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U.S. Citizenship
and Immigration
Services

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FILE:

Office: VERMONT SERVICE CENTER

Date: **MAR 10 2005**

IN RE:

Applicant:

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, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of India who 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). The applicant married her husband, Mr. [REDACTED] in India in 1992. Mr. [REDACTED] is a native of India who became a naturalized U.S. citizen on November 8, 1999. The applicant has two U.S. citizen children born July 21, 1995, and August 11, 2000. The applicant seeks a waiver of her two-year foreign residence requirement, based on the claim that the fulfillment of her requirement would cause her spouse and children to suffer exceptional hardship.

The director determined the applicant had failed to establish that her husband and children would suffer exceptional hardship if she fulfilled her two-year foreign residence requirement in India. The application was denied accordingly.

On appeal, counsel asserts that the applicant's husband and the applicant's nine-year old son, [REDACTED] and four-year old daughter, [REDACTED] would face exceptional hardship if they moved with the applicant to India. Counsel asserts that Mr. [REDACTED] and his family would face a threat to their safety in India, and that a two-year separation from U.S. technological skill opportunities would cause Mr. [REDACTED] to become unemployable in the industry. Counsel asserts further that the applicant's children would face hardship in India because they do not speak the local language, are not used to the climate, and would not have the educational and health related benefits that are available to them in the United States. Counsel asserts in the alternative, that the applicant's family would suffer financial and separation-related emotional hardship if they remained in the U.S. while the applicant fulfilled her two-year foreign residence requirement in India.

Section 212(e) of the Act states in pertinent part that:

(e) 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(I): 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.

The record contains the following evidence relating to the applicant's exceptional hardship claim:

Affidavits written by the applicant and Mr. [REDACTED] stating that Mr. [REDACTED] father was killed in India in 1996 by Naxalite -People's War Group (PWG)- insurgents, and that Mr. [REDACTED] and his family risk being harmed by the PWG due to Mr. [REDACTED] family's former landholdings and business ownership interests in the Indian state of Andhra Pradesh. The affidavits additionally state that the applicant's children would be unable to obtain an education in India that is comparable to the education they receive in the United States. The affidavits state further that the applicant's daughter would be unable to obtain English language-related speech therapy in India, and that the applicant's son would suffer from climate and food-related allergies and ailments in India. In addition, the affidavits state that Mr. [REDACTED] is trained in the technology field as a semiconductor engineer/researcher, that the technology industry has experienced an economic downturn in the U.S., and that Mr. [REDACTED] presently unable to find employment in the industry. The affidavits state that as a result, the applicant is the sole financial provider for her family and that Mr. [REDACTED] would be unable to support his family or to provide a home for his children if he and the children remained in the United States without the applicant.

A February 6, 2003, Initial Evaluation Report from the Thom Child and Family Services organization, indicating that the applicant's 29-month-old daughter [REDACTED] had the expressive language skills of a 22-month old child, and recommending that she receive early intervention expressive language services.

A March 25, 2003, letter from the Marlboro Area, Early Intervention Program, stating that, "Nina receives home visits 1X/week with [REDACTED], M.S., CCC/SLP (speech-language pathologist) and is on the waiting list to join a weekly parent/toddler group. It is felt that [REDACTED] benefits from these services in order to help her develop age appropriate social communication, speech intelligibility and language skills. Her parents are involved in the program and provide needed carry-over activities."

A January 15, 2003, letter from psychologist Ann Frisch, PhD., P.C. relaying family history information and stating that Mr. [REDACTED] believes he and his family would be targeted and harmed by PWG members if they returned to India. The letter states that the applicant's children have Separation Anxiety Disorder (309.21 DSM IV), and that the applicant's daughter also has Expressive Language Disorder (315.31 DSM IV).

Dr. [REDACTED] indicates that Mr. [REDACTED] would be unable to return to India due to a high possibility that he would be tortured and murdered. Based in part on this assumption, Dr. [REDACTED] states that if only the applicant's children returned with her to India, they would suffer severe and lasting psychological damage. Dr. [REDACTED] states that both children would suffer increased separation anxiety due to their separation from their father. Dr. [REDACTED] states further that [REDACTED] would forget her English and would instead learn the local Telegu language, and that her expressive language problems would become more serious. In addition, Dr. [REDACTED] states that exposure to a different language and culture, and being away from their home and community would make the children unhappy.

Dr. [REDACTED] states that Mr. [REDACTED] would also be constantly worried about his family if they returned without him to India and that this would cause him to suffer severe psychological damage.

In addition, Dr. [REDACTED] states that the applicant's children would experience increased separation anxiety and emotional and psychological damage if they remained in the U.S. with their father, and that Mr. [REDACTED] would suffer psychological damage worrying about the applicant's safety in India, and would be unable to financially support his children in the United States.

General medical reports on Separation Anxiety Disorder in children.

General country condition reports and news articles on India.

An undated Medical Certificate signed by Dr. [REDACTED] in Hyderabad, India, reflecting that the applicant's son was treated for wheezing attacks and respiratory tract infections during his stay in India, and stating that the Indian climate is not suitable for him.

Photos and certificates reflecting that the applicant's son is involved in various school clubs and athletic activities.

A death certificate from the Municipal Corporation of Hyderabad, reflecting that the applicant's father-in-law, [REDACTED] was murdered by unknown culprits.

An excerpt from a news article stating that [REDACTED] was found brutally murdered, and that police in Jubilee Hills, Hyderabad, registered the case as a suspected murder for gain case.

An April 1998 affidavit written by [REDACTED] Inspector of Police in Hyderabad, stating that [REDACTED] was murdered by unknown offenders in October 1996, and that the case is under investigation. The affidavit indicates that the applicant's husband and his family face a threat from extremists in Bhimavaram village, Adilabad district because they are landlords there and partners in the company Hyderabad Connect Tronics LTD.

An April 1998 affidavit written by the sub-inspector of Police in Jaipur, stating that the house of [REDACTED] and [REDACTED] was burnt by extremists on November 12, 1991, and that the case has been investigated and is pending trial.

An undated affidavit written by a family friend, [REDACTED] indicating that the applicant's father-in-law was killed and that his family home, including an attached public library, was burned down. The affidavit states that Naxalite extremists target landlords and that the applicant's husband and his family face a threat from Naxalites.

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).

Based on the evidence contained in the record, the AAO finds that the applicant has failed to establish that her husband and children would suffer exceptional hardship if they moved with her to India.

The AAO finds that the applicant has failed to establish that her husband's father was killed by PWG extremists or that she and her family would face a threat of harm from PWG extremists in India based on Mr. [REDACTED] family membership. The AAO notes that the death certificate of the applicant's father-in-law states that he was murdered by unknown culprits, and that the related police report and newspaper article submitted by the applicant state that the killers were unknown. In addition, the AAO finds that the affidavit written by the applicant's family friend, [REDACTED] does not qualify as an expert opinion, and is not probative as to the threat that Mr. [REDACTED] or his family face from extremists in India. The AAO finds further that the U.S. Department of State documents and news articles submitted by the applicant are general in nature and fail to demonstrate that Mr. [REDACTED] or his family would face danger or other hardship in India. Moreover, the AAO notes that previous 1998 and 1999, Department of State, 212(e) waiver decisions relating to the applicant, analyzed the level of extremist-based danger that Mr. [REDACTED] and his family would face if

they returned to India. The Department of State decisions similarly concluded that the applicant had failed to establish who killed her father-in-law, and that she had failed to establish that PWG extremists killed her father-in-law. The Department of State decisions found further that the applicant had also failed to establish that she or her family faced any threat of danger from the PWG extremists outside of the Indian state of Andhra Pradesh.

The AAO finds that the applicant has also failed to establish that her daughter has a speech-related condition that requires medical or ongoing treatment in the United States. The AAO notes that the Marlboro Area, Early Intervention Program report reflects that the applicant's daughter meets with a speech-language pathologist one time a week, and that the parents provide needed language and social communication skill carry-over activities. The report does not otherwise explain what is done during the meetings with the child. Nor does the report discuss the length of the meetings, whether any specialized treatment is provided or needed, or how long services will be provided. Moreover, neither the report nor any other evidence in the record establishes that the speech-therapy services provided by the language therapist can not be provided to the applicant's daughter in India.

The AAO finds further that the letter from Dr. Ann Frisch is not probative of any emotional or psychological hardship to the applicant's husband or his family. The AAO notes that Dr. [REDACTED] report does not indicate how she obtained her reviewing information, whether she confirmed any of the family history or behavioral and medical background contained in the report, or whether she met personally with the applicant's husband and children at any time. In addition, the AAO notes that the applicant's husband and children were not patients of Dr. [REDACTED] prior to or subsequent to her January 2003, letter, and it is noted that Dr. [REDACTED] did not recommend or prescribe any type of treatment plan for the applicant's husband or children. The AAO notes further that the separation and psychological damage conclusions reached by Dr. [REDACTED] regarding the extremist threat faced by Mr. [REDACTED] in India and his inability to live there, are unsupported, as discussed above. Based on the above concerns, the AAO finds that the conclusions reached in Dr. [REDACTED] letter are unreliable and have no probative value regarding the psychological condition of the applicant's husband or children.

The AAO additionally finds that the medical certificate signed by Dr. [REDACTED] fails to establish that the applicant's son suffers from a medical ailment that cannot be adequately treated in India.

Moreover, the AAO finds that the country condition reports submitted by the applicant indicate that the information technology industry is thriving in India, and the record contains no evidence to establish that Mr. [REDACTED] would have put his career on hold in India, or that he would be unemployable in the technology industry in India. See The World Bank Group, India Country Brief, 2004.

The AAO finds further that the evidence in the record also fails to establish that the applicant's husband and family would suffer exceptional hardship if they remained in the U.S. while the applicant fulfilled her temporary foreign residence requirement in India.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "[t]emporary 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)". Moreover, as noted above, the U.S. District Court, District of Columbia stated in *Keh Tong Chen, supra*, that, "[c]ourts 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.”

The AAO finds that the applicant failed to establish that her husband would be unable to find employment if he remained in the U.S. or that he would be unable to support himself and his children in the United States. The AAO notes that although the record contains evidence that Mr. [REDACTED] lost his job in 2001, the record contains no evidence to establish that he has actively searched for new employment or that he is unemployable in or out of his field of expertise. The AAO finds further that, as noted above, the applicant has failed to establish that her husband or children suffer from medical or emotional conditions that would cause them to suffer hardship beyond the anxiety and loneliness ordinarily anticipated from a two-year separation of family members.

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 not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.