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U.S. Citizenship
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Services

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[REDACTED]

FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date: **MAR 19 2008**

IN RE:

[REDACTED]

APPLICATION:

Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

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 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 record reflects that the applicant is a native and citizen of Tajikistan who was admitted to the United States in J1 nonimmigrant exchange status in August 1996 to participate in a program funded by the U.S. government. 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 and child, born in April 2007, would suffer exceptional hardship if they moved to Tajikistan 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 Tajikistan

The 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 Tajikistan. *Director's Decision*, dated March 19, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated November 20, 2007; a copy of the applicant's U.S. citizen child's birth certificate; and additional documentation regarding country conditions in Tajikistan. 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 spouse and/or child would experience exceptional hardship if they resided in Tajikistan for two years with the applicant. To support this contention, the applicant’s spouse states the following:

...I am 27 years old. I have never resided outside the United States. In fact, except for one day spent in the Bahamas, I have never been outside the United States....

...My father, [REDACTED], is a former Chicago Heights Fire fighter who is disabled as a result of an injury he suffered while firefighting and two (2) subsequent heart attacks. My mother, [REDACTED], is dependent on me for the emotional support I have given her for many years. My support has enabled her to cope with the many conflicts in her relationship with my father, the financial and emotional pressures of supporting both her husband and herself, and the demands of caring for a disabled husband, and her own health problems....I am emotionally a very fragile person. As a result of a number of damaging life experiences, I have suffered from a sense of loss, abandonment and lack of self-worth throughout my life....

Until I met [REDACTED] [the applicant], I had never heard of Tajikistan and did not know anything about its political situation or its culture. As I got to know [REDACTED] better, I learned about the hardships and tragedies he had endured growing up during a very turbulent and dangerous period in Tajikistan. He explained that the conflicts between the authoritarian government and the militant Islamic fundamentalists were continuing, that the country lacked basic freedoms we take for granted in the United States, and that his family was in constant danger. He shared with me the ordeal he suffered at the age of 12 when radical Islamic fundamentalists attacked a bus in which he was traveling, murdering most of the passengers. He also spoke about other violent attacks which he had observed or which his family had experienced. He also mentioned the problems he had when he returned to Tajikistan following a visit to the United States in the summer of 1995, as part of a youth exchange program. Specifically, he explained that administrators at the Tajik-Turkish high school which he had attended before his trip to the United States had refused to let him attend the school on account of his visit to the United States because they believed the visit would make him a endanger (sic) to the Islamic values of the school. I learned from [REDACTED] that after he came to the United States the second time two (2) of his uncles were assassinated and following their assassination he had stayed in the United States at the urging of his parents and with the assistance of his host family.... [REDACTED] explained to me that following the deaths of his uncles he decided he had to start educating Americans about human rights in Tajikistan and that his commitment to

this task increased after a third his uncle, [REDACTED] was assassinated in August, 1998.

[REDACTED] discussed with me and others whether he should give up his human rights activities on account of these threats. [REDACTED] decided to curtail his human rights activities for the safety of his family. Nevertheless, his family continued having problems. In the spring of 2000, I learned from [REDACTED] that his Aunt [REDACTED] had been kidnapped, and subsequently released, by members of a militant Muslim group. [REDACTED] also told me of other incidents, including the warnings his sister [REDACTED] received in the fall of 2000 at Turkish-Tajik school from a teacher who told her that [REDACTED]'s activities in the United States could harm her family, the threats from armed gunmen which his father received in January, 2001, and the altered email [REDACTED] received in June 2001, the original text of which came from a cousin, containing threats toward him and his mother....

...I also know that if he is required to live in Tajikistan I would not go with Alisher to spend two (2) years in Tajikistan. As an American Christian woman, I will not endanger myself by living for two (2) years in Tajikistan, where there is continuing violence between the authoritarian government and militants, where Islam is interpreted to restrict severely the role of women, where my husband and his family will have no means to support our baby or me, where the authoritarian government denies its citizens basic human rights and freedoms, and where my health and the health of our baby will be endangered due to the unavailability of quality medical care. Tajikistan borders on Afghanistan, where battles are raging between forces of the United States and NATO and Taliban forces, and Uzbekistan, where the authoritarian government is being challenged by militant Islamic fundamentalists and others. The situation in Tajikistan continues to be a dangerous and unstable place for American women like me whose religion, nationality, and gender make me an easy target for Islamic fundamentalists.... Moreover, since we have decided not to raise our child to be a Muslim, I fear that our child or us would be in danger of harm from Islamic fundamentalists who believe our child is Muslim because his father is Muslim. I also can't go to Tajikistan because I feel obligated as a daughter to be here for my parents whose ill health and emotional conditions require that I be present to care for them. My father's health is very precarious and I could never forgive myself if something were to happen to him while I was living in Tajikistan. My mother must soon undergo another hip replacement operation, and she needs me to be here to care for her and my father....

Affidavit of Denise A. [REDACTED], dated September 25, 2006.

[REDACTED], Clinical Psychologist, further elaborates on the hardships the applicant's spouse would face were she to relocate abroad for two years to Tajikistan. As stated by [REDACTED]

...Tajikistan [redacted] s [the applicant's] country of origin, has been in the midst of a civil war since the breakup of the USSR, when Tajikistan became an independent country. The war has involved primarily a battle between former communist officials and sympathizers and Muslim fundamentalists. [redacted] and his family are non practising [sic] Muslims and have been the victims of violence and persecution: two of his uncles have been killed and several family members were either kidnapped or threatened. [redacted] himself has been threatened by government officials because of his human rights work.

...Life in Tajikistan would be extremely difficult for [the applicant's spouse] because she is a Caucasian woman in a Muslim society, where only 3% of the population is Christian. In addition, difficulties would arise because of the lack of job opportunities, lack of health care, and the separation from her immediate family. It should be noted that [redacted] has been very dependent on her mother, a pattern that developed as a result of [redacted]'s health and hip problems and the conflict between the parents.... Being without either her mother or her husband would be extremely and exceptionally difficult for [redacted] given her long-standing and pervasive need to be taken care of, her difficulties making decisions without a great amount of advice and reassurance from others, and her need for nurturance and support from others....

Report of Psychological Evaluation and Consultation, [redacted] D., Clinical Psychologist, dated March 30, 2006.

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

Tajikistan remains the poorest of the former Soviet republics in Central Asia. It is a nominally constitutional, democratic, and secular republic, dominated by President Emomali Rahmon who has been in power since 1992. Tourist facilities are undeveloped and many goods and services usually available in other countries are unavailable.

Supporters of terrorist groups such as the Islamic Movement of Uzbekistan (IMU), the Islamic Jihad Union (IJU), al-Qaida, and the Eastern Turkistan Islamic Movement remain active in Central Asia, as do anti-Western, anti-semitic extremist organizations such as Hizb'ut-Tahrir. These groups have expressed anti-U.S. sentiments and may attempt to target U.S. Government or private interests in the region, including in Tajikistan. Terrorist attacks involving the use of suicide bombers have previously taken place in neighboring Uzbekistan. Taliban resurgence and successful operations in Afghanistan, including attacks in the north, could also affect the security situation in southern Tajikistan.

Minor explosions have occasionally occurred in Dushanbe in the last two years. These explosions usually happen at night. In June 2007, an individual threw a grenade at the Supreme Court building. Witnesses and unofficial reports indicate three guards were killed, although no official reports confirmed this. In November 2007, a small explosive killed an individual outside the Kokhi Vahhdad conference center in the center of Dushanbe. In both cases, no individual or organization claimed responsibility and authorities continue to investigate. Also in November, a small improvised explosive device destroyed the official car belonging to the Commander of the President's National Guard. Incursions along the Afghan border have resulted in shootings and kidnappings; however, most are believed to be related to narcotics trafficking. None of these incidents have indicated the targeting of Americans or Westerners.

Criminal groups and terrorists do not distinguish between official and civilian targets. Because of increased security at official U.S. facilities, terrorists are seeking softer civilian targets such as residential areas, clubs and restaurants, places of worship, hotels, outdoor recreation events, and other venues. The limited number of facilities catering to Westerners presents a heightened risk. American travelers should also avoid demonstrations and large crowds. Demonstrations and mobs are rare in Tajikistan following the 1992-1997 civil war, and police reaction to such behavior is unpredictable.

The current crime rating for Dushanbe is high. The primary concern is the inability of Tajikistan's law enforcement entities to provide adequate and immediate assistance. Lack of manpower, low salaries, and inadequate training all contribute to a lack of professionalism. Tajikistan's struggling economy and high unemployment have resulted in incidents of street crime, including muggings and armed robberies. Alcohol-related incidents such as bar fights and drunk driving are common. Criminals are not deterred by the risk of confrontation and tend to operate in groups of two or more to decrease their chances of arrest. When crimes do occur, they can be violent in nature. Additionally, the lack of a free media, and the infrequent public outreach between the government and the public through the media, does not provide the average citizen current and accurate information to make informed decisions about their safety.

Government statistics are typically inaccurate because many crimes are not reported to law enforcement organizations. Often police refuse to open minor or routine cases that seem too difficult to resolve. In 2007, the Ministry of Interior reported a number of arrests related to organized crime, although overall reported crimes saw a slight decrease. The Ministry also reported a slight increase in firearm and drug-related offenses compared to previous years.

Crimes of opportunity can occur against anyone, and the Embassy reminds visitors to be careful and cautious in their own personal security, whether within the city limits of Dushanbe or in the more remote areas of the country. Americans should be aware that danger increases after dark, and they are advised to use caution when traveling alone or on foot after dark. The U.S. Embassy encourages visitors to travel in pairs and to notify colleagues of their whereabouts when not working, especially during evening hours. Travelers are also encouraged to carry a copy of their passport (separate from your wallet) to speed up issuance of a new passport in case of theft.

The quality of Tajikistan's medical infrastructure is significantly below Western standards, with severe shortages of basic medical supplies, including disposable needles, anesthetics, and antibiotics. Many trained medical personnel left the country during and following the civil war. Elderly travelers and those with pre-existing health problems may be at particular risk due to inadequate medical facilities.

Significant disease outbreaks are possible due to population shifts and a decline in some immunization coverage among the general population. There have been outbreaks of typhoid in the Dushanbe area and in the south, and the risk of contracting malaria, cholera, and water-borne illnesses is high. Throughout Central Asia, rates of infection of various forms of hepatitis and tuberculosis (including drug-resistant strains) are on the rise. Tuberculosis is an increasingly serious health concern in Tajikistan.

Country Specific Information-Tajikistan, Bureau of Consular Affairs, U.S. Department of State, dated February 14, 2008.

Moreover, the Country Report on Human Rights Practices states the following, in pertinent part, regarding Tajikistan:

Tajikistan, with a population of approximately 7.3 million, is an authoritarian state; political life is dominated by President Emomali Rahmonov and an inner circle of loyal supporters. While the country has a constitution and a multiparty political system, in practice democratic progress was slow and political pluralism limited. The November presidential election lacked genuine competition and did not fully test democratic practices or meet international standards, although there were some improvements on voting procedures. The civilian authorities generally maintained effective control of the security forces.

The government's human rights record remained poor and corruption continued to hamper democratic and social reform. The following human rights problems were reported: restricted right of citizens to change their government; torture and abuse of detainees and other persons by security forces; threats, extortion, and abuse by security forces; impunity of security forces; lengthy pretrial detention; lack of access to prisoners by family members and lawyers; confessions obtained by torture accepted as evidence in trials; harsh and life-threatening prison conditions; restricted international monitor access to prisons; extralegal extradition of prisoners from third countries with apparent government complicity; restricted freedom of speech and the press; restricted freedom of association; restrictions on freedom of religion, primarily for women; registration denial of opposition political parties; imprisonment of political opposition, including journalists; harassment of international nongovernmental organizations (NGOs); difficulties with registration and visas; violence and discrimination against women; trafficking in persons; child labor and forced labor.

The official national minimum monthly wage, which increased to \$5.80 (20 somoni) a month during the year, did not provide a decent standard of living for a worker and family. The World Bank indicated that 42.5 percent of the population lived below the poverty line which they designated at \$2.00 per day (6.88 somoni). Some observers estimated that a minimum of \$23.19 per month (80 somoni) was required to avoid abject poverty in the capital.

Counsel provides numerous articles and reports regarding country conditions in Tajikistan to corroborate the statements made above. As such, based on the documented social and political situation in Tajikistan, its substandard economy and health care, the applicant's and his family's traumatic experiences in Tajikistan with respect to human rights violations, including threats, violence, kidnapping and death, and the possibility that such violations could occur to the applicant's spouse and/or his child, and the applicant's spouse's familial situation with respect to her disabled father and her emotionally dependent mother, the AAO concludes that the applicant's U.S. citizen spouse and child would experience exceptional hardship were they to accompany the applicant to Tajikistan for a two-year period.

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

...A two (2) year separation from my husband would cause me severe hardships, the thought of which would overwhelm me. Separation from [redacted] [the applicant] for this period of time would be devastating for me because his presence is essential to my emotional health.... I am an emotionally fragile person as a result of a number of difficult and damaging experiences during my life which left me with a profound sense of abandonment and lack of self worth. With [redacted] in my

life, I have attained a level of emotional comfort and security I never imagined I could have. Separation from [REDACTED] at this time would be particularly difficult because of my pregnancy, my fear of something going wrong with my pregnancy as it did with my pregnancy earlier this year¹ and the responsibilities of becoming a parent next spring. I am already anxious about how I will manage the birth and care of our child in [REDACTED]'s absence and the effect upon our child if I have to raise our child without [REDACTED] for the first two (2) years of our child's life. Moreover, my separation from [REDACTED] will have a devastating effect upon my financial security and my ability to maintain the modest life style we now live. Alisher earns \$45,000 a year at his job, more than double my \$21,000 salary. Without his salary, I will be unable to pay the mortgage on our home, which I will be forced to sell, to pay basic living expenses or our debts.... Moving in with my parents is not an option. While I love my parents, returning to their home to live is not a healthy option in light of the difficulties I experienced as a child in their home. I would not feel right beginning our child's life in the same environment. Moreover, in view of their own difficult situation my parents will not be in a financial situation to assist us....

Supra at 17-18.

corroborates the concerns outlined above with respect to the emotional and psychological hardship that the applicant's spouse would experience were the applicant to reside abroad for a two-year period. As [REDACTED] states,

...Discussing the possibility that they would have to be separated if [REDACTED] [the applicant] had to return to Tajikistan while [REDACTED] [the applicant's spouse] stayed in the United States was a very difficult task for [REDACTED]. She cried repeatedly when presented with these questions, appeared to have difficulties contemplating the possibility, became more noticeably preoccupied, sad, upset, and less clear in her expressions.... It seemed that the more she thought about the possibility and reality of separation...the more depressed she would become. When she returned after a session in which these issues were presented, she talked about wanting to 'go to sleep forever if he had to go,' adding that she envisions a separation from him as representing her death. It is clear that [REDACTED] seems

¹ The record indicates that in April 2006, while pregnant with her first child, it was discovered that the child was suffering from "...Amniotic Band Syndrome, a disorder in which constriction rings or bands cause soft tissue depressions, encircle digits, extremities, or limbs, and sometimes the neck, thorax or abdomen of the fetus. Sometimes the constriction bands result in intrauterine amputations, which is what occurred with our daughter....I did not know what to do or say. I cried for a number of days. It was very hard for me to communicate with anyone...Part of me just wanted to crawl into a hole and die....On April 28, 2006, the pregnancy was terminated....Though nothing could take away the pain of what I went through, and what we lost, Alisher's love and support made me get through the ordeal...."
Supra at 15.

to fill many gaps in [REDACTED]'s emotional and psychological life and meets many needs that were partially met or not met at all in her past....

[REDACTED] feels completed by being married and being with [REDACTED]. He does things for her, encourages her to go back to school, drives her to new places, pushes her to do new things, and generally seems to provide a boost to her self-esteem and sense of being. She seems to have defined herself differently and more positively since she is with him.... [REDACTED] talks about an incident that occurred the last week of February, when she could not find her husband at a time of a scheduled meeting and could not reach him on the phone. She describes herself as being frantic, in a panic state, and in tears. She realizes that her response was excessive, but was not able and seems generally unable to modulate her emotional responses without him. Her fear and uncertainty about where he was and how he was compounded her reaction, her sense of worry, and her fears....

...Because of her own difficult childhood, a sense of not being good enough and fitting in, she has sensitivities and concerns as to the wellbeing and future of their child if this child has to grow up without a father, without grandparents, or in a country where her family would be a victim of civil war and ethnic and religious persecutions....

Supra at 3.

The record indicates that the applicant has played an integral part in the applicant's spouse's emotional, psychological and financial well-being. As such, due to the fears and anxieties experienced by the applicant's spouse with respect to her husband's anticipated return to Tajikistan and her dependence on the applicant for her own emotional, psychological and financial well being, in light of her recent trauma with respect to the termination of her first pregnancy, her own mental health issues relating to her upbringing, and her parent's health issues, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse exceptional emotional, psychological and financial hardship.

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 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 Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.