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U.S. Citizenship
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FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

AUG 21 2008

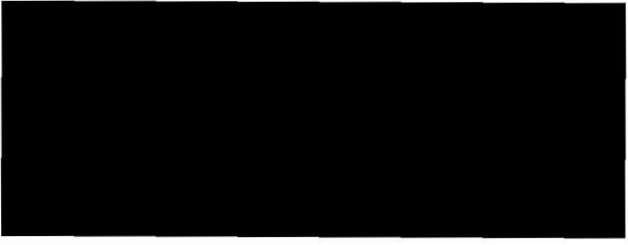
IN RE:



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.

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 India who obtained J-1 nonimmigrant exchange status in December 2000. 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 his participation in graduate medical training. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen twin daughters, born in December 2002, would suffer exceptional hardship if they moved to India temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled his two-year foreign residence requirement in India.

The director determined that the applicant failed to establish that his U.S. citizen children would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in India. *Director's Decision*, dated February 19, 2008. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated March 18, 2008; a letter from the applicant and his spouse, dated March 1, 2008, with referenced exhibit; case law with respect to waivers; copies of two decisions from the AAO; a copy of an article written by counsel about hardship waivers; and documentation with respect to two previously approved Form I-612 applications. 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.

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 establish that the applicant’s U.S. citizen children would experience exceptional hardship if they resided in India for two years with the applicant. To support this contention, the applicant states the following:

...Around June 1996, when I was in the midst of my second year of residency, I started having symptoms of weight loss, anorexia, and general malaise. The symptoms persisted, so I went to a local gastroenterologist. The gastroenterologist initially diagnosed my condition to be stress-related due to my busy residency, and he offered me verbal assurances. After a few weeks, my symptoms worsened, and I started bleeding from the rectum. Once again, I visited the only gastroenterologist in the hospital. I had to virtually beg him to do a colonoscopy. A colonoscopy was done, and my worst fears came true. There was a big ulcerated lesion in my colon, which the biopsy revealed to be carcinoma of the recto-sigmoid region....

Cancer care hospitals in India are generally very sparse; therefore, I was referred to the Tata Memorial Hospital in Mumbai. Due to the long list of patients and non-availability of beds, I had to opt for another hospital in Lucknow, where I finally had surgery.... Since I was not married, I was given the option of sperm preservation in the sperm bank, but due to no availability of the same in the whole of North India, I decided to go ahead with the surgery right away rather than wait and go to another part of India for sperm preservation....

...during my surgery it was found that my cancer had spread to the local lymph nodes, and the treating surgeon decided that I would need a full course of post-operative chemotherapy and radiotherapy....

Unfortunately, as luck would have it, my visa extension was turned down.... we had to pack up our belongings, sell our car, and return to India.

Our experiences in India at the time were not at all good. I struggled for months to find a suitable job. I finally ended up at an institute in New Delhi that paid me a paltry sum of Rs. 20,000 (\$500.00) per month. This was too little, but I had to accept it since there were no other offers.

Our daughters did not have a pleasant experience either. They repeatedly fell ill and had to be treated for upper respiratory infection, diarrhea, and skin rashes due to constant mosquito bites. Since most of the hospitals in India are run by the government, it was a virtual nightmare getting appointments even for small

emergency situations.... My own past medical experience and the constant illness of our children, led my wife and I to decide to go back to the United States. Once again, I started applying to Internal Medicine programs....

I returned to the United States with my family in June 2005.... I consulted with my Gastroenterologist and Endocrinologist and was restarted on hormone therapy for the treatment of my hypogonadism.

At this time my treating Gastroenterologist first suggested that I might be suffering from what is known as hereditary nonpolyposis colorectal cancer. Since I have a history of close family members who have died of gastrointestinal malignancies, I was advised to have screening follow-ups for future malignancy recurrence. I was also informed that my daughters would require close surveillance due to the genetic nature of the disease....

My ongoing battle with hereditary nonpolyposis colorectal cancer, and the problems caused by the cancer treatments, is something I will have to deal with for the rest of my life. The evidence is clear...that my risk of death or serious complications would be vastly higher if I must return to India. I understand very well that hardship to me is not supposed to be relevant in this kind of waiver application. But very serious hardship to me, such as death or the inability to work, would definitely and directly cause many exceptional hardships to my two U.S. citizen children....

and [the applicant's twin daughters] were born in the United States and have been going to daycare and school here. The only language they know is English. We tried to introduce them to Hindi but were not successful. They speak with what Indians would consider an American accent. [redacted] [the applicant's spouse's] parents, who were here for a few months and are well conversant in English, were hardly able to understand what [redacted] and [redacted] were speaking. If they went back to India, it would be impossible for them to communicate with other children and teachers.

In school, they are culturally well adjusted. It would be tremendously difficult for them if we were to relocate to India. Their future in India would be bleak in regard to both their physical health and emotional development....

and I are Kashmiri Pandits (Hindus), an old ethnic group that is the original inhabitants of the valley of Kashmir.... today, after years and years of religious persecution, our families have been forced to live as refugees in our own country. [redacted] s parents are still living in refugee camps.... In short, the entire population of Kashmir Pandits has been ethnically cleansed from their ancient homeland. The survivors live like refugees in their own country....

The grim tragedy is compounded by the equally grim irony that one of the most intelligent, subtle, versatile, and proud communities of the country is being virtually reduced to extinction.... The major dimension of the terrorist violence in Kashmir is the terrorists' commitment to exterminate and subjugate the Kashmiri Pandits in the state. Currently, there are attacks, molestations, kidnappings, and gang rape of women in order to instill fear and humiliation in the few remaining Kashmiri Pandits. Our houses have been burned and our properties looted to ensure that we do not return. All these factors are compounded by the fact that in India it is especially difficult for a Kashmiri Pandit to apply for jobs outside Kashmir. In this present scenario, due to the extremely volatile situation, it is unthinkable for our family to go back to our home in Kashmir. But we would be miserable in any part of India....

Affidavit of [REDACTED] dated May 9, 2007.

To corroborate the applicant's statements regarding his medical condition, its hereditary nature, and the ramifications of the disease on his U.S. citizen children, a letter is provided from [REDACTED].
As stated by [REDACTED],

...I am the Primary Care Physician taking care of [REDACTED] [the applicant] and his medical issues....

[REDACTED] was diagnosed with Malignant Cancer of the recto-sigmoid region in September 1996 and was operated on October 8, 1996. This was followed by extensive radiotherapy...and then followed by chemotherapy.... [REDACTED]'s family has a strong history of cancer of the colon. His condition was later on diagnosed to be Hereditary Non-Polyposis colorectal cancer (HNPCC). [REDACTED] suffered from the complications of the surgery, chemotherapy and radiotherapy. He suffered from hypogonadism, sterility, azoospermia, dry ejaculations and severe radiation colitis. His previous medical records show that he went to the top medical institutions in India for treatment of these complications without success.

[REDACTED] moved to US in June 2001 and received extensive treatment at Mount Sinai Hospital, Manhattan, NY for his post surgical complications.... [REDACTED] is still suffering from hypogonadism and radiation colitis and needs continuous care and very close surveillance. Currently he is also under the treatment of an endocrinologist and a gastroenterologist.

Because of the genetic nature (autosomal dominant) of the Hereditary Non-Polyposis colorectal syndrome (HPNCC) and a very strong family history of colon cancer, [REDACTED]'s twin daughters too are at high risk of inheriting the genes and so will also require close surveillance. They are not only at risk of developing

colorectal cancer but have an increased risk of also developing endometrial and ovarian cancers....

Letter from [REDACTED] M.D., dated February 2, 2007.

[REDACTED], a gastro-surgeon, attests to the substandard medical care in India. As [REDACTED] states,

...I am Board certified Gastro-Surgeon currently practicing in India....

In general in India the demand for cancer treatment are very high with poor availability of facilities. Surveillance of all forms of cancers including the colorectal cancers is almost non-existent. There is an urgent need for strengthening and augmenting the existing diagnostic/treatment facilities which are now [sic] fully inadequate to tackle even the present load.

Given the nature of the disease, [the applicant] is at an increased risk for recurrence of not only colorectal cancers but other forms of cancers too. Since the diagnosis of Familial colorectal cancer (HNPCC) has important implications for the treatment of the affected person and family members, very good surveillance and screening facilities should always be available. In India due to the poor follow up, late diagnosis and inappropriate treatment facilities available a case of recurrence of colorectal cancer can easily be missed with fatal outcomes.

Due to the genetic nature of HNPCC, [REDACTED] and his twin daughters are at a very high risk for inheriting the genetic defect and will need frequent screening....

I strongly believe that [REDACTED] and his kids will certainly benefit from the excellent screening and follow up care available in USA as compared to that in India....

Letter from [REDACTED]

With respect to the negative effects to the applicant's U.S. children were they to relocate to India for a two-year period, [REDACTED] Director, A Family Affair Children's Center, states as follows:

...I have strong concerns about requiring the [REDACTED] family to return to India for two years. My concern is that this will cause exceptional hardship for [REDACTED] and [REDACTED]. Both daughters are U.S. citizens and have lived in the U.S. since birth. The girls have known no other culture. They are English speakers and do not speak or understand their parents [sic] native language....

...A two year stay in India will arrest their development considerably....

Letter from [REDACTED], Director, A Family Affair Children's Center, dated January 30, 2007.

Counsel has also provided extensive documentation regarding the religious turmoil in India as it relates to the Kashmir Pandits, as referenced by the applicant, and the ramifications of said turmoil on the applicant's U.S. citizen daughters were they to return to India. As stated by [REDACTED] MJD,

... [REDACTED] and my family share a common anguish. We both are Kashmiri Pandits and originally belong to the State of Jammu and Kashmir in India. During the past decade and half there has been a targeted killing of members of Kashmir Pandits community which has led to the exodus of 2,50,000 [sic] members of the community resulting in a change in the very demographic profile of the area and blatant religious cleansing. The Kashmir Pandits as an exiled community stand deprived of the original territory that they ancestrally belonged to and called their own in terms of history, identity and culture.... The members of this community as victims to the storm of communalism and fanaticism are refugees in their own country suffering pangs of insecurity and deprivation, torments of neglect and insensitivity. In the present scenario, it would be almost impossible to think that [REDACTED] and his family could return back.

[REDACTED] also has two US citizen daughters who are in the school and relocation at this time would pose a great stress to them. They would go through severe emotional and developmental problems....

Letter from [REDACTED] MD

The AAO notes that the U.S. Department of State, in its Country Specific Information-India, references numerous concerns with respect to country conditions in India. As stated, in pertinent part:

A number of anti-Western terrorist groups (some of which are on the U.S. Government's list of foreign terrorist organizations) are believed to be active in India including, but not limited to, Islamic extremist groups such as Harakat ul-Mujahidin, Jaish-e-Mohammed, Lashkar-e Tayyiba, and Harkat-ul-Jihad-i-Islami. While historically the state of Jammu & Kashmir has been a focal point of terrorist activity, bomb blasts resulting in deaths and injuries have occurred in public places such as markets, as well as on public transportation such as trains and buses throughout India. Examples of recent, major terror attacks include a coordinated series of bombings in market and temple areas of the tourist city of Jaipur, Rajasthan (May 2008), an attack on a government paramilitary facility in Uttar Pradesh (December 2007), coordinated bomb blasts at court facilities in three cities in Uttar Pradesh (November 2007), an explosives blast in a cinema hall in Punjab (November 2007), two explosions at a popular park and restaurant

in Hyderabad, Andhra Pradesh (August 2007), an explosion at the main mosque in Hyderabad, Andhra Pradesh (May 2007), the detonation of explosive devices on a train northwest of Delhi (February 2007), simultaneous attacks on Mumbai commuter trains (July 2006), simultaneous attacks on a train station and places of worship in Varanasi (March 2006), and simultaneous attacks on several markets in New Delhi (October 2005). Terrorist incidents causing fewer casualties occur on a frequent basis, including a few in which American citizens were injured. The motive for many of these attacks has not been clearly established, although it is believed that U.S. citizens and foreigners in general were not specifically targeted in these attacks.

The Department of State recommends that U.S. citizens avoid travel to the state of Jammu & Kashmir, with the exception of visits to the eastern Ladakh region and its capital, Leh. A number of terrorist groups operate in the state, targeting security forces that are present throughout the region, particularly along the Line of Control (LOC) separating Indian and Pakistani-controlled Kashmir, and those stationed in the primary tourist destinations in the Kashmir Valley: Srinagar, Gulmarg, and Pahalgam.

Since 1989, as many as 60,000 people (terrorists, security forces, and civilians) have been killed in the Kashmir conflict. Many terrorist incidents take place in the state's summer capital of Srinagar, but the majority of attacks occur in rural areas. Foreigners are particularly visible, vulnerable, and definitely at risk. There have been attacks specifically targeted at civilians. For example: in October 2007 five soldiers and two civilians were killed in an IED blast carried out by militants in the Baramulla district of Kashmir; in August 2007 terrorists lobbed a grenade at the venue of an Independence Day function in the Bandipora district; in July 2007 a blast on an out-of-state tourist bus killed six and injured 20 civilians in the capital, Srinagar. The Indian government prohibits foreign tourists from visiting certain areas along the LOC (see the section on Restricted Areas, below).

Country Specific Information-India, U.S. Department of State, dated May 29, 2008.

Moreover, in the Country Report on Human Rights Practices-India, the following is stated, in pertinent part, regarding abuses against the Kashmiri Pandits:

Separatist guerrillas and terrorists in Kashmir, the northeast, and the Naxalite belt committed numerous serious abuses, including killing armed forces personnel, police, government officials, judges, and civilians. Insurgents also engaged in widespread torture, rape, beheadings, kidnapping, and extortion.

According to the Norwegian Refugee Council, regional conflicts in Jammu and Kashmir, Gujarat, and the northeast displaced at least 650,000 persons.

Approximately 300,000 Kashmiri Pandits forced to flee the Kashmir Valley in the early 1990s after the outbreak of separatist violence remained in IDP camps in Jammu and New Delhi. They were unable to return to their homes in Jammu and Kashmir because of safety concerns, including the ongoing killings of Hindus in the state.

According to the Ministry of Home Affairs' Annual Report for 2006-2007, there were 55,950 Kashmiri Pandit migrant families, of which 34,562 resided in Jammu, 19,338 in Delhi, and 2,050 in other states. There were 230 migrant families living in 14 camps in Delhi and 5,778 families in 16 camps in Jammu.

Country Reports on Human Rights Practices-India, Bureau of Democracy, Human Rights, and Labor, released March 11, 2008.

Based on the documentation provided, the AAO finds that the hardship the applicant's U.S. citizen children would encounter were they to relocate to India for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year foreign residency requirement. Separating the applicant from specialty physicians who have been treating him for years and are familiar with his conditions and relocating him to a country that has very limited or unavailable medical care in many areas, as reported by the U.S. Department of State, would cause his children hardship beyond that normally associated with a temporary relocation abroad. The children may be forced to contend with their father's deterioration and/or untimely death due to India's substandard medical care, and moreover, the screening and/or follow-up care required by the applicant's children due to the hereditary nature of the disease would not be available to them.¹

Moreover, documentation has been provided regarding the religious turmoil in India and its negative effect on the applicant and his family, who are Kashmiri Pandits. The children's safety is at risk. Finally, the record indicates that the applicant's children have never lived outside the United States and they do not speak, read or write in the native language. To uproot the applicant's children at this stage of their education and social development and relocate them to India, in light of their father's serious medical condition and the likelihood that his condition would worsen in India, the safety concerns due to their religious background and the financial hardship, would be a significant disruption that would constitute exceptional hardship.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in India. The applicant asserts that it would be impossible for the applicant's children to remain in the United States for two years while the applicant returned to India because no one would be available to care for his children. As stated by the applicant:

¹ "...The quality of medical care in India varies considerably. Medical care is available in the major population centers that approaches and occasionally meets Western standards, but adequate medical care is usually very limited or unavailable in rural areas....*Country Specific Information-India*, U.S. Department of State, dated May 29, 2008.

I am subject to the J-1 two-year foreign residence requirement because of my medical training in the United States in J-1 status.... My wife is also derivatively subject to the foreign residence requirement, because she is in J-2 status....

Supra at 1.

As the record indicates, both the applicant and his wife are J visa holders subject to the two-year foreign residency requirement. Such a requirement would leave their two young children in the United States without their mother and father. This situation would constitute exceptional hardship to the applicant's children if they remained in the United States.

The AAO finds that the applicant has established that his U.S. citizen children would experience exceptional hardship were they to relocate to India and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. 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 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.