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U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 07 2010

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:

[redacted]

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.

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 1997. She is subject to the 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 child, born in 2008, 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 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 foreign residence requirement in Russia. *Director's Decision*, dated June 26, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated July 28, 2009 and 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
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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 spouse and/or child would experience exceptional hardship if they resided in Russia with the applicant. To begin, the applicant's spouse asserts that he would suffer emotional hardship, as he does not speak Russian, has never lived in Russia, and is not familiar with the culture and customs. He also notes that he would be concerned for the safety of the family in Russia given the high crime and corruption. In addition, he contends that he would suffer financial hardship as he would be unable to obtain a job due to the substandard economy and his inability to speak the language. Moreover, he asserts that were he to relocate to Russia, he would be unable to continue his current studies toward earning a Master of Engineering degree and he would be required to quit his job and would lose the family's health insurance coverage, tuition reimbursement benefits and medical coverage. Furthermore, he asserts that he has been diagnosed with a heart condition and anxiety and due to the substandard health care in Russia, he would experience medical hardship. Finally, the applicant's spouse contends that his elderly parents are dependent on him to provide emotional and physical support and assistance, as he is the only child who lives in the same city, and were he to relocate abroad, they would suffer, thereby causing hardship to him. *Affidavit of* dated March 16, 2009.

Documentation establishing the applicant's spouse's medical and mental health situation has been provided, including evidence of emergency room visits for heart palpitations, chest pain and arrhythmia, and confirmation that he is under a physician's care, since July 2006, for stress and anxiety, and has been prescribed anti-anxiety medication. In addition, documentation to support the applicant's spouse's assertions regarding the problematic country conditions in Russia, including high crime and a lack of quality medical care[1] and a substandard economy has been submitted. Finally, counsel has provided evidence of the applicant's spouse's parent's dependence on him.

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[1] The U.S. Department of State asserts as follows regarding safety and medical care in Russia, in pertinent part:

> There is a general risk of American citizens being victims of indiscriminate terrorist attacks. American citizens in Russia should be aware of their personal surroundings and follow good security practices. Americans are urged to remain vigilant and exercise good judgment and discretion when using any form of public transportation. When traveling, Americans may wish to provide a friend, family member, or coworker a copy of their itinerary. Americans should avoid large crowds and public gatherings that lack enhanced security measures. Travelers should also exercise a high degree of caution and remain alert when patronizing restaurants, casinos, nightclubs, bars, theaters, etc., especially during peak hours of business.
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> It is not uncommon for foreigners in general to become victims of harassment, mistreatment and extortion by law enforcement and other officials. Police do not need to show probable cause in order to stop, question or detain individuals.

Based on a totality of the circumstances, the AAO concurs with the director that the applicant's U.S. citizen spouse would suffer exceptional hardship were he to relocate to Russia due to the problematic country conditions, long-term separation from his parents, his community and his employment, unfamiliarity with the country, customs and language, and financial hardship. A relocation abroad would cause the applicant's spouse hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.

As for the applicant's U.S. citizen child, counsel asserts and documents that a relocation abroad would cause the child exceptional emotional, medical and financial hardship. Counsel notes and provides an article establishing that the applicant's child's development will be impacted by a separation from her father, one of her caregivers. In addition, counsel references, and the U.S. Department of State corroborates, the problematic country conditions in Russia, including the high crime rate and the risk of terrorism, and substandard medical care, which in turn, could cause the applicant's child extreme hardship as she needs well-baby checks ups and various immunizations due to her age. Furthermore, documentation has been provided establishing the problematic economic situation in Russia, including a high unemployment rate.[2] Finally, counsel has submitted

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> Medical care in most localities is below Western standards and expectations due to shortages of medical supplies, differing practice standards and the lack of comprehensive primary care. The few facilities in Moscow and St. Petersburg that approach acceptable standards do not necessarily accept all cases. Access to these facilities usually requires cash or credit card payment at Western rates at the time of service. The U.S. Social Security Medicare Program does not provide coverage for hospital or medical costs in Russia or anywhere else outside the United States.
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> Elderly travelers and those with existing health problems may be at particular risk. Elective surgeries requiring blood transfusions and non-essential blood transfusions are not recommended, due to uncertainties surrounding the local blood supply.

Country Specific Information-Russian Federation, U.S. Department of State, dated August 6, 2009.

[2] As the U.S. Department of State confirms, in pertinent part:

> The ranks of unemployed swelled to an International Labor Organization (ILO) estimated 9.5% in the first quarter of 2009; 1.8 million Russian lost their jobs in the first quarter of 2009 alone. Unemployment is highest among women and young people. [D]ata collected between January and September 2008 indicates 13.5% of the population, approximately 19 million people, continue to live below the subsistence minimum of 4,630 rubles per month. About 25% of the population is highly vulnerable to poverty, as vulnerability to low levels of income remains high and a large number of people are concentrated around the poverty line, according to the World Bank.

Country Specific Information-Russia, U.S. Department of State, dated April 2009.

evidence to establish that daycare organizations in Russia do not accept children under the age of 1 ½ year of age, that there is normally a two-year wait to get a slot in a Russian daycare, and that the applicant will be unable share an apartment with her mother, as her mother's apartment is very small, thereby causing financial hardship to the applicant and her child. *Brief in Support of Appeal,* dated July 28, 2009.

Due to the hardships the child would experience based on separation from her father, and the risks of relocating to Russia due to the problematic country conditions, including concerns for her safety and financial hardship, the AAO concludes that the applicant's U.S. citizen child would experience exceptional hardship were she to relocate to Russia to reside with the applicant.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or child would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in Russia. Counsel notes that the applicant's spouse has a history of suffering from stress and anxiety from July 2006 through the present. Counsel further asserts that were the applicant to relocate abroad, with or without their daughter, the applicant's spouse's stress and anxiety would worsen, thereby causing exceptional emotional hardship. *Id.* at 1-2. To support this assertion, a letter has been provided by Lakeshore Health Partners, confirming that "I am [the applicant's spouse's] primary care physician which I have been treating him since July 2006. Since that time, he has suffered from stress and anxiety, for which I am treating him at the present time. He currently takes Celexa daily for this diagnosis...." *Letter from* dated March 17, 2009. In addition, confirms that if the applicant's spouse were to be separated from his wife, it "will be imperative that he seeks mental health support for managing the crisis which this will provoke...." *Psychological Evaluation,* dated July 2009.

Moreover, the applicant's spouse notes and documents that were his spouse to relocate abroad, he would suffer financial hardship, as he is dependent on the applicant's income. He notes that the applicant is the family's primary breadwinner, contributing about 62% of the family's monthly household income. Without the applicant's income, her spouse would not be able to make the mortgage payment each month, while at the same time paying for other basic expenses such as the car, groceries, medical bills, utilities, and home and auto insurance. *Supra* at 1-2.

Counsel has provided documentation with respect to the applicant's spouse's medical and mental conditions. In addition, financial documentation has been submitted, including a detailed outline of monthly income and expenses and evidence of numerous bills paid by the applicant and her spouse, establishing the applicant's critical contributions to the finances of the household, and further corroborating the applicant's spouse's assertion that without the applicant's income, the applicant's spouse will suffer financial hardship.

Based on a totality of the circumstances, the AAO has determined that the applicant's U.S. citizen spouse would experience exceptional hardship if he remained in the United States while the applicant relocated to Russia to comply with her foreign residency requirement. The applicant's

spouse needs the applicant's support on a day to day basis, for emotional stability and to ensure the continued financial viability of the household.

As for the applicant's child, the record establishes that the applicant plays an integral role in the daily care and survival of the child; the child is exclusively breastfed. *Letter from* , dated March 10, 2009. As the applicant notes,

> I am the only person who can console and comfort my daughter when she is tired or cranky and that she often acts distressed and cries inconsolably if she can't find me in the room;
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> [W]ere I required to depart for Russia...my husband would become solely responsible for the care of our infant daughter and would have to juggle work, school, and child care and find a way to pay for our basic expenses with a 62% decrease in our monthly income....

Affidavit for dated March 16, 2009.

The AAO concurs with counsel that the emotional, psychological and physical ramifications of separating a young child from her mother due to a foreign residence requirement would cause the child exceptional hardship.

The AAO thus concludes that the applicant has established that her U.S. citizen spouse and child 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 term. The evidence in the record establishes the hardship the applicant's spouse and child 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 he 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.