

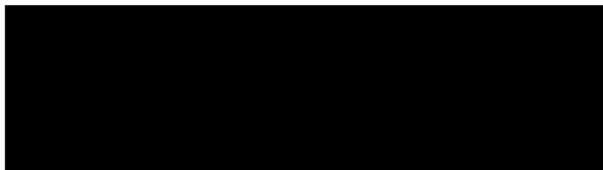
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



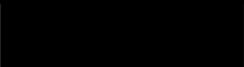
U.S. Citizenship  
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date:

**MAY 19 2010**

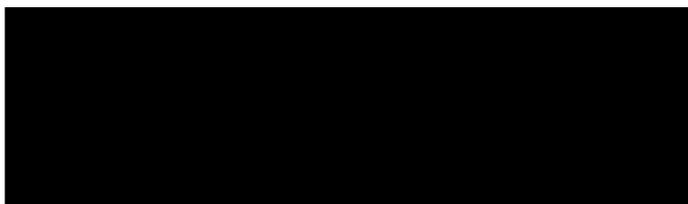
IN RE:



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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

A handwritten signature in black ink that reads "Perry Rhew".

Perry Rhew  
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, a citizen of Russia, obtained J-1 nonimmigrant exchange status in August 1996. 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 government financing. The applicant presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen spouse and two children, born in 2005 and 2007, would suffer exceptional hardship if they moved to Russia 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 Russia.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Russia. *Director's Decision*, dated June 18, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated August 11, 2009, and referenced supplemental 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 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 children would experience exceptional hardship if they resided in Russia for two years with the applicant. The applicant contends that her spouse and children would suffer medical hardship, as they would not be eligible for state-supported health benefits and insurance if they are unable to obtain employment, and moreover, would be exposed to the comparatively poor health conditions in Russia. *Affidavit of* [REDACTED] dated February 15, 2005. In addition, the applicant's spouse notes that he is currently working for a young, fast growing company and any break in his upward trajectory will result in major career disruption. *Affidavit of* [REDACTED] dated February 15, 2005. Moreover, the applicant notes the substandard economy in Russia and the difficulties she and her husband would encounter in terms of obtaining gainful employment to support themselves and their two children, due to their U.S. degrees, language unfamiliarity for the applicant's spouse and job skills that do not transfer for the applicant as she has been trained in accounting based on U.S. rules and regulations, thereby causing the applicant's spouse and children financial hardship. *Supra* at 5-6. Finally, the applicant asserts that he would be concerned for his and his family's safety in Russia, due to anti-American sentiment, terrorist activity and ethnic and political conflicts. *Supra* at 1.

Based on a totality of the circumstances, the AAO concurs with the director that the applicant's U.S. citizen spouse and children would suffer exceptional hardship were they to relocate to Russia due to the lack of medical coverage, unfamiliarity with the country, culture, customs and language, substandard medical and economic conditions, and significant career disruption with respect to the applicant's spouse. A relocation abroad would cause the applicant's spouse and children hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.

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 period that the applicant resides in Russia. In a declaration the applicant's spouse asserts that he will suffer emotional hardship were his spouse to relocate abroad due to the long and close relationship he has with the applicant and due to the fact that he would be forced to raise two young children without the applicant's daily presence and support. He notes that he grew up in a divorced family and knows what it is like to be separated from family and he does not want to relive the negative experience of long-term separation. *Supra* at 2. In addition, due to his spouse's long-term relocation, the applicant and her spouse contend that the applicant's spouse will suffer career disruption. As a single parent and sole caregiver, they explain that he will need to take more time off to care for his children and will need to maintain a more rigid schedule. His company is very

small and any unscheduled absence, even for an hour or two, plays a crucial role in the company's ability to operate and such absences are not something that will be taken lightly by management. The applicant and her spouse point out that in the last 22 months, their daughter [REDACTED] has had 39 doctor visits related to various health issues and due to the applicant's flexible schedule, the applicant's spouse did not have to miss work. Becoming sole caregiver to two young children and the responsibilities of such a role may put the applicant's employment in jeopardy. *Letter from [REDACTED] and [REDACTED] dated August 11, 2009.*

In addition, the applicant and her spouse reference the emotional hardship their children will face due to their mother's long-term absence. [REDACTED], the applicant's eldest child, has experienced separation anxiety issues in the past and such condition will worsen were her mother to relocate abroad for a two-year period. [REDACTED], the applicant's youngest child, suffers from "Breath Holding Spells" and separation from her mother may worsen the situation, due to increased anxiety and because of less parental supervision as her mother will be residing abroad, [REDACTED] will be at a much higher risk of injury following the fainting spells. The applicant and her spouse explain that there are times when the spells become frightening and severe enough to require immediate medical attention. *Id.* at 7-11.

Finally, the applicant and her spouse reference the financial hardship the applicant's spouse and children would face, due to the fact that the applicant's currently monthly take home pay accounts for two-thirds of the current family income and said portion would be lost should the applicant have to relocate abroad, as the record establishes that the applicant would not be able to obtain gainful employment in Russia to assist with the finances of the U.S. household. Such a loss would create financial hardship to the applicant's spouse and children. *Id.* at 12-16.

In support of the hardships referenced above, a letter has been provided from the applicant's spouse's employer, [REDACTED] Mr. [REDACTED] confirms that the applicant's spouse is an integral part of the operations team and his success is dependent upon his ability to provide immediate and accurate service to the clients throughout the world and GTS is dependent upon the applicant's spouse's ability to meet the demanding work schedule, a schedule which includes both regular business hours and, when necessary, unscheduled hours. [REDACTED] concludes by stating that without this level of commitment, GTS would be unable to provide excellent customer service and differentiate themselves from the competition. *Letter from [REDACTED], dated July 31, 2009.*

In addition, a letter has been provided from the applicant's child, [REDACTED] Ms. [REDACTED] confirms [REDACTED] dependence on her mother and further notes that [REDACTED] exhibits anxiety and discomfort when her familiar routes of support are not readily available to her and it is thus especially important for [REDACTED] to keep her family and support system intact so that she may continue to receive the comfort and support so vital during this stage of development. *Letter from [REDACTED], dated August 4, 2009.*

Moreover, a letter has been provided from the applicant's child, [REDACTED], pediatrician, confirming the child's history of breath-holding spells and confirming that the stress of her mother's disappearance is likely to exacerbate the number and severity of breath-holding spells and in addition, she would be under reduced parental supervision in her mother's absence. Such a predicament could lead to an increased risk of injury from falling and hurting her head or other parts of her body, and the reduced parental supervision might lessen the probability that the child would get immediate, appropriate care. *Letter from [REDACTED]* dated August 6, 2009.

Finally, documentation has been provided establishing the applicant and her spouse's income and expenses, assets and liabilities, to establish that without the applicant's income, the family would suffer financial hardship. Moreover, documentation establishing the difficulties the applicant would incur in obtaining gainful employment in Russia to assist in the U.S. household's finances has been provided by counsel. As noted by [REDACTED]

[REDACTED] "We have contacted numerous foreign companies that we work with in Moscow and other locations throughout Russia.... Even though your knowledge of US Generally Accepted Accounting Principles (GAAP) comes as a big plus, all positions at this level require a thorough knowledge of all aspects of Russian accounting and taxation and an extensive experience in conversion of Russian accounts into US GAAP. In addition, most companies operating in Russia require knowledge and experience with *IC* system, which is widely used in Russia. We regret to have not been able to assist you in your job search at this time. We strongly recommend that you take steps to fill in gaps specified above.... We also recommend that you confirm your US diploma in Russia, as it is something that is often required by employers...." *Email Correspondence from [REDACTED]* dated July 27, 2009.

Based on the record, the AAO has determined that the applicant's U.S. citizen spouse and children would experience exceptional hardship if they remained in the United States while the applicant relocated to Russia to comply with his foreign residency requirement. The applicant's spouse would be required to assume the role of primary caregiver and breadwinner to two young children, while continuing to fulfill his demanding job obligations, without the complete support of the applicant. Moreover, as the applicant and her spouse assert, separating two young children, who have documented issues of separation anxiety and breath holding spells, from their mother, who has played a pivotal role in their day to day care, would cause hardship to the applicant's spouse and children. As such, were the applicant to relocate abroad to comply with her foreign residency requirement, the applicant's spouse and children would suffer exceptional hardship.

The AAO thus finds that the applicant has established that her U.S. citizen spouse and children would experience exceptional hardship were they to relocate to Russia and in the alternative, were they to remain in the United States without the applicant, for the requisite period. The evidence in the record establishes the hardship the applicant's spouse and children would suffer if the applicant temporarily departed the U.S. 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.