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U.S. Department of Homeland Security
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U.S. Citizenship
and Immigration
Services

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[REDACTED]

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 24 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.

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 record reflects that the applicant is a native and citizen of Venezuela who was admitted to the United States in J-1 nonimmigrant exchange status in June 2001 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 foreign residence requirement, based on the claim that his U.S. citizen child, born in April 2003, would suffer exceptional hardship if he moved to Venezuela temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Venezuela.¹

The director determined that the applicant failed to establish that his child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Venezuela. *Director's Decision*, dated November 13, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief; a supplemental forensic psychological evaluation, dated January 8, 2008; color photographs of the applicant's scars as result of a crime perpetuated against him in Venezuela; additional documentation regarding anti-Semitism in Venezuela; and a letter from a pediatrician in Venezuela with respect to treatment received by the applicant's child in July 2004. 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 The record indicates that the applicant's spouse and daughter entered the United States as J-2 nonimmigrants, based on their derivative status of the applicant, a J-1 visa holder. As such, the applicant's spouse and daughter are also subject to the two-year foreign residence requirement.

(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 child would experience exceptional hardship if he resided in Venezuela for two years with the applicant. To support this contention, the applicant states the following:

[redacted] [the applicant's child]...will be five years old when we are scheduled to return to Venezuela. He has spent four blissful years growing up in the safety and security of the United States. If my wife and I are forced to leave the United States and return to Venezuela with [redacted] he will be torn from our safe, stable, and happy home and the love of his extended family and thrust into an unfamiliar world filled with violence and menace to Americans and those who share his Jewish faith. [redacted] is particularly susceptible given his health problems as the result of his premature birth and my experience in Venezuela of being viciously attacked, repeatedly shot, and left for dead by attackers who have never been caught or brought to justice. While still in the safety of America, [redacted] has begun to show signs or [sic] fear and terror at returning with Venezuela with us as he remembers the terrifying time he has spent there and as he absorbs the adult conversation and news broadcasts about the horrors of Venezuela today.

...hardships include: the daily escalating chaos and danger in Venezuela, an anti-American country on the brink of civil war; having his personal security at risk every day as an American of Jewish decent who does not speak Spanish; an unrelenting criminal environment without effective police protection so bad that it previously allowed me to be shot repeatedly and left for dead outside our home in Caracas; the constant threat that he would be kidnapped because his parents are perceived to be wealthy as he is an American, his father is a surgeon and both his parents are Jews; and a leader, Hugo Chavez, who takes pride in supporting terrorism and targeting Americans, like my son [redacted], with dangerous rhetoric and actions.

...At the moment, [redacted] is a happy and well-adjusted child living in a free and democratic society. He attends classes at the Jewish Community Center and is physically active.... [redacted] s school is entirely in English and he speaks and understands very little Spanish. He loves to go to the park and play outdoors, which he can do freely in America.. [redacted] would be practically house-bound in Venezuela. We have taken [redacted] three times to visit Venezuela and each time

we have had to keep him shuttered behind barred windows and locked doors almost the entire time. He could not pursue the activities that he enjoys in the United States and his emotional and physical health languished as a result.... We were clear that his depressed mood, hyper-vigilance, and anxiety were rooted in the prison-like environment in Venezuela and the extreme threats he senses to his well-being as an American there....

My wife and I are direct descendants of Holocaust survivors, a fact which affects every facet of our lives and as a result deeply impacts our American citizen son, [REDACTED]. Our emotional heritage makes [REDACTED] far more vulnerable to life long emotional and psychological scarring than other American children.... I have always had problems with anxiety as a result of my psychosocial history. Both my wife and I have high vulnerability to depression. Our mental diagnosis are consistent with that of the offspring of Holocaust survivors. We suffer from the intergenerational trauma suffered by descendants of Holocaust survivors.... In Venezuela, [REDACTED] would be exposed to the same horrors of daily life we so fear and his emotional and psychological state would be further traumatized by our own worsening mental state....

The fact that my wife, my daughter and I, along with our darling son [REDACTED] are Jewish cannot be overlooked. It is part of who we are and contributes to our exceptional vulnerability to forcible relocation, cultural alienation, and worst of all, prejudicial targeting by political and cultural leaders in Venezuela. People of all faiths in Venezuela feel increasing desperation at the growing power of Hugo Chavez; his actions and rhetoric to ingratiate himself with dictators and terrorists around the world....

...we are also deeply concerned for [REDACTED]'s safety in Venezuela because of the extraordinarily high crime rate. Venezuela is ranked 4th in the world for per capital murders and 5th in the world for kidnapping. Over 60 people are murdered every weekend in Caracas alone and more than 100 nationally. CNN reports that Venezuela is the violent crime capital of the world. Our fears for [REDACTED] are exacerbated because Americans and those who have lived in America for long periods of time are generally viewed in Venezuela as being wealthy. This will place us, and in particular our son, at even higher risk for kidnapping and robbery....

The constant state of fear caused by the lawless anarchy of Venezuela was brought home to me when I was brutally attacked and shot eleven times in an attempted kidnapping outside my home in Caracas. I barely survived that vicious attack and my life has never been the same. I was attacked because I was thought to be wealthy as member of the Jewish faith. The attack took place in front of my own home, as I sat in my own car, gunman opened fire on me and it is a miracle that I

am alive today. My attackers were never brought to justice by the corrupt and ineffective police force. I can barely describe the terror and suffering that I endured as the result of the chaotic lawlessness in Venezuela. I will never fully recover emotionally or physically from the experience. The bullets that remain in my body are a reflection of the mental scars I carry.... If we return, it will only be a matter of time before I, or my wife, or God forbid, our small son, suffer another attack. As my attackers remain at large, to attack and kill at will, it is clear they have the power to return and attack us again....

Several recent kidnapping cases involving foreigners in Caracas have further traumatized our family. Most tragically, three teenage brothers who were Canadian citizens were murdered after being abducted by men who wore police uniforms. Shortly thereafter a nationally-known businessman was kidnapped at a temporary roadblock and later killed. The top suspects in that kidnapping were also police officers....

Currently more than 8,000 infants die each year from diarrhea in Venezuela. At least 70% of these deaths could have been avoided by immunization and proper medical treatment. [REDACTED] was born prematurely, at only 32 weeks, and required care in the neonatal intensive care unit before he was able to come home with us. As the result of [REDACTED]'s premature birth, he is exceptionally vulnerable to learning difficulties and psychological problems, especially loss and anxiety. Given [REDACTED]'s high risk for problems exacerbated by his premature birth, such as depression, anxiety and impaired personal and peer relationships...it is unlikely that he could receive proper care in Venezuela for his conditions....

Hugo Chavez has also made clear that he favors communism.... As an American and a Jew, it would cause [REDACTED] extreme hardship to have to sit in a classroom day in and day out and be told that the country of his birth and citizenship is a constant menace to the health and safety of all Venezuelans. He also could not be instructed in our religious beliefs as communism opposes all religions. This schism between the freedoms [REDACTED] was born into in America and experiences in our home and the education he would have to endure in Venezuela will further traumatize him. Furthermore, [REDACTED] impressionable peers will feel license to act out the daily propaganda against him as an American citizen....

...We have no sponsor to allow us to return to the United States after two years and we could be denied our Venezuelan passports, effectively trapping [REDACTED] an American citizen, in a violent place radically opposed to his native country.

Counsel has provided extensive documentation that corroborates the statements made by the applicant. In addition, the Department of State, in its Consular Information Sheet for Venezuela, states, in pertinent part, the following:

Venezuela is a medium income country with a substantial oil industry. The political situation in Venezuela is highly polarized and volatile. Violent crime is a continuing problem. Assaults, robberies and kidnappings occur throughout the country....

Violent crime in Venezuela is pervasive, both in the capital, Caracas, and in the interior. The country has one of the highest per-capita murder rates in the world. Armed robberies take place in broad daylight throughout the city, including areas generally presumed safe and frequented by tourists. A common technique is to choke the victim into unconsciousness and then rob them of all they are carrying. Well-armed criminal gangs operate with impunity, often setting up fake police checkpoints. Kidnapping is a particularly serious problem, with more than 1,000 reported during the past year alone. According to press reports at least 45 foreigners have been kidnapped in the first eight months of 2007. Investigation of all crime is haphazard and ineffective. In the case of high-profile killings, the authorities quickly round up suspects, but rarely produce evidence linking these individuals to the crime. Only a very small percentage of criminals are tried and convicted.

Maiquetía Airport, the international airport serving Caracas, is dangerous and corruption is rampant. Concerns include personal property theft, mugging, and "express kidnapping" in which individuals are taken to make purchases or to withdraw as much money as possible from ATMs, often at gunpoint. The Embassy has received multiple, credible reports that individuals with what appear to be official uniforms or other credentials are involved in facilitating or perpetrating these crimes. For this reason, American citizen travelers should be wary of all strangers, even those in official uniform or carrying official identification. There are also known drug trafficking groups working from the airport. Travelers should not accept packages from any persons and should keep their luggage with them at all times.

Because of the frequency of robberies at gunpoint, travelers are encouraged to arrive during daylight hours if at all possible. If not, travelers should use extra care both within and outside of the airport. The Embassy strongly advises that all arriving passengers make advance plans for transportation from the airport to their place of lodging. If possible, travelers should arrange to be picked up at the airport by someone who is known to them. The Embassy has received frequent reports recently of armed robberies in taxicabs going to and from the airport at

Maiquetía. There is no foolproof method of knowing whether a taxi driver at the airport is reliable. The fact that a taxi driver presents a credential or drives an automobile with official taxi license plates marked "libre" is no longer an indication of reliability. Incidents of taxi drivers in Caracas overcharging, robbing, and injuring passengers are common. Travelers should take care to use radio-dispatched taxis or those from reputable hotels. Travelers should call a 24-hour radio-dispatched taxi service from a public phone lobby or ask hotel, restaurant, or airline representatives to contact a licensed cab company for them....

Harassment of U.S. citizens by pro-government groups, Venezuelan airport authorities, and some segments of the police occurs but is quite limited. Venezuela's most senior leaders, including President Chavez, regularly express anti-American sentiment. The Venezuelan government's rhetoric against the U.S. government, as well as American culture and institutions, is slowly affecting attitudes in what used to be one of the most pro-American countries in the hemisphere....

U.S. Department of State, Consular Information Sheet for Venezuela, dated November 1, 2007.

Moreover, the International Religious Freedom Report 2007 reports the following regarding anti-Semitism in Venezuela:

The President, government officials, and government-affiliated media outlets promoted anti-Semitism through numerous anti-Semitic comments that created a spillover effect into mainstream society. There was a rise in anti-Semitic vandalism, caricatures, expressions at rallies, intimidation, and physical attacks against Jewish institutions.

The Anti-Defamation League (ADL) reported that the President and government officials expressed anti-Semitic sentiments, blaming Israel and the Jews for the world's problems and utilizing stereotypes about Jewish financial influence and control. In criticizing Israel during the 2006 conflict between Hezbollah and Israel, President Chavez made anti-Semitic statements. On August 25, 2006, in Beijing, and again in Doha 3 days later, President Chavez likened Israeli behavior to that of the Nazis and reiterated the theme of genocide. On August 6, 2006, on the television program, *Aló, Presidente*, on *Venezolana de Televisión*, President Chavez accused Israelis of "applying to the Lebanese people and to the Palestinian people the same treatment they have so criticized about the Holocaust." On July 28, 2006, in an interview broadcast domestically and on *Al-Jazeera* television, President Chavez stated that Israel's actions regarding the Palestinians and Lebanon were "perpetrated in the fascist manner of Hitler... they are doing what Hitler did to the Jews."

Government-sponsored media outlets utilized anti-Jewish caricatures and political cartoons on several occasions. The local Jewish community expressed strong concerns that such statements and publications fostered a climate permissive to anti-Semitic actions. The hosts of La Hojilla, a pro-Chavez talk show on official government television, made recurring anti-Semitic slurs, and the Government's de facto official daily newspaper, *Vea*, regularly published anti-Semitic comments.

Extremely offensive anti-Semitic graffiti and leaflets appeared on synagogue walls and in Jewish neighborhoods and increased in the Caracas area following the July-August 2006 conflict involving Israel and Hezbollah. Between June and September 2006, buildings associated with the Jewish community were vandalized four times, according to an international Jewish group. Jewish leaders also expressed concern over the Government's close relationship with Iran, whose President called repeatedly for the annihilation of the country of Israel.

International Religious Freedom Report-Venezuela, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, released September 14, 2007.

Based on the U.S. Department of State's position on travel by Americans to Venezuela, the social, religious, and political turmoil in Venezuela, strong anti-American and anti-Semitic sentiment, the applicant's own traumatic near-fatal experience in Venezuela and the ramifications of said event on the child's upbringing and psyche, and the concerns outlined above regarding the language barrier and substandard health care, the AAO finds that the applicant's U.S. citizen child would experience exceptional hardship were he to accompany the applicant to Venezuela for a two-year term.

The second step required to obtain a waiver is to establish that the applicant's child would suffer exceptional hardship if he remained in the United States during the two-year period that the applicant and his spouse reside abroad. As stated by counsel,

[REDACTED]'s [the applicant's child's] immediate family, consisting of his father, mother, and older sister, are all nationals and citizens of Venezuela. The status of his mother and sister, who hold J-2 status, is completely dependent upon that of his father, and they would therefore be forced to return to Venezuela with [REDACTED] [the applicant] in the event that a waiver was not granted.... Young [REDACTED] will be only five when his father's current status expires and therefore would experience exceptional hardship if he remained in the United States as an orphan....

Brief in Support of Appeal.

As the record indicates, the applicant, his wife and their daughter are J visa holders subject to the two-year foreign residency requirement. Such a requirement would leave a young child in the United States without

his parents and sibling. This situation would constitute exceptional hardship to the applicant's child if he remained in the United States.

The AAO finds that the applicant has established that his child would experience exceptional hardship were he to relocate to Venezuela and in the alternative, were the child to remain in the United States without the applicant, for the requisite two-year period. As such, upon review of the totality of circumstances in the present case, the AAO finds the evidence in the record establishes the hardship the applicant's child would suffer if the applicant temporarily departed the U.S. for two years would go significantly beyond that normally suffered upon the temporary separation of families.

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.