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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

#3 #2

FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 29 2009

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:

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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 "Perry Rhew".

Perry Rhew
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 November 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 2008, would suffer exceptional hardship if she moved to Venezuela temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Venezuela.¹

The director determined that the applicant failed to establish that his U.S. citizen child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Venezuela. *Director's Decision*, dated September 12, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief and referenced exhibits. 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 entered the United States as a J-2 nonimmigrant, based on her derivative status of the applicant, a J-1 visa holder. As such, the applicant's spouse is 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 U.S. citizen child would experience exceptional hardship if she resided in Venezuela for two years with the applicant. The applicant asserts that his child would suffer exceptional emotional, psychological and physical hardship were she to reside in Venezuela for a two-year period. As the applicant states:

Our Jewish heritage and religion is at the very core of our family's identity. My paternal grandparents are survivors of the Holocaust and the extended family of both my parents was ripped apart as they fled to different countries throughout the world in order to escape persecution and enslavement at the hands of the Nazis....

The beautiful haven that was Venezuela, to which our ancestors escaped during and after the Second World War, has since disappeared, and the Jewish community in Venezuela is under attack from [REDACTED] his brutish and corrupt government, and the public he has brainwashed with his anti-Semitic actions and hateful speech.... It was therefore with heavy hearts that we read and heard stories from our loved ones back home about two unprovoked and unwarranted raids by armed police forces which occurred while young children were in school....

Since 2004, the International Religious Freedom Reports issued by the U.S. Department of State have discussed the alarming rise of anti-Semitism in Venezuela.... All of us, as members of the Jewish community in Venezuela, have personally felt the effects of this frightening attitude; I myself provided security for my synagogue in Caracas for almost 10 years.... My wife and I are absolutely petrified at the harassment and violence that our family will be subjected to should we return to Venezuela....

The physical safety of my daughter [REDACTED] would be endangered not only by a hateful, bigoted government and public but also by [REDACTED] plan to socialize medicine and nationalize the private hospitals and clinics of Venezuela. [REDACTED] was born prematurely and has already suffered serious medical hardships as a result. Our pediatricians found that she has a heart murmur which causes differing oxygenation levels in different parts of her body. More frighteningly, our tiny daughter has an umbilical hernia, which may require surgical treatment in the future....

The State currently controls 60% of health care in Venezuela. The public hospitals in Venezuela have reached a crisis stage: the basic medical equipment necessary to treat patients is either broken, scarce, or nonexistent. Poorly paid physicians refuse to work, engaging in demonstrations to protest the lack of equipment and supplies, or they simply leave for other countries where they will receive adequate pay and have the resources to perform their work....

Even if [REDACTED] were not Jewish and had no significant health problems, living in Venezuela for a minimum of two years would nonetheless place her young life in serious danger. Venezuela currently has the 4th highest murder rate in the world, and our daughter is 8 times more likely to be murdered there than in America. Kidnapping for money is a particularly heinous crime that occurs throughout the country, and members of the Jewish faith are frequent targets.

My father was kidnapped by individuals posing as police but who were common criminals in disguise. He was driving home when the 'police' stopped him, searched his car, and pulled a gun on him. They took his car keys and demanded that he drive them to his home. When he refused, they severely beat him....

I have also been victimized by Venezuela's unchecked criminal element. When I was 25 years old, two men assaulted me with a large 9 mm gun after I had parked my car and threatened to shoot me if I did not hand over all my valuables. These terrifying near-death incidents that we have personally experienced, witnessed, and heard of have deeply and devastatingly affected my wife and me.... The oppressive violence and anti-Semitism that awaits our family in Venezuela is the same that we faced before moving to the United States, and immersion in the environment, [REDACTED] concludes, would force my wife and me to once again experience the same psychological trauma and trigger our post-traumatic reactions.

Furthermore, as responsible parents, we would not allow Rachel to run and

play freely with her friends, at playgrounds, or even travel to and from school without bodyguards or riding in a bullet-proof car, protections that many of our Jewish friends and family in Venezuela have had to employ in order to protect their lives. Growing up in such an environment of constant danger and violence would dramatically increase her vulnerability to developing mental and emotional disorders so that, in addition to the great likelihood that she would become a victim of kidnapping, mugging, or murder, our darling daughter would face the risk of permanent psychological scarring....

As the direct descendant of Holocaust survivors, I possess an emotional heritage which makes me exceptionally vulnerable to anxiety and depression borne of intergenerational trauma and this makes my American citizen daughter [REDACTED] far more susceptible to emotional and psychological damage than other American children in the event that she is forced to live in Venezuela, surrounded by an oppressive atmosphere of anti-Semitic rhetoric and violence....

Condemning my American citizen child to live in Venezuela for an indefinite period of years would permanently scar her without any countervailing benefit.... The transference of the increasing anxiety and depression my wife and I are experiencing at the prospective of living in such danger in Venezuela...is unavoidable and will cause her untold emotional and psychological harm....

Affidavit of [REDACTED] dated September 3, 2008.

Counsel has provided extensive documentation that corroborates the statements made by the applicant with respect to the problematic social, political and religious situation in Venezuela. The Department of State, in its Country Specific Information for Venezuela, states, in pertinent part, the following:

Venezuela is a medium income country whose economy is dominated by a substantial oil industry. The political climate in Venezuela is highly polarized and volatile. Violent crime is a serious problem, and the capital city of Caracas has been cited as having the highest per capita homicide rate in the world. Kidnappings, assaults and robberies occur throughout the country.

Violent crime in Venezuela is pervasive, both in the capital, Caracas, and in the interior. The country's overall per capita murder rate is cited as one of the highest in the world, and Caracas was listed as the murder capital of the world in the September 2008 Foreign Policy magazine. Kidnapping is another serious concern. The Venezuelan National Counter Kidnapping

Commission was created in 2006, and since then, official statistics have shown an alarming 78 percent increase in the number of reported kidnappings. Surveys show that the overwhelming majority of kidnappings are not reported to the police. Armed robberies take place throughout the city, including areas generally presumed safe and frequented by tourists. Well-armed criminal gangs operate widely, often setting up fake police checkpoints. Only a very small percentage of crimes result in trials and convictions.

Travel to and from [REDACTED] the international airport serving Caracas, can be dangerous, and corruption at the airport itself is rampant. Both arriving and departing travelers have been victims of personal property theft and muggings. The Embassy has received multiple, credible reports that individuals wearing what appear to be official uniforms or other credentials are involved in facilitating or perpetrating these crimes.... The Embassy has also received multiple, credible reports of victims of "express kidnappings," in which individuals are taken to make purchases or to withdraw as much money as possible from ATMs, often at gunpoint, as well as unconfirmed reports of uniformed airport officials attempting to extort money from travelers as they go through the normal check-in and boarding process for departing flights. Furthermore, there are known drug trafficking groups working from the airport. Travelers should not accept packages from anyone and should keep their luggage with them at all times.

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 [REDACTED] regularly express anti-American sentiment. The Venezuelan government's rhetoric against the U.S. government, its American culture and institutions, has affected 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 July 8, 2009.

Moreover, the International Religious Freedom Report 2009 reports the following regarding anti-Semitism in Venezuela:

Government-affiliated media outlets made numerous anti-Semitic statements during the reporting period. The hosts of *La Hojilla*, a pro-[REDACTED] talk show on official government television, made recurring anti-Semitic slurs, and *Diario Vea* regularly published anti-Semitic comments. These media outlets accused rabbis and Jewish businesspersons of

conspiring to destabilize the Government and of supporting Israel's military incursion into the Gaza Strip. Government-sponsored media outlets published anti-Jewish caricatures and political cartoons on numerous occasions. The local Jewish community expressed strong concerns that such statements and publications fostered anti-Semitism, creating an atmosphere of fear and distrust of the community. In August 2008 [REDACTED] met with the country's Jewish leaders and pledged to work with them to combat anti-Semitism, irrespective of world events.

In December 2008 and January 2009 there was a marked increase in anti-Israeli and anti-Semitic graffiti in Caracas and other cities. During the reporting period, the country's Jewish organizations received numerous telephone threats. On January 14, 2009, the Government announced its suspension of diplomatic relations with Israel and simultaneously called on the international community to punish Israeli leaders via the [REDACTED] for military action in Gaza.

The suspension of diplomatic relations further escalated anti-Semitism in the country. During the late night/early morning hours of January 30-31, 2009, armed gunmen vandalized the [REDACTED] synagogue, the oldest synagogue in Caracas, and held the building for several hours. The attackers ransacked administrative areas and files, and wrote anti-Semitic graffiti on the interior walls. Following a February 4, 2009, meeting between the [REDACTED] and [REDACTED] government officials publicly condemned the attack. On February 5, [REDACTED] personally phoned the president of [REDACTED] to condemn the attack and promised to guarantee the safety of the Jewish community. On February 9, 2009, criminal charges were filed against 11 persons alleged to have perpetrated the attack, including several police officers.

Jewish leaders reported numerous incidents throughout the reporting period of anti-Semitism including graffiti, slurs, political cartoons, and media commentary. On June 17, 2009, protestors spray-painted swastikas on the official residence of opposition [REDACTED]. On February 26, 2009, unknown assailants threw a small explosive device at a Jewish community center in Caracas. Government officials promised to investigate and pursue those responsible. No suspects had been charged at the end of the reporting period. On January 23, 2009, anti-Semitic banners were displayed in the [REDACTED] in the city of [REDACTED].

In the weeks prior to the January 30, 2009, attack on the Tiferet Israel synagogue, anti-Semitic graffiti appeared throughout the city of Caracas. On January 8, 2009, vandals spray-painted the exterior of the Tiferet Israel synagogue, and anti-Semitic graffiti began to appear on numerous buildings, monuments, and squares across Caracas; on January 22, 2009, individuals spray-painted additional graffiti.

International Religious Freedom Report-Venezuela, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, released October 26, 2009.

Counsel has also submitted a letter from [REDACTED] stating the following:

[REDACTED] has extensively documented and continues to monitor the rising wave of anti-Semitism witnessed under the [REDACTED] Regime. The building complex housing the Jewish community school and cultural and sports center in Caracas has been inexplicably raided twice by Venezuelan police since [REDACTED] came to power. Certain government officials and commentators in the official media frequently resort to implicit and explicit anti-Semitic displays. [REDACTED] has repeatedly compared Israelis to the Nazis, and he has accused Israel of engaging in genocide against Arabs. [REDACTED] has aligned Venezuela with countries and radical Islamic movements that are a verifiable threat to world Jewry....

Given the most recent intensification of the anti-Semitic rhetoric, demonstrations and violence, we believe that [REDACTED] [the applicant], his wife and his US-citizen daughter have legitimate fears of persecution and can potentially become the subject of intimidation in this hostile environment toward Jews....

Letter from [REDACTED] Director of International Affairs, Anti-Defamation League, dated April 27, 2009.

Based on the social, religious, and political turmoil in Venezuela, strong anti-American and anti-Semitic sentiment, the applicant's and his family's own traumatic experiences in Venezuela and the ramifications of said events on the child's upbringing and psyche, and the concerns outlined above regarding substandard health care, the AAO finds that the applicant's U.S. citizen child would experience exceptional hardship were she 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 U.S. citizen child would suffer exceptional hardship if she remained in the United States during the two-year period

that the applicant and his spouse reside abroad. The record establishes that the applicant and his spouse 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 her parents. The AAO concurs with the director that this situation would constitute exceptional hardship to the applicant's child if she remained in the United States.

The AAO finds that the applicant has established that his U.S. citizen child would experience exceptional hardship were she 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.