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U.S. Citizenship  
and Immigration  
Services

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MAR 28 2005

FILE:

Office: VERMONT SERVICE CENTER

Date:

IN RE:

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 Acting Director, Vermont 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 Waiver Review Division (WRD).

The record reflects that the applicant is a native of India. He was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on June 25, 1992 to pursue graduate medical training at ██████████ ██████████ New York. The applicant 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 record reflects that the applicant's wife is a citizen of India, and that they have two United States Citizen children (██████████ born May 22, 1997) and ██████████ (born August 20, 2001). The applicant seeks a waiver of his two-year residence requirement in India, based on the claim that his two children would suffer exceptional hardship if they accompany him to India.

The Director found that the evidence submitted failed to establish that the applicant's departure from the United States would impose exceptional hardship upon his children. The application was denied accordingly. *Decision of the Acting Director, Vermont Service Center, Saint Albans, Vermont, dated December 5, 2003.*

On appeal, counsel contends that the applicant's United States citizen children will experience exceptional hardship if the family moves to India for two years. In support of the appeal, counsel submitted a brief; a January 23, 2004 letter from Sanjiv's treating physician; and materials regarding air pollution in India. The entire record was 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 at 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 the Immigration and Naturalization [now, the Director of 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 *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.)

At the outset, the AAO notes that the applicant and his wife have two United States citizen children; Shreya is seven years old, and Sanjiv is three years old. The applicant's wife is a citizen of India and does not have legal status in the United States. If the applicant's waiver is denied, the entire family will have to move to India. As it cannot be expected that two minor children would be left in the United States without their parents, this decision only addresses the potential hardship that the United States citizen children will experience in India.

Counsel contends that the applicant's children will experience exceptional hardship if they are required to live in India for two years. Counsel asserts that Sanjiv has a medical condition that cannot be properly treated in India, and that Shreya will suffer exceptional psychological hardship if she lives in India for two years.

suffers from reactive airway disease. treating physician, Dr. wrote a letter dated January 23, 2004 in which he described Sanjiv's condition:

who is now two years old has had reactive airway disease since he was an infant. This causes restriction of his airways to his lungs and decreases his oxygen supply to his body. If not treated effectively it could cause growth retardation, brain damage and death. Recently was diagnosed with pneumonia. Pneumonia is an infection of the lungs. The air sacs in the lungs fill with pus and other liquid which prevents oxygen from reaching the bloodstream. Untreated, pneumonia can kill. Children with reactive airway disease have a higher incidence of pneumonia.

was diagnosed with pneumonia after a period of wheezing and high fever. Though his parents treated him with drugs intended to open the airways, there was little improvement. was brought to my office with symptoms of pneumonia on 12/2/03. He was treated with antibiotics and is currently being treated with an inhaled steroid treatment intended to dilate his lungs. still exhibits symptoms of wheezing and coughing when he exerts himself. He is under close medical supervision.

has previously been prescribed the drug AccuNeb as treatment for reactive airway disease and respiratory distress. This drug is not available outside of the United States and cannot be stockpiled for long periods of time. This is a special pediatric asthma drug which cannot be easily substituted.

Dr. goes on to describe how India is one of the most polluted countries in world, with an extremely high concentration of airborne particulates that are known to exacerbate reactive airway disease and to increase the risk of infection, especially in children. The record contains articles describing the air pollution problem in India. Dr. stated that during a recent brief visit to India with his parents, experienced respiratory distress that required medical attention.

Dr. concluded:

requires on-going medical monitoring and treatment. The treatment and monitoring are not available in India. contracted pneumonia here in the United States despite our best efforts to avoid such infection. In India, the chances for infection are much greater and the possibility of effective treatment much less. Leaving the United States for India will place in great medical risk.

The AAO finds that medical condition will cause him to experience exceptional hardship if he lives in India for two years.

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 his 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 Director, U.S. Department of State WRD. Accordingly, this matter will be remanded to the Director so that he may request a United States Department of State WRD recommendation under 22 C.F.R. § 41.63. If the United States Department of State WRD recommends that the application be approved, the application must be approved. If, however, the United States Department of State WRD recommends that the application not be approved, the application will be re-denied with no appeal.

**ORDER:** The record of proceeding is remanded to the Director for further action consistent with this decision.