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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **MAR 16 2010**

IN RE: [REDACTED]

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

ON BEHALF OF APPLICANT:
[REDACTED]

INSTRUCTIONS:

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

A handwritten signature in black ink 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 applicant is a native and citizen of India who obtained J-1 nonimmigrant exchange status in June 2004 to participate in graduate medical 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 2007, would suffer exceptional hardship if she moved to India 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 India.

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 India. *Director's Decision*, dated September 2, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated September 28, 2009. 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 child would experience exceptional hardship if she resided in India for two years with the applicant. In a declaration, the applicant contends that his child would suffer emotional, physical and financial hardship were she to relocate to India to reside with the applicant for a two-year period. He notes the poor environmental conditions, including toxic pollutants and disease, the high level of terrorist activity, political and social instability, and the inability to obtain gainful employment to maintain his child's quality of living. He further references that his child has been diagnosed with anemia, a potentially serious blood disorder that can lead to weakness, fatigue and for children, impaired neurological development, and such a condition will worsen in India due to substandard medical care and the inability to obtain proper treatment due to the poor financial prospects in India. Finally, the applicant notes that his child is at the prime age for language development, but a relocation to India would cause a setback in her English language acquisition and educational development, thereby causing hardship when she returns to the United States. *Affidavit of* [REDACTED] dated April 16, 2009.

In support, counsel has submitted extensive documentation regarding the problematic country conditions in India, including terrorist activity, political instability, high crime rate, substandard environmental conditions, oversupply of doctors, and evidence of physicians as targets of violence in India. Moreover, documentation has been provided establishing the difficulties the applicant would face in obtaining gainful employment in India to maintain his child's quality of living, due to age discrimination and low pay. *Letters from* [REDACTED], dated March 29, 2009, and [REDACTED] dated March 29, 2009. In addition, documentation has been provided establishing the applicant's child's medical condition, specifically, anemia, and the negative ramifications of relocating to India. As noted by the applicant's child's treating physician:

[REDACTED] [the applicant's child], who is now 2 years old is under my care since the time of her birth.... The result of complete blood count revealed anemia with small size of red blood cells. Further investigations

including serum hemoglobin electrophoresis was done. The differential diagnosis at this time is alpha thalassemia (this is a genetic disorder of abnormal production of hemoglobin that is vital for carrying oxygen to body) versus iron deficiency anemia.

She has been currently placed on oral iron therapy. She will need close follow up and monitoring of blood count and hemoglobin electrophoresis at regular intervals. If the repeat tests continue to be abnormal she will be referred to pediatric hematologist. She needs to be under close supervision in order to properly diagnose and treat the anemia which can impair her physical and mental development in future.

To the best of my knowledge the test of hemoglobin electrophoresis is not readily available in developing countries including India and pediatric hematologist are unheard in India.

Letter from [REDACTED] dated July 7, 2009.

The AAO notes that the U.S. Department of State has issued a Travel Alert for U.S. citizens intending to travel to India. As the U.S. Department of State notes, in pertinent part:

The Department of State alerts U.S. citizens to ongoing security concerns in India. The U.S. government continues to receive information that terrorist groups may be planning attacks in India. Terrorists and their sympathizers have demonstrated their willingness and capability to attack targets where U.S. citizens or Westerners are known to congregate or visit. This replaces the Travel Alert dated December 29, 2009, and expires on April 30, 2010.

The November 2008 attacks in Mumbai provide a vivid reminder that hotels, markets, and other public places are especially attractive targets for terrorist groups.

Travel Alert-India, U.S. Department of State, dated January 29, 2010.

Moreover, the AAO notes that the U.S. Department of State corroborates the applicant's statements regarding substandard health care in India. *Country Specific Information-India, U.S. Department of State, dated July 9, 2009.*

Based on the problematic country conditions, including terrorist activity, the targeting of physicians, substandard health care, safety and environmental concerns, the applicant's child's documented medical condition and the need for continued monitoring and treatment by individuals familiar with her condition and financial hardship due to the applicant's inability to find gainful employment to

support his child, the AAO concludes that the applicant's U.S. citizen child would experience exceptional hardship were she to accompany the applicant to the India 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. As stated by the applicant,

My wife is on a J-2 visa, so her presence in the United States is dependent upon mine. If my hardship waiver is denied, we will both have to leave the United States. Our child is far too young to leave behind in the United States....

Supra at 1.

As the record indicates, 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 U.S. citizen 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 India 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 U.S. citizen 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.