redacted] [the applicant's child], [redacted] [the applicant's spouse], or I will be targeted for kidnapping, extortion or violence....

If I went back to Colombia, I would have to get a job as a physician, which would put me at a very high risk. There are many documented cases of doctors who have been kidnapped, or who have suffered through extortion and violence. In addition, my connection to the US will make me more of a target....

Being a physician is very dangerous in Colombia because the guerillas and the other terrorist groups that operate there often kidnap physicians both to hold for ransom and to treat their own fighters. What's more, the paramilitaries consider anyone who speaks out or works for the betterment of human rights to be a 'subversive.' As a physician, as someone who works for the public good, I would be considered a subversive....

Unfortunately, in Colombia, as both Human Rights Watch and the U.S. government have documented, civilians bear the brunt of the current violence. Colombia leads the Western hemisphere in reported human rights and international humanitarian law violations. For many years, Colombia has been one of the world leaders in kidnappings....

Terrorist groups and common criminals consider friends and relatives of an individual of means to be as valuable a target as the individual himself. In Colombia, to even be remotely associated with money puts your life in danger. I cannot bear the thought of putting my family at risk of being kidnapped because of the misperception that I, as a physician trained in the US, will be able to pay a large ransom.

and I have been directly affected by the violence in Colombia, and we know all too well the danger and the fear that pervades life in Colombia. My father was murdered when [REDACTED] was a teenager....

The violence in Colombia most closely affected me on the terrible day when my mother was shot. She was leaving her hair salon when a man grabbed her purse and put a bullet in her chest and another in her hip....

I have almost been shot. While driving home one day in Medellin I heard gunshots very close to me. My heart raced with fright and I drove away from the area as quickly as I could. When I stopped to look at my car, I saw that a bullet had hit one of my tires. I was an innocent bystander who had gotten caught in crossfire and almost killed. Unfortunately, this is a common reality of living in Colombia.

Just the simple fact of owning a car in Colombia makes you a target for criminals. People are most vulnerable while in their cars, and many robberies, kidnappings, and murders occur on the streets. My father had his SUV stolen at gunpoint. I have seen a man shot in the head by a motorcyclist in the adjacent lane....

Car bombs are still exploded regularly in Colombia....

My niece and nephew in Colombia, who are 9 and 13...frequently they have nightmares about being kidnapped or about someone they love being harmed. I do not want my son, [REDACTED], to grow up suffering from these same nightmares. If [REDACTED] were to live in Colombia, I fear that he may not be as lucky as I was in avoiding the violence. When I consider all of the incidents in which members of my family and I could have been killed in one of those 'just missed' or 'almost' events, it is terrifying to imagine that [REDACTED] could easily be harmed or be left without a parent if something should happen to me or [REDACTED]....

My connection to the United States, as the mother of an American citizen and the wife of a permanent resident, and as someone who has worked here for many years, heightens the risk that I would be targeted. The added fact that physicians working in the United States are considered to be wealthy greatly heightens the risk of extortive kidnapping....

Affidavit of [REDACTED] M.D., dated September 18, 2007.

Counsel has provided extensive documentation with respect to the problematic country conditions in Colombia. In addition, the AAO notes that the U.S. Department of State recently issued an updated Travel Warning for Colombia. As stated by the U.S. Department of State on August 7, 2008:

This Travel Warning updates and reminds American citizens of ongoing security concerns in Colombia. The Department of State continues to warn U.S. citizens of the dangers of travel to

Colombia. While security in Colombia has improved significantly in recent years, violence by narco-terrorist groups continues to affect some rural areas and cities. The potential for violence by terrorists and other criminal elements exists in all parts of the country. This Travel Warning supersedes the Travel Warning for Colombia issued February 05, 2008.

Violence has decreased markedly in many urban areas; however, the level of violence in Buenaventura remains high. Small towns and rural areas of Colombia can still be extremely dangerous due to the presence of narco-terrorists. Common crime remains a significant problem in many urban and rural areas. For additional details about the general criminal threat, please see the Department of State's Country Specific Information for Colombia.

The incidence of kidnapping in Colombia has diminished significantly from its peak at the beginning of this decade. Nevertheless, terrorist groups such as the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and other criminal organizations continue to kidnap and hold civilians for ransom or as political bargaining chips. No one is immune from kidnapping on the basis of occupation, nationality, or other factors. Kidnapping in rural areas is of particular concern. On July 2, 2008, the Government of Colombia rescued 15 hostages, including three Americans, who had been held for more than 5 years. Although the U.S. government places the highest priority on the safe recovery of kidnapped Americans, it is U.S. policy not to make concessions to or strike deals with kidnapers. Consequently, the U.S. government's ability to assist kidnapping victims is limited.

Travel Warning-Colombia, U.S. Department of State, Bureau of Consular Affairs, dated August 7, 2008.

Based on the documented problematic country conditions and security concerns for U.S. citizens residing in Colombia, and the applicant's and her family's past traumatic experiences in Colombia and their effect on her spouse's and their child's emotional and psychological well-being, the AAO concludes that the applicant's spouse and child would experience exceptional hardship were they to accompany the applicant to Colombia for a two-year period.

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 Colombia. As stated by the applicant's spouse:

[redacted] [the applicant's child] is not even a year old, and to separate him from [redacted] [the applicant]...is impossible to consider, as this would cause great anguish.... I feel equally insecure and anxious about going there while and I remain in the United States....

I would not be able to fully focus on my daily responsibilities as a Test Specialist if every day I had the psychological burden of worry and psychological distress of wondering if my wife's health and life were safe. The consequences of my stress and worry could be detrimental to me both emotionally and professionally.

Crime has touched my family in far greater ways, however, than the robbery of my mother's home. Almost 20 years ago, my father was kidnapped and murdered. He had a very good job as an accountant with one of the largest companies in Colombia. The crime was never solved, and the authorities did almost nothing to investigate. Our family received a threatening phone call from someone who told us not to ask any questions about my father's death, or we would end up like him. As you can imagine, we were devastated and frightened, and my family suffered greatly.

I believe that enforcing [REDACTED]'s return to Colombia may lead to her injury, kidnapping, or death.... There is a very real possibility that [REDACTED] would not return from Colombia because of the pervasive violence... Even the possibility of harm coming to her creates great stress, anxiety, and hardship for me....

Forcing [REDACTED] to return to Colombia, a violent country in which physicians are particularly at risk, represents an exceptional hardship to me and our son because of my immense and wholly justified fear for her....

Affidavit of [REDACTED], dated September 26, 2007.

Due to the fears and anxieties experienced by the applicant's spouse with respect to his wife's anticipated return to Colombia in light of their family's traumatic experiences while residing in that country and the negative emotional and/or psychological ramifications of separating a young child from his mother, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse and child exceptional hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

As such, 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 spouse and child would experience exceptional hardship were they to relocate to Colombia and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term.

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 acting center 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 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.