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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

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FILE:

Office: CALIFORNIA SERVICE CENTER

Date **MAR 16 2010**

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:

SELF-REPRESENTED

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.

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 native and citizen of Belarus, obtained J-1 nonimmigrant exchange status in August 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 child, born in 2007, would suffer exceptional hardship if they moved to Belarus 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 Belarus.

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 Belarus. *Director's Decision*, dated September 15, 2009. The application was denied accordingly.

In support of the appeal, the applicant submits a letter, dated September 28, 2009 and referenced supporting documentation. 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 child would experience exceptional hardship if they resided in Belarus for two years with the applicant. To begin, the record establishes that the applicant's spouse was crowned [REDACTED] in April 2009. She signed a contract with [REDACTED] to represent Oklahoma's married women and to be a public figure, sharing her message and platform of Strengthening Marriage and Family. Due to her role as [REDACTED], she is required to make numerous appearances throughout the state and surrounding states. *Letter from [REDACTED] / [REDACTED] [REDACTED], dated June 10, 2009.* The applicant contends that were his spouse to relocate abroad for a two-year term, she would have to abandon her contractual obligations to [REDACTED] and forego the chance of advancing with respect to her career, causing her exceptional hardship. In addition, the applicant asserts that his spouse would suffer emotional hardship as she does not speak Belarusian or Russian and is unfamiliar with the culture and customs of Belarus. Finally, the applicant asserts that his spouse would suffer emotional hardship due to long-term separation from her extended family and her church community¹; the record indicates that the applicant and his spouse are active members of the Church of Jesus Christ of Latter Day Saints, he as a ward clerk and she as an activities coordinator. He also notes that in Belarus, his spouse would not be able to practice her religion freely, due to religion oppression.² *Statement from [REDACTED] dated May 3, 2007.*

¹ In support of the emotional hardship referenced, a letter has been provided from [REDACTED] Professional Counselor. [REDACTED] confirms that the applicant's spouse received treatment in 2007 due to issues pertaining to her parents' divorce and feelings of abandonment, rejection and stepfamily issues. [REDACTED] expresses concern at the possibility that the applicant's spouse will be separated from her family and her support structure and concludes that the "healthiest dynamic for emotional stability is to have access to a strong community of strong, healthy relationships. I hope that it will be possible to keep Heather's support unit intact and ongoing...." *Letter from [REDACTED] dated October 9, 2009.*

² The U.S. Department of State affirms the applicant's statements with respect to religious oppression in Belarus. As noted,

The law provides for freedom of religion; however, the government restricted this right in practice. While the constitution affirms the equality of religions and denominations, it also contains restrictive language, stipulating that cooperation between the state and religious organizations "is regulated with regard for their influence on the formation of spiritual, cultural, and country traditions of the Belarusian people."

Based on a totality of the circumstances, the AAO finds that the applicant's U.S. citizen spouse would suffer exceptional hardship were she to relocate to Belarus due to professional and career disruption, unfamiliarity with the language, culture and customs of Belarus, religious oppression and separation from her extended family and her church. A relocation abroad would cause the applicant's spouse hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or child would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in Belarus. In a declaration the applicant states that his spouse would suffer exceptional emotional, spiritual and financial hardship were she to remain in the United States while the applicant relocated abroad for a two-year period. As he contends,

The economy in Belarus is suffering to a great extent. The annual national debt is close to 60% of GDP, the poverty and unemployment rates are beyond what is statistically proven, and the income rate is an average of 807,846 rubles, or about \$377 (Ministry of Statistics, March 2008) even though the cost of living is comparable to, if not higher than, that of the United States (see included cost of living document).

As [REDACTED] my wife is only required to make 12 appearances per year.... Though she has done far more than that so far in her reign, she has been able to take our daughter with her to her appearances, or else schedules them in the evening or on the weekend. Also, this is not a paid position.... This role has enabled her to be active in the community in doing public service and networking for the future, yet also allows her the freedom to continue in her full-time role as a mother....

Her [the applicant's spouse's] monthly expenses would be \$3,222, which adds up to \$38,664 annually. In 2008, her income was \$11,596, in 2007, it was \$22,763, and in 2006, it was \$14,465. That is considering that in

The government continued to use restrictive provisions of the 2002 religion law to hinder or prevent activities of groups other than the Belarusian Orthodox Church. In particular, the law restricts the ability of religious organizations to provide religious education, requires governmental approval to import and distribute literature, and prohibits foreigners from leading religious organizations. A concordat and other arrangements with the government provide the Belarusian Orthodox Church with privileges not enjoyed by other religious groups. The Belarusian Orthodox Church is a branch of the Russian Orthodox Church and the only officially recognized Orthodox denomination in the country.

2007 and the first half of 2008, [REDACTED] [the applicant's spouse] was working full-time....

Heather will not only be unable to provide for the family, but full time employment would preclude her from her main responsibilities of being a stay at home mom during these formative years in the development of our daughter. Being devoted Christians and faithful members of our church, we strongly believe that it's a mother's responsibility to stay at home with children while they are young, instead of letting someone else (babysitter or daycare) raise them for us.

If I go to Belarus, my wife and daughter would lose their sole source of income. I work for a large natural gas company and receive health, dental and vision insurance through my employer. It covers all members of my family. If I leave the country my wife and daughter would lose their medical and dental coverage, and would face hardship in treating their routine and unexpected medical and dental conditions.

In our church, the Church of Jesus Christ of Latter Day Saints, married men are not only husbands and father, but also priesthood holders. Each spiritually worthy male, including myself, can be ordained and hold the priesthood. I'm not only a husband for my wife and a father for my daughter, but also a spiritual leader of my family.... By going to Belarus, my family would lose this spiritual guidance and bond that we have.... The roles of father and mother are described in Doctrine and Covenants, which is considered to be scripture in our church, as well as in the Proclamation to the World issued by the church presidency....³

[S]eparation is against our religious beliefs. Family, a united family, with the daily presence of a mom and dad, is one of the cornerstones of our faiths. Therefore, separating from my wife and daughter would be

³ As noted in A Proclamation to the World, as read by [REDACTED] at the General Relief Society Meeting, The Church of Jesus Christ of Latter-Day Saints,

By divine design, fathers are to preside over their families in love and righteousness and are responsible to provide the necessities of life and protection for their families. Mothers are primarily responsible for the nurture of their children....

unthinkable for both them and me. In addition, it would create even more emotional trauma for the family.

Letter from [REDACTED] dated September 28, 2009.

Based on a totality of the circumstances, the applicant has established that his spouse would suffer emotional, spiritual and financial hardship if she remained in the United States while the applicant relocated to Belarus to comply with his foreign residency requirement. The applicant's spouse would be required to assume the role of primary caregiver and breadwinner to a young child, while suffering from past feelings of abandonment and separation that lead to counseling, without her spouse's daily emotional and spiritual guidance, support and encouragement.

The AAO thus concludes that the applicant has established that his U.S. citizen spouse would experience exceptional hardship were she to relocate to Belarus and in the alternative, were she 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 would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.⁴

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.

⁴ As the AAO has determined that exceptional hardship exists with respect to the applicant's U.S. citizen spouse were the applicant to relocate to Belarus or a two-year period, it is not necessary to evaluate whether the applicant's U.S. citizen child would experience exceptional hardship were the applicant to relocate abroad for a two-year period.