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HS

[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: **AUG 12 2008**

IN RE: [REDACTED]

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:

[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 Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Center 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 native and citizen of Nepal, obtained J-1 nonimmigrant exchange status. He 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) based on the Exchange Visitor Skills List and government financing. The applicant presently seeks a waiver of the two-year foreign residence requirement based on persecution on account of political opinion.

The center director found that the applicant had failed to establish he would be subject to persecution if he returned to Nepal. *Center Director's Decision*, dated April 29, 2005. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated June 28, 2005; an affidavit from the applicant, dated June 28, 2005; and additional documentation pertaining to country conditions in Nepal. In addition, on December 14, 2005, counsel submitted evidence that the applicant's spouse, also a J-1 nonimmigrant exchange status holder subject to section 212(e) of the Act, had obtained a Form I-612, Application to Waive Foreign Residence Requirements, approval, dated December 2, 2005, based on having established that she would be subject to persecution on account of political opinion were she to return to Nepal, her home country. 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(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.

Persecution has been defined as "...a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Matter of Acosta*, 19 I & N, Dec. 211 (BIA 1985). Unlike applicants for refugee or asylee status, who may establish a well-founded fear of persecution on account of five separate grounds including race, religion, nationality, membership in a particular social group, or political opinion, an applicant for a waiver under section 212(e) of the Act must establish that he or she **would be** persecuted on account of one of three grounds: race, religion or political opinion.

To support the assertion that the applicant would be persecuted on account of his political opinion if he returned to Nepal, the applicant states as follows:

... With the absence of freedom of press, nobody can provide a fair and accurate picture of what is actually happening in Nepal. Even with the filtered news and information that comes through government channels, everybody realizes how people are living in constant fear and terror.... Furthermore, this is not just limited in certain parts of the country.... There is no free press to give a fair and accurate account of Maoist torture and government executions. The only sources of reporting are government run papers and International human rights agency like—Amnesty International. The former tries to underreport in order to show that the government is in control, and the latter has a very limited access to real facts. However, the government run newspaper, The Rising Nepal, in its

editorial, admits the Maoist insurgency has taken many lives, and the security situation has depleted everywhere.... In Nepal, the people have fear of losing their lives at any time. Unknowingly, a bomb blast and gun shot taking place at any time and any place has made the lives of Nepalese fearful. They can't walk and breathe freely.... This argument is supported from the fact that on June 6, 2005 at least 53 persons were killed when a landmine planted by Maoist rebels blew up a passenger bus to pieces....

Maoist's insurgency has cause [sic] people to flee from their villages.... There has been a large population transfer from the Himalayan Kingdom into India....

...Despite security by the UN Commission on Human Rights, the authorities failed to put in place any meaningful mechanism to respect human rights. For the second successive year, the highest number of 'disappearances' reported to the UN occurred in Nepal.

The argument that I could live in anonymity and avoid danger seems simply impossible and impractical due to where I have to live. I live in a small village community where everybody knows everybody else. Furthermore, due to my family being recognized in politics and other social developments—anonymity will not be easily achieved. Maoist training camps are being run in the village Secondary school...where my wife used to serve as a teacher. In short, it is virtually impossible for me to go unnoticed.

The argument that I might not be perceived as being opposed to the Maoist movement since I have not been present to make my feelings known is simply unrealistic. The majority of those targeted and persecuted likely never said a single word concerning their views of Maoists. Rather, views were attributed to them because of their particular position, i.e., teacher or recipient of western aid. It is completely unrealistic to suggest, given my family history and my personal background, that as long as I keep my mouth shut, I don't run the risk of being persecuted. As an example, just last year a person was tortured simply for accepting USAID assistance. It is not likely that he approached the Maoists and informed them that he was the recipient of USAID assistance, yet he was tortured because they simply found out about him. This argument that my lack of anti-Maoist sentiments will protect me fails to appreciate that most of these rebels do not operate on established guidelines on whom they should choose as their victim. In a given day anyone can be a target, but some are clearly more prone to than others. They include: pro-democratic politicians, teachers, students, people associated with United States government and those who adhere to democratic ideals. I have many of these traits that Maoists abhor. I am a former teacher, I am the recipient of western aid, I come from a prominent family, have been educated in the west and have lived in the US for that many years, my wife was

the former head mistress of a school that is now a Maoist recruiting center, my brother was chairman of VDC in our village and my village is now a major Maoist stronghold. I might as well be American as far as they are concerned. In addition, I could be a target for extortion for random since they will assume that I have amassed wealth in the US....

Many lives have been taken by the Maoist insurgency, and I am terrified by the prospect of going back to live in constant fear and terror of being found and tortured or killed....

*Affidavit of [REDACTED]*, dated June 28, 2005.

As further stated by counsel, in pertinent part:

...The evidence shows that because (1) he [the applicant] is a former teacher; (2) he is from a prominent family which historically has been actively involved in social and educational development; (3) he is the recipient of World Bank aid; (4) he is U.S. educated in social and economic development; (5) his wife is the former Head Mistress of a school that is now a Maoist recruiting center; (6) his bother [sic] is the last democratically elected chairman of VDC in his area and served in that capacity for 10 years from 1991-2001; (7) that his village is now a major Maoist stronghold; (8) he is perceived to have accumulated great wealth and to be pro-American from living in the U.S. for 15 years; (9) he is a former government employee and; (10) he now has a United States citizen son, Mr. Aryal [the applicant] would be subject to persecution.

To the Maoists, (1) possesses a belief or characteristic they seek to overcome by means of punishment of some sort; (2) the Maoists could easily become aware that [REDACTED] possesses this belief or characteristic; (3) the Maoists have the capability of punishing [REDACTED] and (4) the Maoists have the inclination to punish [REDACTED]....

*Brief in Support of Appeal*, dated June 28, 2005.

In corroboration of the above statements, the U.S. Department of State, in its Country Report on Human Rights Practices-Nepal, states, in pertinent part:

The November 2006 peace agreement between the then-Seven-Party alliance and the Maoists ended the decade-long insurgency and called for the Nepal Police (NP) and the Armed Police Force (APF) to enforce law and order across the country. Authorities reestablished many police posts, but Maoists, or their subsidiary organization, the Young Communist League (YCL), prevented some from being reestablished and subsequently forced others to close.... Lacking

political backing, police were often reluctant to intervene, particularly against the Maoists or YCL members.

Members of the security forces committed some human rights abuses during the year, and the Maoists/YCL and members of other small, often ethnically based armed groups committed numerous grave human rights abuses.... Maoists frequently employed arbitrary and unlawful use of lethal force, including torture and abduction. Violence, extortion, and intimidation continued throughout the year. Impunity for human rights violators, threats against the media, arbitrary arrest, and lengthy pretrial detention were serious problems. The government also compromised the independence of the judiciary....

According to a local NGO, Informal Sector Service Center (INSEC), security forces killed at least 28 individuals, and the Maoists/YCL killed approximately 23 persons.

According to AF, the Maoists committed 67 acts of torture, one case of rape, and 96 cases of abduction since the People's Movement of April 2006. The government failed to conduct thorough and independent investigations of reports of security force or Maoist/YCL brutality and generally did not take significant disciplinary action against those involved. Citizens were afraid to bring cases against the police for fear of reprisals.

The November 2006 peace agreement called on the NP and the APF to enforce law and order across the country. Authorities reestablished several police posts, but the Maoists forced some of the reestablished posts to close. The police stood aside during most incidents of violence, particularly events involving Maoists. According to police accounts, government officials instructed police not to intervene in the case of Maoist violence for fear of endangering the peace process. There were multiple events during the year in which police detained Maoist and YCL cadres for illegal acts, only to see them freed by political leadership within the Home Ministry or after intervention by other political leaders.

Corruption and impunity remained a problem in the police force. Although the authorities removed a few police officials from their posts because of human rights violations, human rights groups reported that these individuals were promoted or reassigned as advisors at the Home Ministry. According to human rights groups, a culture of impunity continued to exist within the police. At the district level, police often operated without significant guidance from superiors, allowing vast discretion in the enforcement of laws. As in the previous year, there were many reports of police abuse and bribery.

Although the Maoists announced the dissolution of their parallel government structures and courts on January 18, according to police and NGO reporting, they

continued to function in some districts, particularly in rural areas. Even in areas where they no longer functioned, the Maoists often expected previous decisions and sentences to be carried out. These courts had no due process, and handled both criminal and civil cases. According to OHCHR, the people's courts did not provide minimum guarantees of due process and fair trial.

The Maoists returned some previously seized property but kept most illegally seized lands and properties in their possession; they also seized additional properties.

There were no reports of the government forcing civilians to resettle. Some persons who had resettled to escape Maoist extortion, recruitment, or retaliation could not return home.

Members of the Maoists, the Maoist-affiliated YCL, and various other splinter groups in the Terai frequently committed acts of violence, extortion, and intimidation throughout the year.

INSEC reported that, through December 10, Maoists and members of other armed groups killed between 229 and 234 civilians. OHCHR received reports of more than 130 killings of civilians during the year.

In some areas Maoists demanded that schools follow a calendar devoid of religious holidays. Maoist extortion and pressure forced private schools, orphanages, and other institutions to close or alter schedules in some districts.

Abuses by the YCL continued relatively unabated throughout the year. According to OHCHR, abuses by the YCL were conducted in a manner similar to those carried out earlier by other CPN-M cadres. They include abductions and ill-treatment in captivity, attacks on physical and mental integrity, and the violent disruption of political activities. They also included threats against newly established police posts and violence against several government officials and property. OHCHR also received reports of "donations" ranging from \$281 (20,000 rupees) per month to \$5,627 (400,000 rupees) representing one-time payments requested in the name of the YCL from business representatives. The businesses often asked OHCHR not to raise the cases for fear of reprisals.

Maoists regularly extorted money from businesses, workers, private citizens, and NGOs. When individuals or companies refused or were unable to pay, Maoist recrimination frequently was violent, or implied the threat of violence.

Maoist-inspired work stoppages, enforced through violence and intimidation, caused particular hardship to workers in many economic sectors.

On August 9, a group led by Maoist cadre members attacked a police post in Nuwakot District, stealing two guns and approximately 100 rounds of bullets from three police officers who were at the post.

On November 1, YCL cadre members beat two persons whom they forcefully captured from the premises of the Ministry of Local Development in Lalitpur District.

On November 18, members of the YCL abducted six persons, including doctors and directors of Nobel Medical College, based in Biratnagar, Kathmandu, and tortured them for 14 hours at an unidentified location near Kamidanda in Kavre District.

On December 5, Maoist cadres beat a foreign tourist at Birethani in Kaski District who did not pay the "donation" that the cadre demanded.

The Maoists opposed freedom of expression, and through intimidation and job actions by affiliated unions, attempted to restrict print and broadcast media. Maoists threatened private FM radio stations to force them to broadcast Maoist propaganda, and the Maoists themselves operated both fixed site and small, mobile FM radio stations that broadcast propaganda. Maoist radio stations broadcast widely.

During the first week of August pro-Maoist workers presented the management of Radio HBC FM with a list of demands related to pay and job conditions and padlocked part of the facility. In reaction, the FM management stopped broadcasting. On August 29, two days after management advisor Birendra Dahal ended his fast-until-death in support of press freedom, he posted a notice that all journalists and employees were fired. The move drew widespread criticism and staffers protested. In September management conceded the major demands of the protesting employees, and the radio resumed transmission.

On September 26, the Maoist-aligned All Nepal Communication, Press and Publications Trade Union prevented work in the marketing department of Kantipur Publications. As a result, on September 27 *Kantipur* and *The Kathmandu Post* appeared without advertising.

According to the Federation of Nepalese Journalists, from January through November 30, Maoists killed one journalist and abducted another, while police officials arrested 39 journalists.

On July 5, a group of Maoists allegedly abducted journalist Prakash Singh Thakuri from Kanchanpur. A team of human rights organizations, including representatives from the International Institute for Human Rights, Environment, and Development (INHURED), INSEC, the Institute of Human Rights

Communication Nepal(IHRICON), and AF, initiated a probe on a request by [REDACTED]'s wife. According to the report by the team, Maoists were responsible for the abduction. On July 8, police arrested a local Maoist leader, Pom Lal Sharma, for his alleged involvement in the abduction. He was released after he told police he had only shown the house of Thakuri to some YCL cadres. The YCL denied its involvement.

On October 3, an unknown group abducted Pappu Gurung from Dodhara district. On October 5, Maoists abducted Birendra Shah, a central member of Press Chautari Nepal and correspondent of Kathmandu-based Nepal FM, in Bara district. The International Federation condemned the disappearances. Shah's body was recovered on November 8, and Maoists took responsibility for the killing. The interim government appointed a parliamentary panel headed by Urmila Aryal to investigate the incident in Bara. The panel concluded that local Maoists had been responsible for the attack. At year's end the government had not taken further corrective action to investigate these cases.

Maoist groups curtailed academic freedom, regularly extorted money from private schools and teachers, and inflicted punishment on school officials. Despite the Comprehensive Peace Agreement, the country's media continued to report instances of abduction, extortion, and intimidation by Maoists outside the Kathmandu valley, although at a much lower level than in 2006.

*Country Report on Human Rights Practices-Nepal, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, dated March 11, 2008.*

Section 212(e) of the Act requires that the applicant establish that he would be persecuted upon return to his country of nationality or last residence, a very high standard. The AAO finds that the applicant has established that he would be persecuted in Nepal on account of political opinion.

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 DOS. Accordingly, this matter will be remanded to the center 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 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 center director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.