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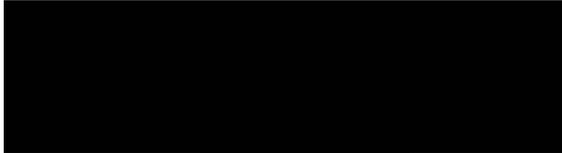
U.S. Department of Homeland Security
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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: **APR 07 2008**

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.

Robert P. Wiemann, 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 applicant is a native and citizen of Lebanon who was admitted to the United States in J1 nonimmigrant exchange status in June 2002 to participate in graduate medical training. She is thus 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 presently seeks a waiver of her two-year foreign residence requirement, based on the claim that her U.S. citizen children, born in December 2003 and April 2006, would suffer exceptional hardship if they moved to Lebanon temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Lebanon.

The director determined that the applicant failed to establish that her children would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Lebanon. *Director's Decision*, dated November 20, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated January 2, 2008 and a letter and supporting documentation from the applicant's spouse's employer regarding his employment, the duties of his position, and his work schedule. 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(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.

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).

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The first step required to obtain a waiver is to establish that the applicant's children would experience exceptional hardship if they resided in Lebanon for two years with the applicant. To support this contention, the applicant states the following:

...If I were forced to return to Lebanon, my U.S. citizen children, J [redacted] and [redacted] would suffer exceptional hardship for a number of reasons. They would suffer psychological, physical and medical hardships....Since they will still be very

young when we return to Lebanon (they will be ages 5 and 3), and because they already have a history of medical concerns, they will be predisposed to infections and will not be able to receive the proper medical care in Lebanon. They will additionally be exposed to serious risks of physical hardship due to the growing radical anti-Americanism found among the general public in Lebanon, and due to the constant political instability that results in violent clashes throughout Lebanon. Moreover, the economic constraints would also serve as additional and exceptional hardship on my children. They will also fall behind in their English language development, as English is not spoken in Lebanon....They will moreover suffer psychologically in being separated from their father at such a young age....

It will be extremely difficult for me to find gainful employment should I be forced to return to Lebanon. Because so many physicians are being compelled to return to Lebanon from abroad, there has been an increase in the supply of physicians in a manner that is disproportionately larger than the demand for their services....I will have added difficulty in finding work in my specialized field of pediatric infectious diseases. I will likely have to work as a general practitioner, making a substantially lower salary as well as stunting any potential to garner any additional training or expertise....

If I am unable to find work in my field, then I will be lucky if I find work as a general physician....the medical field is saturated and underfunded in Lebanon. I do not know how I will support my children without a job. If I were to try to find a job outside of medicine, I would have to take an unskilled job, which would pay me close to nothing. It will be difficult for my husband to support two separate households while he resides in the US. He will be able to provide some help, but it may not be enough to support me and our children.

...With a limited family income, covering basic health expenses such as routine pediatrician visits, medications and laboratory tests, becomes a real problem. There is no organized healthcare system, and as such, patients must pay all expenses out of pocket....This also means that I, facing unemployment or poor pay, will have trouble paying physicians to see my children should they become seriously or chronically ill. They already have a history of medical problems....Though I am a doctor, I will not be able to treat my children should they become ill. I will not readily have access to the facilities needed for the monitoring and treatment they will require should they become ill....

The consequences of my low-income level will directly affect my children's well being. [redacted] [the applicant's son] will be between the ages of three and five when we return to Lebanon. Because I will face unemployment and a low salary, I will have to be flexible to work longer hours to make ends meet. While I am at

work, [REDACTED] will require childcare. Unfortunately, neither my family nor my husband's family can help me with childcare....

...I will have to pay for childcare. In order to make ends meet, it is most likely that if I do find work, I will have to work long, evening and weekend hours to make ends meet. This means I will have to find childcare not only for [REDACTED] during regular hours, but also for [REDACTED] [the applicant's daughter] during evening and weekend hours, when she is not in school. Childcare costs are very expensive and are not available into the evening hours or overnight. The average cost of childcare in Lebanon is \$416 per month, which is a very high portion of the low salary I will make....Either I will not be able to afford childcare, or I will have to sacrifice paid work so I can stay home with [REDACTED] and [REDACTED], leaving me with no money to survive....

I am extremely nervous as to what will happen to my children's health should they be compelled to return to Lebanon for two years. Both of my children suffer from medical conditions that can be exacerbated by the environmental pollutants common to Lebanon. [REDACTED], my oldest child, has always had a growth problem. She was born at the 50th percentile for weight and height, but at 5 months of age, she started having poor weight gain. Her growth curves fell until she reached below the 3rd percentile for height and weight by the age of 10 months....She was then followed closely by a pediatrician....Due to lack of improvement, [REDACTED] was eventually admitted to the Women and Children's Hospital of Buffalo for one week in January 2005 for further evaluation. She was seen by multiple consultants including a cardiologist, endocrinologist, gastroenterologist, and neurodevelopmental and feeding disorders specialist. She underwent multiple blood tests and an upper and lower endoscopy....A radio-imaging scan revealed high grade acid reflux....Currently, she is at the 5th percentile for weight and between the 5th and 10th percentile for height....She is still followed up closely for growth by her pediatrician....

my youngest child....started having frequent spit-ups and his weight gain became slower....He was also started on Prevacid for presumed acid reflux....

I am also concerned that my children will fall ill of other illnesses and not receive proper treatments in Lebanon....their existing conditions, in tandem (sic) with the poor environment and poor healthcare, will place their lives and well-being at risk....

[REDACTED] is currently three years old, and she will be 5 years old when we move to Lebanon. There are the prime years for children to develop language. She will best develop her English comprehension and speaking abilities if in an English speaking environment. If my daughter were forced to move to Lebanon, she would

be taken from the United States during a period in her life that is crucial to language development...If [REDACTED] is compelled to move to Lebanon for two years, her only exposure to the English language will be at home and this is not sufficient....

[REDACTED] faces another problem educationally: getting along in Lebanese schools without knowing Arabic. Even though my husband and I have tried to teach her Arabic, [REDACTED] seems to be only taking to English....She will thus be far behind when she enrolls in school in Lebanon....

My children are very close to my husband, their father. Unfortunately, if our children were to return with me to Lebanon, they would be separated from their father for two years. This can lead to disturbing problems....

My children would suffer both psychological and potential physical hardship if they were to return to Lebanon. Their young age would not shield them from the danger to life and limb posed by anti-American extremists, which have demonstrated a complete disregard for human life regardless of age or gender. It would be exceptionally difficult to protect them every minute of every day for two years. My children are American citizens, who, during the most crucial years of their development, would be bombarded with anti-American imagery. This would be extremely harmful for their self-image and sense of self....

Affidavit of [REDACTED] dated August 29, 2007.

[REDACTED], the applicant's children's pediatrician, further elaborates on the children's medical issues.

As [REDACTED] states,

...I have been the pediatrician for [REDACTED]s [the applicant's] children, [REDACTED] and [REDACTED] since July 2005. [REDACTED] will be approximately five and a half years old and [REDACTED] will be roughly three years old when they must leave the United States and go to Lebanon....

First and foremost, neither child will have received all their vaccinations by the time they are forced to leave the country. Although vaccinations may be available in Lebanon, there is no guarantee that they will have access to a full range of shots. Moreover, it is well documented that drugs and immunizations in developing countries do not meet the high standards set out by the FDA or the AMA in the United States. Because both [REDACTED] and [REDACTED] are so young and were born in the United States, they will not have built up the immunity to fight the many diseases that exists in these developing countries.

There are several exacerbating factors that make the need for [REDACTED] and [REDACTED] to stay in the United States even more dire. Most notably, [REDACTED] has a serious growth problem... [REDACTED] the younger child, also suffers from slowed weight gain and is being treated... It is imperative that both of these children be monitored closely to ensure that their development is not stunted. I am afraid that if these children are forced to return to Lebanon, they will not receive the ongoing treatment that they need and if they get sick, the illness will dramatically affect their already unstable growth. This effect will be particularly serious for Jana who already has a minimal reserve.

Letter from

M.D., Memphis Pediatrics, PLLC, dated April 23, 2007.

[REDACTED] a physician who has treated children residing in Lebanon for numerous years, states the following regarding medical hardships in Lebanon for young children:

...Many of the children I have treated suffer from disorders that are caused by the environment in Lebanon. Children often suffer from water/food-borne disease that result in gastroenteritis, typhoid fever, brucellosis and hepatitis A, air-borne diseases mainly asthma and reactive airways and general pollution-related diseases such as dermatitis in addition to conditions arising from inappropriate disposal of garbage... Children who were not raised in Lebanon and do not have the required immunity needed to fight off these environmental diseases are substantially worse off. They get sick more often and with a greater degree of severity. I would therefore not recommend [REDACTED] [the applicant] bring her US-raised children to Lebanon for a period of two or more years. They would definitely become ill, and perhaps even severely ill.

I especially make this recommendation now because of the increased amounts of microscopic pollution found in water supplies due to the bombing damage from the summer of 2006. Children absorb this type of pollution at higher rates and the long-term effect of this unexpected water pollution on the people of Lebanon is still being studied. Moreover, most children living in Lebanon are currently suffering from psychological disorders pertaining to ongoing conflicts.

It has been brought to my attention that both [REDACTED] and [REDACTED]...suffer from acid-reflux disease... This is a condition that would be further exacerbated should they be forced to move to Lebanon because of the difficulty to afford their needed medication chronically... Due to the volatile nature of this country, most hospitals lack the necessary funding and equipment needed to properly treat patients who need constant monitoring like [REDACTED]. If these children were forced to move to Lebanon with their parents, their health would be severely affected by multiple limitations including, both environmental hazards and extreme pollution and the lack of reliable healthcare...

Letter from [REDACTED] dated April 23, 2007.

Counsel has also provided a number of articles regarding the problematic political and social situation in Lebanon. Moreover, a Travel Warning, issued by the U.S. Department of State, Bureau of Consular Affairs, dated October 17, 2007, states the following:

This Travel Warning updates information on security threats and ongoing political tensions in Lebanon, and advises U.S. citizens of current safety and security concerns. The Department of State continues strongly to urge that Americans defer travel to Lebanon and that American citizens in Lebanon consider carefully the risks of remaining. This Travel Warning supersedes the Travel Warning issued on June 14, 2007.

The U.S. remains concerned about the threat of terrorist attacks against Western and Lebanese government interests in Lebanon. Groups such as Al-Qaeda and Jund al-Sham are present in Lebanon, and they have issued statements calling for attacks against Western interests. The Department of State also is concerned that the clashes between terrorist extremists and the Lebanese Armed Forces that occurred in the Nahr al-Bared refugee camp in northern Lebanon from May to September 2007 could occur in other camps in Lebanon. U.S. citizens who visit refugee camps in Lebanon risk becoming trapped during hostilities.

Two anti-Syria Members of Parliament were assassinated in separate car bombings in Beirut -- Walid Eido on June 13, 2007, and Antoine Ghanem on September 19, 2007. Others were killed and injured in both incidents, including innocent bystanders.

On June 7, 2007, a bomb exploded in the town of Zouk Mousbeh, north of Beirut. This followed the discovery of explosive-laden vehicles in Eastern Lebanon. Since May 20, explosions have occurred in the Beirut neighborhoods of Achrafieh and Verdun, the Beirut suburb of Sad Al-Bouchrieh, and the resort town of Aley.

The Department of State urges U.S. citizens to defer travel to Lebanon, and that U.S. citizens already in Lebanon carefully consider the risks of remaining. U.S. citizens who choose to remain in Lebanon are encouraged to maintain a high level of vigilance; confirm and maintain the validity of their passports and other U.S. travel documents for themselves and their family members; monitor the local security situation and be ready to depart quickly in the event of any deterioration in the situation.

U.S. citizens traveling to Lebanon or resident in Lebanon should be aware the U.S. Embassy has limited ability to reach all areas of Lebanon. The Embassy cannot guarantee that Embassy employees can render assistance to U.S. citizens in areas where there is little or no government control, such as the southern part of Lebanon where Hizballah continues to be active.

In a crisis situation, U.S. citizens are responsible for arranging commercial or private means of transportation to depart Lebanon. If evacuation is warranted, only when all other transportation options are unavailable will the U.S. government assist U.S. citizens in leaving a country. This service will be provided on a cost-recovery basis, which means the traveler must reimburse the U.S. government for the cost of the travel. The lack of valid travel documents will slow the U.S. embassy's ability to provide assistance. Further information on the department's role during emergencies is provided at http://www.travel.state.gov/travel/tips/emergencies/emergencies_1212.html.

The Department of State considers the threat to U.S. government personnel in Beirut sufficiently serious to require them to live and work under strict security restrictions. These practices limit, and may occasionally prevent, access by U.S. Embassy officials to certain areas of the country. Unofficial travel to Lebanon by U.S. government employees and their family members requires prior approval by the Department of State.

Landmines and unexploded ordnance pose significant dangers throughout southern Lebanon, particularly south of the Litani River, as well as in areas of Lebanon where civil war fighting was intense. More than a dozen civilians have been killed and over 100 injured by unexploded ordnance following the armed conflict in July-August 2006. Travelers should watch for posted landmine warnings and strictly avoid all areas where landmines and unexploded ordnance may be present.

Travel Warning, U.S. Department of States, Bureau of Consular Affairs, dated October 17, 2007.

Based on the political and social turmoil in Lebanon, the security concerns with respect to U.S. citizens, the children's documented medical problems and Lebanon's substandard health care, their unfamiliarity with the country and its language, the financial hardship they would face due to the applicant's inability to find gainful employment and their prolonged separation from their father, the AAO finds that the applicant's U.S. citizen children would experience exceptional hardship were they to accompany the applicant to Lebanon for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Lebanon. As stated by the applicant,

...My husband, [REDACTED], was also on a J-1 clinical visa. He is also subject to the two-year home residency requirement. My husband will remain in the US on an H1B visa for three years to complete the terms of a Delta Regional Authority waiver job. My J-1 training program will end in June 2009. At that time, my husband will still be completing his Delta Regional Authority waiver job....

Supra at 1.

Counsel further elaborates on the applicant's spouse's status in the United States. As stated by counsel,

...In the instant case, the Service based its entire argument on an its (sic) contention that the children may remain in the US with their father, who is an H1-B holder. We remind the service that an H1-B holder is not entitled to remain in the country indefinitely, and that any number of situations could arise when the foreign national would lose his non-immigrant status. For example, he could be prevented from working because of an injury or his sponsoring employer could go out of business. The temporary and revocable nature of an H1-B holder's non-immigrant status distinguishes him from a legal permanent resident or US citizen...

Brief in Support of Appeal, dated January 2, 2008.

The AAO concurs with counsel that due to the applicant's spouse's nonimmigrant status and its temporary and revocable nature, it has not been established that the children would be able to remain in the United States during the two-year period that the applicant has to return to Lebanon. As such, were the applicant's spouse required to depart the United States at some point in the future, such a predicament would leave the young children in the United States without their parents. By default, this situation would constitute exceptional hardship to the applicant's children.

In the alternative, if the applicant's spouse were able to remain in the United States during the applicant's two-year home residency requirement, the applicant contends that her husband would be unable to properly care for the children. As stated by the applicant,

...I am extremely close to my children. I have been their primary caretaker since their birth...Unfortunately, if I were to return to Lebanon without them for two years, they would be absolutely devastated. This can lead to disturbing problems in children. I am afraid that my separation from my children will cause long-lasting psychological effects on my children.

Sadly, my husband will not be at home very much to help my children cope with my absence for two years. He will have busy work hours, as do most physicians who work in a federally designated underserved area....

Because my husband will have to work so much, that means Jana and Ahmad will spend a lot of time in childcare. This will exacerbate any symptoms of Separation Anxiety Disorder, as they will effectively be separated from both parents. There is no doubt that this sudden absence of both parents for a period of at least two years will be exceptionally difficult on my children, to the point that they will suffer psychological and perhaps developmental repercussions.

Supra at 12-13.

In this alternative, were the applicant's spouse able to remain in the United States, with a valid nonimmigrant status, caring for the children during the requisite two-year period, the AAO concurs with counsel that the children would suffer exceptional psychological and emotional hardship as they would be separated from their mother, their primary caretaker, for a prolonged period during a critical stage of their academic and social development.

The AAO finds that the applicant has established that her children would experience exceptional hardship were they to relocate to Lebanon and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's children would suffer if the applicant temporarily departed the U.S. for two years 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.