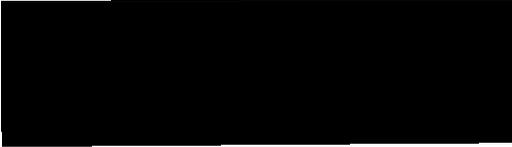




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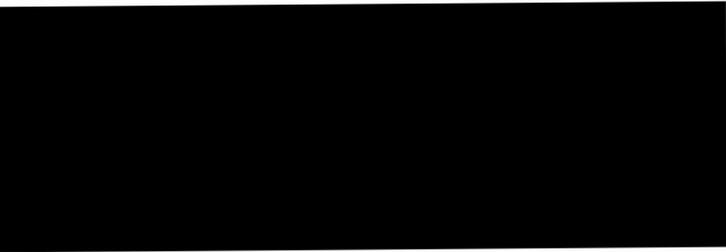


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FILE:  Office: CALIFORNIA SERVICE CENTER Date: **MAY 21 2008**

IN RE: 

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

ON BEHALF OF APPLICANT:  


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

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The record reflects that the applicant is a native and citizen of Ukraine who was admitted to the United States in J-1 nonimmigrant exchange status in August 2000 to participate in a program funded by the U.S. Department of State. She 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 her two-year foreign residence requirement, based on the claim that her U.S. citizen children, born in May 2005 and September 2006, would suffer exceptional hardship if they moved to Ukraine temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in Ukraine.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in Ukraine. *Director's Decision*, dated October 9, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated January 8, 2007; an affidavit from the applicant with supporting exhibits, dated January 8, 2008; a Psychological Hardship Evaluation, dated December 2, 2007; and additional information about country conditions in Ukraine. The entire record was reviewed and considered in rendering this decision.

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

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

- (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,
- (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or
- (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an

aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [now, Citizenship and Immigration Services (CIS)] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Homeland Security (Secretary)] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General (Secretary) to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General (Secretary) may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "Therefore, it must first be determined whether or not such hardship would occur as the consequence of her accompanying him abroad, which would be the normal course of action to avoid separation. The mere election by the spouse to remain in the United States, absent such determination, is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed. Further, even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e), supra."

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

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

loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad.” (Quotations and citations omitted).

The first step required to obtain a waiver is to establish that the applicant’s U.S. citizen children would experience exceptional hardship if they resided in Ukraine for two years with the applicant. To support this contention, the applicant states the following:

...Since the submission of my initial application, my marriage to my U.S. citizen husband, [REDACTED], has drastically taken a turn for the worse....There can be no reconciliation between us. His drug addiction has gone out of control. He is committing crimes. He has attacked me.

[REDACTED]’s [the applicant’s spouse’s] drug addiction problem and related criminal behavior had been something I tried to help him overcome because I love him and because of our two little children. Recently, however, he has become violent and out of control. He has attacked me physically while I was holding onto our infant, and his violence in the presence of both our children has gravely endangered them. [REDACTED] no longer participates or contributes meaningfully to our lives. Assault charges (and others) are pending against him.

As I had detailed in my original waiver application, [REDACTED] had developed a serious drug problem, and our local police had arrested him. Now, however, while in the Pre-trial Intervention program, he has violated the court’s trust by continuing to use drugs, to steal, and by attacking me. He was just sentenced on January 4, 2008, to two years probation on the original drug charges, and on January 14, 2008, he faces sentencing for his most recent crimes....

[REDACTED], who had long battled depression, tried to commit suicide by cutting his wrist. That soon led to his discharge from the U.S. Army....

On May 27, 2005, we had our first child, a boy named [REDACTED]. In December of that same year, we purchased our first home. My parents moved in with us and things were stable and quite happy. [REDACTED] was managing his depression, Sylvester had his grandparents in his life, and I had my parents’ ongoing support.

In about August 2006, I began to recognize something was gravely wrong with [REDACTED], but he would not talk to me about it. When I was about nine months pregnant with our second child, [REDACTED] came to me with some little packets he had found in our bedroom. They had white powder in them. I knew that they must be illegal drugs. I do not want to think about what [REDACTED] would have suffered if he had put the drugs in his mouth....

I begged, pleaded, and argued for [REDACTED] to stop using drugs. Nothing worked. Then [REDACTED] started a downward spiral of behavior. He would first leave the house for hours at a time at night. This his absences soon turned to several days away from us. He would never call. We had no idea if he was in danger or even dead. I was sleepless, scared, and alone.

The next thing I noticed was that [REDACTED] was regularly withdrawing hundreds of dollars from our bank account. Our clients began to call to say he was not showing up for work. We quickly started to lose all the contracts that we had worked so hard to obtain. [REDACTED] would not admit to his addictions, so we could not confront it.

On November 4, 2006, [REDACTED] was arrested for possession of 21 vials of crack cocaine and possession of drug paraphernalia....

...Sentencing for this offense took place on January 4, 2008....

On September 25, 2006, I gave birth to [REDACTED] I cannot explain how difficult it has been for me to be raising two babies not only on my own, but while dealing with the severe narcotics addiction of my husband, and attempting to salvage our only source of income by holding onto the last of our loyal clients. I never was able to rest. I was virtually going sleepless to protect and support our two children, and trying to end the spiraling behavior of [REDACTED]

On November 5, 2007, while enduring all of this, [REDACTED] and I got into an argument at home about his behavior and his failure to help me with the children and the business. I was holding onto [REDACTED] who was then just a year old. [REDACTED] slapped me in the face, pulled my hair, and choked me, all while I held and tried to protect [REDACTED]

[REDACTED] finally let me go. But I knew from that moment on that my children and I were no longer safe around him until, if at all, he stopped using drugs. I got away and filed charges against him at the police station.

The Police later came and arrested him when he was in his car. During the arrest, the Police also found drugs on [REDACTED] They charged him with Domestic Violence, Drug Possession, Possession of Drug Paraphernalia, and Driving with a Suspended License. I had to kick [REDACTED] out of our lives for now, and maybe forever. I will not drop the charges against him....

[REDACTED], however, wants to still be with the children. I don't want them to be deprived of their father and his love and affection, even if he is out of control....

...If I were forced to return to the Ukraine with the children, they would suffer enormously. I would not be able to afford a house for them. Job prospects for anyone, but especially for women, are almost nothing. The Ukraine economy does not support avenues for entrepreneurs, especially single-parent mothers. Even if I were to find some menial job (I only have a high school education), the wage would not allow for me to support two children. Furthermore, at their young ages, children need daycare if I am to work....Daycare is not readily available, and, even if it were, the bulk of my wages would be used up paying for it....

For [REDACTED], [REDACTED] and me, there is no home to return to in Ukraine. There is no family there that could take us in. There are no job prospects for me. I was last there when I was just 15 years old. I have not established any adult ties, and am not part of any adult community anywhere in the Ukraine. With two children in my arms, alone, I suspect that we would end up in some sort of shelter, but I don't know if social services even exist in Ukraine. Maybe I would be arrested. The authorities may take [REDACTED] and [REDACTED] away from me for not being able to provide for them. Ukraine is a strange, chauvinistic, paternalistic, corrupt and backward country. It is no place for my children to be, especially in the horrible circumstances I will be in as a single mother. Without a father, it is not (sic) place for them to live without a stable, healthy, secure mother with a support system....

My attorney is enclosing some documentation describing the backward, and corrupt conditions in the Ukraine, that bode badly for new businesses, or for women entering the workforce with a U.S. high school education. As for my husband, [REDACTED], I see no prospect of him contributing to my children and me if we were to live in Ukraine. He is in the dregs of drug addiction. He is heavily involved in the criminal justice system...I do not believe [REDACTED] has any incentive to send support payments to us in Ukraine. Furthermore, I do not know of any family court process that I could enforce against him to pay support while I am with the children in the Ukraine.

*Affidavit of* [REDACTED], dated January 8, 2008.

The applicant further states,

...Last year, the doctors discovered that [REDACTED] [the applicant's child] had a heart murmur. He is currently in good health and does not have any major problems but he does need to be monitored. Maybe his condition could be monitored in the Ukraine as it would be monitored here but I would not be able to pay for the proper care. The Ukraine offers healthcare to its citizens but because of the corrupt nature of the government, no treatment is given without a bribe. My grandfather who is living in the Ukraine recently suffered from a stroke. When the ambulance arrived, they refused to drive him to the hospital without payment. I

don't know where or how we would live. I don't know where the kids would go to school as they don't speak the language of the Ukraine.

*Affidavit of* [REDACTED] dated July 25, 2007.

Counsel has provided numerous articles corroborating the statements above, namely the applicant's spouse's criminal situation and the problematic political, social and economic conditions in Ukraine. In addition, the Consular Information Sheet for Ukraine, released by the U.S. Department of State, Bureau of Consular Affairs, states, in pertinent part, the following regarding country conditions in Ukraine:

Ukraine is undergoing a significant economic, political, and social transformation, and income disparities have grown sharply. As a result, foreign visitors may be perceived as wealthy targets for criminals. Americans often stand out in Ukraine, and are therefore more likely to be targeted than in Western European countries, where incomes are higher and Americans may blend in better.

Most street crime ranges from various scams, simple pocket picking, purse snatching, and theft of personal items from parked cars, to mugging, armed robbery, or the drugging of unsuspecting victims at nightspots and bars (where they are then robbed). Cases of assaults in apartment building corridors, elevators, and stairwells, as well as armed break-ins and crimes involving small caliber firearms have also been reported.

Credit card and ATM fraud is widespread. Ukraine operates as a cash economy, and money scams are widespread. Although credit card and ATM use among Ukrainians is increasingly common, it is nevertheless strongly recommended that visitors and permanent residents of Ukraine refrain from using credit cards or ATM cards except at major international establishments.

*Burglaries of apartments and vehicles represent a significant threat to long-term residents. Although few cars are actually stolen, primarily because of increased use of alarm systems and security wheel locks, vehicular break-ins and vehicular vandalism are common.*

Ukraine lacks reliable tourist and travel services for foreign victims of crime. Transferring funds from the United States, replacing stolen traveler's checks or airline tickets, or canceling credit cards can be difficult and time consuming. There are few safe low-cost lodgings, such as youth hostels. Public facilities in Ukraine are generally not equipped to accommodate persons with physical disabilities.

In December 2005, Ukraine reported the first cases of H5N1 ("avian influenza," "avian flu," "bird flu," "chicken flu") among birds in Crimea. Further outbreaks followed in 2006. On January 18, 2008, another outbreak of the H5N1 avian influenza virus was detected at a poultry farm in the Krasnogvardiyskyi Rayon in Crimea. There are no registered human cases of H5N1 in Ukraine.

The U.S. Embassy maintains a list of hospitals and clinics with some English-speaking staff. Many facilities have only limited English speakers. There are no hospitals in Ukraine that provide a level of medical care equal to that found in American hospitals, or which accept American health insurance plans for payment (see the section on Medical Insurance below). Some facilities are adequate for basic services. Basic medical supplies are available; however, travelers requiring prescription medicine should bring their own. Elderly travelers and those with existing health problems may be at risk due to inadequate medical facilities. When a patient is hospitalized, the patient, relative, or acquaintance must supply bandages, medication, and food. The Embassy recommends that ill or infirm persons not travel to Ukraine. The Embassy also recommends that travelers obtain private medical evacuation insurance prior to traveling to Ukraine.

Medical evacuation remains the best way to secure western medical care. This option, however, is very expensive and could take at least several hours to arrange. Travelers may wish to purchase medical evacuation insurance

*Consular Information Sheet-Ukraine, released by the U.S. Department of State, Bureau of Consular Affairs, dated March 28, 2008.*

Based on the problematic country conditions in Ukraine, the concerns outlined above regarding separating two young children from their father and relocating them far away for a two-year period, the possibility that their father may be imprisoned or under strict probation, thereby limiting his ability to visit the children in the Ukraine, the children's unfamiliarity with the culture and language in Ukraine, the separation from their grandparents, the substandard health care in Ukraine, and the psychological effects that the applicant's children may suffer due to the events they have witnessed with respect to their father, his drug use and his abuse of their mother, the AAO concludes that the applicant's U.S. citizen children would experience exceptional hardship were they to accompany the applicant to Ukraine for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen children would suffer exceptional hardship if they remained in the United States during the two-year period that the applicant resides in Ukraine. As the applicant states,

...If I am allowed to remain in the United States, I can live with, support, and love [REDACTED] and [REDACTED] and get my businesses back on their feet so that I can support the children and live with financial independence from [REDACTED] (while we all learn to live with emotional independence from him). I will be able to have

the love and support of my parents as I move through this time of traumatic, long-term transition. I will be able to make sure that the children can visit their father under conditions of safety in a secure, time-limited and supervised environment. We have placed our home on the market. It is my goal to obtain me (sic) share of any equity that we have after the sale, and to buy a small condominium for the children and me and hopefully, have room for my parents.

The children have suffered a major trauma of abandonment and separation from one parent, their father. In fact, much of the emotional abandonment began more than a year ago, with [REDACTED]'s attention to feeding his drug habit taking precedence over loving us.

If I were forced to live in the Ukraine for two years my children would suffer horrific trauma of loss of love, affection, and constancy of both parents. It would devastate them for life. They are United States citizens and deserve to remain here with all the high-quality public education and opportunity, and abundance that life has to offer them at this young stage in their lives. I don't know how they would survive here without me, as I could not send them money from the Ukraine. I will certainly have no source of sustainable income. My parents do not have good jobs. And [REDACTED] is far from being stable and must, if at all, concentrate on getting his own life in order before he can be responsible to the children....

*Supra* at 7-9.

The applicant's children have a unique and tragic past with an unresolved future with their father. They have been witnesses to domestic abuse and drug use and victims to financial instability, and with the applicant's spouse currently involved in the criminal justice system, it is unclear when, or if, he will be able to properly care for them. The applicant's children have an emotional need to remain with their mother, their primary caregiver and the source of stability for them. Living with their father, who may or may not be going to prison and who has not been rehabilitated at this time, while their mother resides thousands of miles away, would create hardship that would go significantly beyond that normally suffered upon the temporary separation of families. The AAO thus concludes that the applicant's children would experience exceptional hardship were they to be separated from their mother for a two-year term.

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 children would experience exceptional hardship were they to relocate to Ukraine and in the alternative, if they were 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 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 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.