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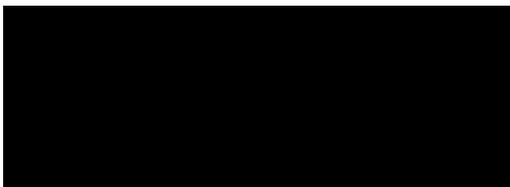
Date: **AUG 29 2006**

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:

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 Acting Director, Nebraska 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 and citizen 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's last admission to the United States in J1 nonimmigrant exchange status was on February 26, 2001.<sup>1</sup> The applicant has a lawful permanent resident spouse. She presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse.

The acting director determined that the applicant failed to establish her spouse would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in India. *Acting Director's Decision*, dated April 6, 2006. The application was denied accordingly.

On appeal, counsel asserts that the applicant has demonstrated that there would be exceptional hardship to her spouse if she fulfilled the foreign residency requirement. *See Form I-290B*, dated May 2, 2006.

The record includes, but is not limited to, counsel's brief, family photographs, the applicant's affidavit, the applicant's spouse's affidavit, evidence of financial obligations and monthly budget, a psychological report for the applicant's spouse, letters of support regarding the applicant and her spouse's medical conditions, and country condition articles. The entire record was considered in rendering this decision.

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 [now the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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

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<sup>1</sup> The record indicates that the applicant's most recent admission to the United States was in O-1 status on April 28, 2004. *Applicant's Form I-94*, dated April 28, 2004. The applicant's passport includes a departure stamp from India on April 28, 2004. *Applicant's Passport*, at 28, dated April 28, 2004. The length of time she spent in India is not clear from the record, however, this amount of time would be deducted from the requisite two year stay in India.

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.

Counsel asserts that the acting director used the standard of "life threatening physical or mental illness" in the decision and there is no case law or legal precedent with this standard. *Brief in Support of Appeal*, at 3, dated May 24, 2006. Counsel is correct in asserting that this is not the appropriate standard per relevant case law. Counsel also contends that *Orife v. Salturelli*, No. 5571229 (E.D. Mich. Dec. 31, 1975) is the only case cited and it is unclear why this case is used as legal precedent. *Id.* at 2. The AAO will rely on the precedent case law below in adjudicating the applicant's case.

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 demonstrate that the applicant's spouse would experience exceptional hardship upon relocation to India for two years. The applicant asserts that her spouse would be targeted and harassed because of her inability to have a child and he would face psychological hardships and cultural discrimination as a result of her condition. *Applicant's Statement*, at 1, dated September 28, 2005. The applicant states that she and her spouse will not be able to continue their infertility treatments due to lack of adequate medical service and infertility clinics. *Id.* The record indicates that it will be more difficult to find treatment in India, however, it appears possible to receive fertility treatment. In addition, the record does not reflect emotional hardship to the applicant's spouse based on the applicant's inability to receive treatment.

The applicant contends that her spouse would suffer economic and emotional hardship as a member of a caste which is discriminated against and the poor environmental conditions would be dangerous to his health. *Id.* at 2. The applicant states that her spouse has tension spontaneous pneumothorax and air pollution can worsen the condition. *Id.* at 5. The record lacks medical evidence demonstrating that he will face serious medical problems in India. The applicant states that there is a lack of positions in her spouse's industry and the salary would be inadequate to support them. *Id.* at 6. There is no evidence that the applicant's spouse and/or the applicant would be unable to find employment in India in order to support themselves financially. Counsel states that the applicant's spouse could have his lawful permanent resident card revoked if he leaves the United States for an extended period of time. *Brief in Support of Appeal*, at 3. The AAO notes that the applicant's spouse can obtain a re-entry permit if he leaves the United States for more than one year. The record reflects that relocation may result in some emotional stress and financial and logistical problems for the applicant's spouse, however, these problems do not rise to the level of exceptional hardship.

The second step required to obtain a waiver is to demonstrate that the applicant's spouse would suffer exceptional hardship upon remaining in the United States during the two-year period. The applicant states that her spouse would suffer economic hardship trying to meet their monthly obligations while trying to support her and his family in India. *Applicant's Statement*, at 2. The applicant states that her spouse is financially responsible for his father's medical bills from a cardiac bypass surgery. *Id.* at 8. The record does not support these claims of hardship. The applicant also states that he would suffer emotional and psychological hardships due to separation. *Id.* The record includes a psychological evaluation which states that the applicant's spouse has an adjustment disorder with mixed anxiety and depressed mood. *Psychological Evaluation for the Applicant's Spouse*, at 3, dated June 18, 2005. The AAO acknowledges the important role of a clinical psychologist, however, it gives little weight to the submitted report as it is based on a one-time meeting and there is no mention of a follow-up appointment, proposed therapy or treatment for the applicant's spouse. The AAO notes that separation entails inherent emotional stress and financial and logistical problems which are common to those involved in the situation. A review of the record does not indicate that the applicant's spouse would suffer exceptional hardship upon remaining in the United States without the applicant during the two-year period.

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.