

Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

H/3

[REDACTED]

FILE:

Office: NEBRASKA SERVICE CENTER

Date **JUL 30 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 Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and 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 (WRD).

The record reflects that the applicant is a citizen of Russia who is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant was admitted to the United States in J1 nonimmigrant exchange status on August 3, 2001. The applicant's spouse is a U.S. citizen and she presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse.¹

The director determined that the applicant failed to establish her spouse would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in Russia and the application was denied accordingly. *Director's Decision*, dated January 25, 2007.

On appeal, the applicant asserts that the director applied an inappropriate legal standard to the adjudication of the hardship claims. *Brief in Support of Appeal*, at 1, undated. The applicant has also requested oral argument. The regulation at 8 C.F.R. § 103.3(b) provides that the affected party must explain in writing why oral argument is necessary. Citizenship and Immigration Services (CIS) has the sole authority to grant or deny a request for oral argument and will grant such argument only in cases that involve unique factors or issues of law that cannot be adequately addressed in writing. In this case, the necessity for oral argument has not been shown. Consequently, the request is denied.

The record includes, but is not limited to, the applicant's brief; statements from the applicant and her spouse; statements from the applicant's spouse's father, mother and uncle; a statement from the applicant's spouse's pastor; documents related to the applicant's spouse's financial hardship claim; the applicant's spouse's medical records and evaluations; a letter from the applicant's employer; and country conditions information on Russia. The entire record was considered in rendering this decision.

Section 212(e) of the Act states in pertinent part that:

(e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission

(i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,

(ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency [now, Department of State Waiver Review Division] pursuant to regulations prescribed by him, had designated as clearly requiring the services of

¹ The record indicates that the applicant returned to Russia for approximately one year and re-entered the United States on May 19, 2003 on a different J-1 visa. The second J-1 visa did not include the two-year home residency requirement. Therefore, the time that the applicant spent in Russia is deducted from the two-year home residency requirement.

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*. (Quotations and citations omitted).

In *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad. (Quotations and citations omitted).

The first step required to obtain a waiver is to demonstrate that the applicant's spouse would experience exceptional hardship if he moved to Russia for the required time period. The applicant states that her spouse is a second-year law student and he would face exceptional education and career hardship if he relocated to Russia. *Brief in Support of Appeal*, at 7. The applicant notes *Matter of Hersh*, 11 I&N Dec. 142 (D.D. 1965) and *Matter of Chong*, 12 I&N Dec. 793 (D.D. 1968) in asserting that education disruption is a basis for exceptional hardship. *Id.* The applicant asserts that her spouse has a more severe predicament than the applicant in *Matter of Hersh* as he must attend an American Bar Association (ABA) accredited law school which is not present in Russia, he has never been to Russia, he would encounter religious intolerance and persecution based on his religion, and he has more sources of hardship. *Id.*

The applicant states that her spouse would be deprived of taking commercial bar review courses and he would be in academic isolation as he could not interact with instructors, professors and other students. *Id.* at 13. The applicant states that her spouse's career development would be prolonged, obtaining gainful employment would be postponed, his student loans would enter into repayment and his loans are more than the average monthly income in Russia. *Id.* at 13, 15. The record reflects that the applicant's spouse's loan debt is \$68,759. *Access Group Document*, dated February 20, 2007. The record indicates that the applicant's spouse is integrated into the U.S lifestyle and educational system and he is currently pursuing his law degree while relying on the applicant to support him emotionally and financially. The AAO finds *Matter of Chong* and *Matter of Hersh* to be persuasive in this case due to the similar fact patterns.

The applicant's spouse's psychologist states that the applicant's spouse is suffering from symptoms of anxiety, depressed mood, problems with sleep, headaches and problems concentrating at school, and that his depression and associated symptoms will worsen if he leaves the United States. *Evaluation from [REDACTED] Ph.D.*, at 5, undated. The applicant states that her spouse would have extreme difficulty finding psychological treatment in Russia considering the documented evidence regarding the state of mental health, the gross disparity in mental health professionals relative to the United States and the language barrier that he would encounter. *Brief in Support of Appeal*, at 20. The record includes country conditions information that supports the applicant's statements.

The applicant's spouse's pastor states that there are few Catholic churches open for worship in Russia and it would be a hardship for the applicant and her spouse to regularly practice their faith there. *Letter from Rev. [REDACTED]* dated April 6, 2006. The applicant states that her spouse plays an integral role in the lives of his uncle and grandfather, as his uncle lacks general competence and his grandfather suffers from an advanced stage of Alzheimer's disease. *Brief in Support of Appeal*, at 24. The applicant's spouse's father details the grandfather's history of Alzheimer's disease and the role of the applicant's spouse in caring for him.

Applicant's Spouse's Father's Statement, at 1-2, dated March 30, 2006. Considering the totality of the circumstances, the AAO finds that exceptional hardship would be imposed on the applicant's spouse if he relocated to Russia for the required time period.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if he remained in the United States during the required time period. The applicant states that her spouse is a second-year law student and he would face exceptional education and career hardship if they were separated. *Brief in Support of Appeal*, at 7. The applicant states that her spouse's educational and career advancements are completely dependent on the benefits and income she provides, as the U.S. Department of Education expects her to contribute \$15,021 as a family contribution for her spouse's education. *Id.* at 8. The record includes a March 19, 2006 financial aid web submission confirmation reflecting an expected family contribution of \$15,021. The record includes a printout from the University of Detroit Mercy School of Law which lists the 2006-2007 cost of attendance as approximately \$47,000. The record includes an employment letter for the applicant which reflects her annual salary of \$26,773.

The applicant states that her spouse works 20 hours per week without benefits and is involved in moot court, mock trial, fundraising and participating in school/church activities. *Id.* The applicant states she will not be able to support her spouse financially due to the lack of the employment prospects in Russia. *Id.* The record includes country conditions information which reflects that it will be difficult for her to financially support her spouse. The applicant states that she is employed at Wayne State University and receives health, dental, vision and life insurance. *Id.* at 15. The record includes the applicant's health insurance verification form and life insurance enrollment form which detail her employment benefits. As mentioned previously, the AAO finds *Matter of Chong* and *Matter of Hersh* to be persuasive in this case due to the similar fact patterns.

The applicant asserts that her spouse has a pre-existing psychological condition, her spouse has sought regular treatment from two psychotherapists and a psychiatrist over the course of the last three years and the director disregarded the findings of these mental health professionals. *Id.* at 17. The record includes substantiating evidence of the applicant's spouse's psychological issues. As mentioned, the applicant's spouse's psychologist states that the applicant's spouse is suffering from symptoms of anxiety, depressed mood, problems with sleep, headaches and problems concentrating at school. *Evaluation from [REDACTED]*, at 5. The psychologist also states that the applicant's spouse has a history of difficulty with intimacy in tandem, the absence of close relationships with others and that his symptoms will worsen if separated from the applicant. *Id.*

The applicant asserts that separation is against her spouse's Catholic religious beliefs. *Brief in Support of Appeal*, at 20. The applicant states that she is concerned that the applicant's psychological condition and workload would be prevent him from caring for his uncle and grandfather. *Id.* at 24. Considering the totality of the circumstances, the AAO finds that exceptional hardship would be imposed on the applicant's spouse if he remained in the United States without the applicant for the required time period.

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. *See Section 291 of the Act, 8 U.S.C. § 1361.* The AAO finds that in the present case, the applicant has 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 WRD. Accordingly, this matter will be remanded to the acting director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD 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 WRD recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The appeal is sustained and the record of proceeding is remanded to the acting director for further action consistent with this decision.