



U.S. Citizenship
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FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: FEB 12 2008

IN RE:
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[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 Acting Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Acting 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 is a native and citizen of Colombia who obtained J-1 nonimmigrant exchange status on October 1, 1999 to participate in graduate medical education training. He 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 his two-year residence requirement, based on the claim that his U.S. citizen spouse would suffer exceptional hardship if she moved to Colombia temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Colombia.

The acting center director determined that the applicant failed to establish that his spouse would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Colombia. *Acting Center Director's Decision*, dated December 14, 2006. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated January 12, 2007; a letter from the applicant and his spouse, dated January 10, 2007; evidence of the applicant's current nonimmigrant status in the United States; case law with respect to hardship waivers; and supplemental information and articles about country conditions in Colombia. In addition, counsel sent a follow-up letter on January 11, 2008, documenting that the applicant's spouse is pregnant, with an expected delivery date of August 21, 2008.¹ 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

¹ Any statements made by counsel, the applicant and/or his spouse regarding hardships that their unborn child would face were the applicant to comply with his two-year home residency requirement are speculative and can not be considered by the AAO at this time.

(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 spouse would experience exceptional hardship if she resided in Colombia for two years with the applicant. To support this contention, the applicant states the following:

The political situation in Colombia is dangerous. We continue to be plagued with poverty, unemployment, corruption, narcotraffic, and continuous civil war with the different guerilla and paramilitary groups. Physicians are in particular danger and are frequent victims of this violence. It is not uncommon that a physician is asked to take sides when faced with an injured guerilla, policeman, or an army agent.

The wealthy people in Colombia live in constant fear of kidnapping. I personally know of over 20 families in my city that have been affected by this tragic problem. If I were to return to Colombia...as a Harvard-trained interventional cardiologist who is married to an American, there is no doubt that I would be victimized by this violence and very likely kidnapped from any of these organizations. I do not want to put my wife and family through excessive risk....

Colombia is the kidnapping capital of the world where one out of every three reported kidnappings worldwide occur. Foreign citizens, especially U.S. citizens and wealthy and successful individuals, are the main target.... I would be a target for kidnapping because of my profession and level of training....

...Another major issue is that it would be very difficult for [redacted] [the applicant's spouse] to get a job in these areas after her Master's program, given the lack of established businesses....

Even if [redacted] were to move to Colombia with me during those two years, the threat of violence or kidnapping would not diminish. [redacted] is a U.S. citizen with limited knowledge of Spanish and the local environment, which are necessary to be able succeed. Also, her physical appearance is such that it is obvious that she is a foreigner and could, unfortunately, be targeted solely for this reason....

The applicant's spouse corroborates the concerns outlined above and further elaborates on the hardships she would encounter residing in Colombia.

...After we were married, I went to Colombia to visit [redacted]s [the applicant's] father who was ill. Colombia is a country of disparity. The people are generous, and the culture and land are rich. It really makes me sad that the violence and instability in Colombia threatens the existence of so many hardworking good people. In the short time I was there, I was stopped three times by the police. I was stopped twice in [redacted]s hometown Barranquilla and once in Cartagena. Normally this would not be a scary event, but considering that the guerillas and paramilitary groups are often involved in kidnappings and can be disguised as police made these situations very terrifying....

We were extremely careful to only travel during the daytime and not to go on any isolated roads. Despite our efforts, all three stops were terrifying. Though I was well read on the happenings in Colombia and the serious political, economic and social problems, it was entirely different to experience something personally. No one likes to live in fear. Always being cautious is not only exhausting but almost impossible. Despite more precautions, things happen when you least expect it. The paramilitary groups and guerrillas that want to disrupt life in Colombia are savvy and very prepared.

During my visit, I realized the potential for violence in Colombia was very real. I know what it feels like to live in fear. I know what it feels like to fear losing your loved ones.... I feel strongly that if [redacted] were to return to Colombia, it would be both his and my detriment. I cannot honestly and willingly expose myself or [redacted] to this type of danger. No one can prevent a natural disaster, but we can prevent putting ourselves directly in harm's way by moving to a country at war....

It is clear that foreigners, especially U.S. citizens and people with money, are targeted in Colombia. Pedro has trained in the best university program in the world. He will no doubt be a successful physician.... His commitment to helping his community and the underserved populations will only give him additional press and popularity, and therefore additional attention.... We have witnessed and been told by many Colombian friends who now live in the United States that the additional attention we would receive would be harmful to us. Success will undoubtedly attract unwanted attention, and for that I truly fear for both Pedro's and my own life.

After September 11, there was plenty of media spotlight on Colombia. Of the 28 terrorist organizations in the world that are recognized by the U.S. State Department, three are located in Colombia....

The option of moving to Colombia would greatly affect my education and my professional career. I have studied in the United States and have worked for a number of years here. I have been very focused on my career, and I am halfway through completing my Master's Degree in Business Administration. I think the career hardship imposed by our having to move to Colombia would be extremely damaging.... I know moving to Colombia would significantly jeopardize my career, as I am not fluent in Spanish and do not have any business contacts there. There are very few American businesses operating in Colombia because of the instability and extraordinary risks associated with travel to this country....

Affidavit of [REDACTED], dated April 25, 2006.

The Department of State, in its Consular Information Sheet for Colombia, states, in pertinent part, the following:

...Travel to Colombia can expose visitors to considerable risk. The Secretary of State has designated three Colombian groups – the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and the United Self-Defense Forces of Colombia (AUC) – as Foreign Terrorist Organizations. These groups have carried out bombings and other attacks in and around major urban areas, including against civilian targets. Terrorist groups have also targeted critical infrastructure (e.g., water, oil, gas, and electricity), police and military facilities, public recreational areas, foreign-owned factories, and modes of transportation.

During the past four years, kidnapping and other violent crimes have decreased markedly in most urban areas, including Bogotá, Medellin, Barranquilla, and Cartagena. The level of violence in Cali, Buenaventura, and the surrounding areas remains high, largely as a result of the illicit drug trade. Colombia continues to have a high rate of kidnapping for ransom. The FARC continues to hold hostage three U.S. government contractors – all U.S. citizens – who were captured in February 2003 when their small plane went down in a remote area of Colombia.

Kidnap or murder victims in Colombia have included journalists, missionaries, scientists, human rights workers and businesspeople, as well as tourists and even small children. No one can be considered immune. Although the U.S. government places the highest priority on the safe recovery of American hostages, and the Colombian government has had some success with hostage-recovery teams, rescue capabilities are limited. Colombian law requires that private individuals coordinate efforts to free kidnap victims with the Colombian Office of

Anti-Kidnapping (Ministerio de Defensa/Programa Para la Defensa de la Libertad Personal).

Official and personal travel by U.S. Embassy employees outside of most urban areas is subject to strict limitations and reviewed case by case. U.S. Embassy employees are allowed to travel by air, but inter- and intra-city bus transportation is off-limits to them.

The U.S. Embassy must approve in advance the official travel to Colombia of all U.S. government personnel. Such travel is approved only for essential business. Personal travel by U.S. military personnel to Colombia requires advance approval by the U.S. Embassy. Military personnel requesting permission for personal travel should contact the office of the Embassy's Defense Attaché through the Embassy switchboard at 011-57-1-315-0811. Non-military employees of the U.S. Government do not need Embassy approval for private travel....

Armed robbery and other violent crimes are common in major Colombian cities. Several recent robberies of American citizens have occurred after using automatic teller machines (ATMs) on the street. In some cases, robbers have used motorcycles to approach their victims and later flee the scene. American citizens are urged to use ATMs only during daylight hours and only inside shopping malls or other protected locations. Driving to and from the location – rather than walking – provides added protection. When using an ATM, you should be on the lookout for anyone who may be watching or following you. Generally speaking, if you are the victim of a robbery and not in fear of losing your life or of serious bodily harm, you should not resist. Robbery victims have sometimes been shot and killed while resisting.

Robbery of people hailing taxis on the street is a particularly serious problem in Bogotá. Typically, the driver – who is one of the conspirators – will pick up the passenger, and then stop to pick up two or more armed cohorts, who enter the cab, overpower the passenger, and take his/her belongings. If the passenger has an ATM card, the perpetrators will often force the passenger to withdraw money from various ATM locations. Such ordeals can last for hours.

In almost every case of taxi-related crime, the victims have been riding alone and have hailed their taxis off the street. Rather than hailing a taxi, you should take advantage of the telephone dispatch service most taxi companies offer. Many hotels, restaurants, and stores will call a taxi for you, and the taxis usually arrive within minutes. When a taxi is dispatched by telephone, the dispatcher creates a record of the call and the responding taxi. Additionally, the passenger receives a code from the dispatcher, which helps ensure that the correct taxi has arrived.

The Embassy continues to receive reports of criminals using disabling drugs to temporarily incapacitate tourists and others. At bars, restaurants, and other public areas, perpetrators may offer tainted drinks, cigarettes, or gum. Typically, victims become disoriented or unconscious, and are thus vulnerable to robbery, sexual assault, and other crimes. Avoid leaving food or drinks unattended at a bar or restaurant, and be suspicious if a stranger offers you something to eat or drink.

U.S. citizens in Bogotá routinely fall victim to a scam in which purported undercover police officers approach them on the street and request to examine their money or jewelry. The “officers,” who are in fact criminals, then flee with the person’s belongings. Legitimate Colombian police officers do not ask to examine money or jewelry.

American citizens should be aware of the danger of traveling on inter-city and rural roads in Colombia, including on buses, due to the risk of kidnapping and other activity by criminal gangs. Buses within cities also present a risk of robbery and other crime. U.S. Government employees in Colombia are prohibited from taking buses anywhere in the country. They are also forbidden from driving outside most urban areas, and they cannot drive on roads outside of urban areas at night.

Consular Information Sheet-Colombia, U.S. Department of State, Bureau of Consular Affairs, dated June 21, 2007.

Moreover, the U.S. Department of State recently issued an updated Travel Warning for Colombia. As stated by the U.S. Department of State on June 4, 2007,

This Travel Warning updates ongoing security concerns in Colombia and reminds American citizens of those concerns. This supersedes the Travel Warning issued January 18, 2006.

The Department of State warns U.S. citizens of the dangers of travel to Colombia. Violence by narcoterrorist groups and other criminals continues to affect all parts of the country, urban and rural.

Violence has continued to decrease markedly in most urban areas, including Bogotá, Medellín, Barranquilla, and Cartagena. The level of violence in Cali, Buenaventura, and the surrounding areas remains high, largely as a result of the illicit drug trade. Many rural areas of Colombia remain extremely dangerous due to the presence of narcoterrorists and Colombian government operations against them.

Terrorist groups such as the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), and other criminal organizations, continue to kidnap civilians for ransom or as political bargaining chips. No one can be considered immune from kidnapping on the basis of occupation, nationality, or other factors. The FARC have held three American official contractors hostage since February 2003. Although the U.S. government places the highest priority on the safe recovery of kidnapped Americans, it is U.S. policy not to make concessions to or strike deals with kidnappers. Consequently, the U.S. government's ability to assist kidnapping victims is limited.

U.S. government officials and their families in Colombia are permitted to travel to major cities in the country, but only by air. They are not allowed to use inter- or intra-city bus transportation. They also are not permitted to travel by road outside of urban areas at night. All Americans in Colombia are urged to follow these precautions.

Travel Warning-Colombia, U.S. Department of State, Bureau of Consular Affairs, dated June 4, 2007.

Based on the career disruption that the applicant's spouse would encounter were she to reside in Colombia for a two-year period with the applicant; the concerns outlined above regarding the language barrier that the applicant's spouse would face; financial hardship in light of the fact that the applicant's spouse has a student loan balance of over \$100,000, as confirmed by the applicant and his spouse in their letter dated January 10, 2007; and the problematic country conditions and security concerns for U.S. citizens residing in Colombia; the AAO concludes that the applicant's U.S. citizen spouse would experience exceptional hardship were she to accompany the applicant to Colombia for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if she remained in the United States during the two-year period that the applicant resides in Colombia. In this case, counsel contends and documents that the applicant's spouse will experience emotional, psychological, professional and financial hardship were the applicant to fulfill his two-year foreign residency requirement in Colombia while his spouse remained in the United States. As stated by the applicant's spouse,

...I also feel very strongly that if I was to stay in the United States alone and Pedro was to go to Colombia, my career would also suffer greatly. I would have an enormous emotional and financial burden to bear while trying to hold on to a job. I mentioned in my initial application what escalated stress did to my academic record during the time of Hurricane Hugo and Hurricane Marilyn. My parents almost died and were coping with having lost all of their belongings and going through the aftermath of such devastating hurricanes. We saw on TV after Hurricane Katrina how people are affected mentally and emotionally to the point of mental breakdowns, high blood pressure and even more seriously strokes and heart attacks when faced with extreme hardship. This is what I went through with my

family and what I fear I would experience again if [redacted] had to leave me and go to Colombia. Everyday he would face imminent danger and be in harms way. I would be a nervous wreck and be extremely emotionally drained. My career would most definitely suffer the consequences during the extended emotionally challenging time....

Letter in Support of Appeal, dated January 10, 2007.

In addition, the applicant's spouse states the following:

.. [redacted] [the applicant] is not only my husband, but is also my best friend.... I think relationships are hard enough without having to go through long-term separation. It is further complicated when the situation is compounded by the worry and stress of danger and violence.... If we are separated, I know in my heart I could not go on with my life in any normal manner...The likelihood of kidnapping and violence against [redacted] in Colombia could forever change my life. It would not only be the stress of being apart for so long, but I could not pretend to go on with my life knowing that at any moment I could get a call saying that something had happened to [redacted] I would have to deal with the fact that at any moment his life could be in danger. The psychological effect of constantly thinking about that is debilitating.... We are just starting out in our professional lives and would not be able to pay for ransoms. The consequences for this are certain death. The emotional suffering and fear this causes is really too much, and it is not a hardship I could deal with....

If [redacted] were forced to leave, we would be in financial duress. I am currently pursuing my Master's Degree and have not worked for the last six months. Also, I have taken substantial student loans. I could not afford to pay for our mortgage, student loans, and childcare alone....

...I am on an educational and professional track that requires top performance all the time. I could not possibly perform well if I were separated from [redacted] for an extended period and worried to death about his health and safety each and every day. This would be exceptionally traumatizing to me due to my own past traumas of forced separation from my parents in the aftermath of the hurricane in 1995....

Supra at 11-13.

Due to the applicant's spouse's ongoing studies and professional goals; her dependence on the applicant for her own emotional, psychological and financial well being; and the fears and anxieties experienced by her with respect to her spouse's anticipated return to Colombia, a country of political and social turmoil; the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse emotional,

psychological and financial hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

As such, upon review of the totality of the circumstances in the present case, the AAO finds the evidence in the record establishes that the applicant's spouse would experience exceptional hardship were she to relocate to Colombia and in the alternative, were she 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 acting center 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 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.