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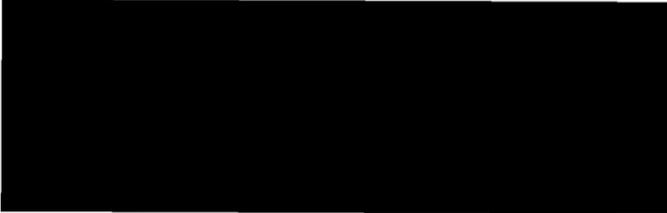
U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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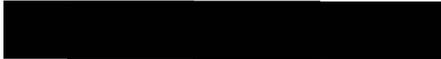


Office: CALIFORNIA SERVICE CENTER

Date:

NOV 04 2009

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.

A handwritten signature in black ink that reads "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, a citizen of Russia, obtained J-1 nonimmigrant exchange status in November 1999. He is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e) based on government financing. The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse and step-child, born in 1992, would suffer exceptional hardship if they moved to Russia temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Russia.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Russia. *Director's Decision*, dated April 17, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated May 13, 2009, 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

(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 spouse and/or step-child would experience exceptional hardship if they resided in Russia for two years with the applicant. To begin, the applicant’s spouse asserts that she and her daughter will suffer hardship due to the substandard living conditions in Russia, including inadequate medical care and lack of affordable academic opportunities for her daughter. She further notes that her daughter’s biological father lives in the United States and would vehemently oppose his daughter’s relocation due to their joint legal custody arrangement. Moreover, the applicant’s spouse contends that her daughter would suffer due to the unfamiliarity with the language, customs and culture in Russia, thereby causing her, as her mother, exceptional hardship. Furthermore, she notes that she and her daughter would suffer financial hardship in Russia. As the applicant’s spouse states, “It will be extremely difficult for me and my husband [the applicant] to find employment to support ourselves and we will be risking personal harm and injury. Russia is a nation fraught with internal problems including: political corruption, extra judicial killings and blatant human rights violation. Disappearances, arbitrary arrest and detention and abuse of women are common.... Abuses committed by police and military personnel involved in illegal activities, including coerced protection, kidnapping, gangs, drug syndicates, etc.... The Russian economy shows very little growth and is still recovering from economic crisis.... [W]e are prime targets for being kidnapped and held for ransom, which is rampant in Russia. The victims are often killed regardless of the outcome of negotiations for ransom. The very thought of these things occurring causes me indescribable distress and heartache....” *Affidavit of* [REDACTED] dated June 16, 2008. Counsel has provided documentation with respect to the problematic country conditions in Russia.

Based on a totality of the circumstances, the AAO concurs with the director that the applicant’s U.S. citizen spouse and step-child would suffer exceptional hardship were they to relocate to Russia due to the problematic country conditions referenced above. In addition, the applicant’s step-child would suffer due to separation from her biological father and unfamiliarity with the country, customs and language. Alternatively, were the applicant’s spouse’s child to remain in the United States with her biological father, the applicant’s spouse would suffer exceptional hardship due to long-term separation from her daughter, for whom she has been primary caregiver since 2000. A relocation abroad would cause the applicant’s spouse and step-child hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.<sup>1</sup>

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<sup>1</sup> On appeal, counsel references the fact that the applicant is subject to the ten-year bar of section 212(a)(9)(B)(I)(ii) of the Act, for unlawful presence, were he to depart the United States to fulfill his two-year foreign residency requirement, “making the hardship to his wife and step-daughter much greater than the two-year foreign residency requirement” of section 212(e) of the Act. *Brief in Support of Appeal*, dated May 13, 2009. The AAO notes that the unlawful presence bar to which the applicant may be subject were he to depart the United States is based on the applicant’s own voluntary actions in choosing to remain in the United States beyond his period of unauthorized stay. Therefore, no weight will be given to this argument with respect to the instant appeal.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or step-child would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in Russia. In a declaration the applicant's spouse states that she and her child would suffer exceptional emotional hardship due to the close relationship they have with the applicant. As she states, "I am scared to be separated from my husband [the applicant]. He is my life and the family depends on him for everything. It would be detrimental for my daughter not to have a father figure around her. She is in the most critical stage of her adolescent life, and she needs a step-father beside her. She needs a role model and a father figure as she continues to grow. I am in my second marriage and she is still in the process of recovering from the previous family break up. To break this family again would caused [sic] serious emotional trauma to each and everyone of us.... Should I stay in the United States with my daughter, I will not be able to see my husband regularly because of the expenses and safety issues involved with the travel..." *Supra* at 2-3. Counsel further documents that the applicant's spouse and step-child are suffering from post-traumatic stress disorder due to past trauma and the stress with respect to the applicant's two-year foreign residency requirement. *Psychological Report from [REDACTED]* dated June 16, 2009. Finally, counsel contends that were the applicant to reside abroad for two years, the applicant's spouse and step-child would suffer financial hardship. As counsel notes,

The [REDACTED] have a thriving family business, an architecture firm. [REDACTED] [the applicant] provides the architectural services, while [REDACTED] [the applicant's spouse] manages the office.... [W]ithout the architect, there would be no business, and therefore no business for Mrs. [REDACTED] to manage. The architecture firm would have to close its doors. The [REDACTED] clients have hired their firm for [REDACTED] expertise and design style.... Replacing him as an architect is impossible. No other architect can duplicate his unique sense of design and style that his clients paid him for.

Their business has been operating since 2003. The office employs [REDACTED] and [REDACTED]. The annual income of [REDACTED] is approximately \$150,000. [REDACTED] takes an annual salary of \$20,000 from the business, while [REDACTED] earns approximately \$80,000....

Even if, hypothetically, the firm remained open and hired a new architect, [REDACTED] could no longer serve as office manager, as the salary she has been drawing would be insufficient to keep the family's home without [REDACTED] income.

The [REDACTED] monthly essential expenses, including mortgage, business expenses, food, medical care, insurance, child support payments, and clothing, total approximately \$8,400.

[I]t would be impossible for ██████ to maintain two households. Architects in Russia are paid, on average, between \$300,000-\$1 million rubles annually. Converted to US dollars, that is between \$9,714 and \$32,400 annually. [E]ven if ██████ earned the highest salary as an architect in Russia, he would not begin to cover his family's expenses, not to mention his own.

*Brief in Support of Appeal*, dated May 13, 2009.

Counsel has provided documentation with respect to the applicant's spouse's and step-child's mental health. In addition, financial documentation has been submitted, establishing the applicant's critical contributions to the finances of the household as an architect, and further corroborating counsel's assertions that without the applicant's income, the applicant's spouse and child will suffer financial hardship.

Based on a totality of the circumstances, the AAO has determined that the applicant's U.S. citizen spouse and step-child would experience exceptional hardship if they remained in the United States while the applicant relocated to Russia to comply with his foreign residency requirement. The applicant's spouse and step-child need the applicant's support on a day to day basis, for emotional stability and to ensure the continued viability of the business, which provides critical financial support to the applicant's spouse and child.

The AAO thus concludes that the applicant has established that his U.S. citizen spouse and step-child would experience exceptional hardship were they to relocate to Russia and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. The evidence in the record establishes the hardship the applicant's spouse and step-child would suffer if the applicant temporarily departed the U.S. 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 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.