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U.S. Department of Homeland Security  
Bureau of Citizenship and Immigration Services

**113**

ADMINISTRATIVE APPEALS OFFICE  
425 Eye Street N.W.  
BCIS. AAO.20 Mass., 3/F  
Washington, D.C. 20536

[REDACTED]

**AUG 21 2003**

FILE [REDACTED] Office: Nebraska Service Center Date:

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility 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 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.



Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The waiver application was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The case will be dismissed.

The applicant is a native of China and a naturalized citizen of Canada who is subject to the two-year foreign residence requirement of section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e), because the Director, Waiver Review Division (WRD), U.S. State Department Visa Office has designated China as a country requiring the services of persons with the applicant's specialized knowledge or skill.

The applicant was admitted to the United States as a nonimmigrant exchange visitor on November 4, 1986, to work as a research scholar. The program was financed entirely by the applicant. At the completion of the program in January 1988, the applicant moved to Canada where he was granted asylum in 1989. He subsequently became a Canadian citizen in 1993. Because China does not recognize dual citizenship pursuant to sections three and nine of the Citizenship Law of the People's Republic of China, the applicant automatically lost his Chinese citizenship when he obtained Canadian citizenship. See *Announcement of the Consulate General of the People's Republic of China in Chicago* submitted by counsel as Exhibit 6.

The applicant returned to the United States in 1996, to complete his medical residency and he is currently an H-1B faculty member at the University of Chicago. The applicant seeks a waiver of his two-year Chinese residence requirement in order to remain in the United States and adjust his status to that of a lawful permanent resident.

The director determined that section 212(e) of the Act does not apply to Canadian citizens and concluded that the applicant therefore did not meet the 212(e) waiver of foreign residency requirements. The application was denied accordingly.

On appeal, counsel asserts that the director erred in finding that the applicant was not subject to section 212(e) requirements, because there is no blanket exemption to section 212(e) requirements for Canadians. Counsel asserts further that, although it is true that section 212(e) of the Act does not apply to Canadian citizens because Canada is not on the Exchange Visitor Skills List, the applicant is nevertheless subject to the two-year foreign residence requirement under section 212(e) because his occupation is on the Exchange Visitor Skills List for China, and because he participated in the exchange program while he was a citizen of China. Counsel asserts that the applicant's two

sons are U.S. citizens and that they would suffer exceptional hardship if the applicant returned to China without them or if they accompanied him to China. Counsel asserts further that in any case, the applicant is no longer a citizen of China, and that he would not be able to return to live and work there. Counsel adds that even if the applicant could return to China, he could be subject to political repression due to his asylee status in Canada.

Section 101(a)(15)(J) of the Act, 8 U.S.C. § 1101(a)(15)(J) states, in pertinent part, that:

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens

. . . .

(J) an alien having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training and who, if he is coming to the United States to participate in a program under which he will receive graduate medical education or training, also meets the requirements of section 212(j), and the alien spouse and minor children of any such alien if accompanying him or following to join him.

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

(e) 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 the Bureau of Citizenship and Immigration Services] 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 of 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.

Thus, in the applicant's case, a waiver of the two year residency requirement can be granted if the applicant establishes either exceptional hardship to his U.S. citizen children, or if he establishes that he would be subject to persecution on account of race, religion, or political opinion in China.

Counsel has failed to establish that the applicant's two U.S. citizen children would suffer exceptional hardship if the applicant were required to fulfill his two-year residency requirement in China. Counsel asserts that the applicant's 5-year-old and 1-year-old, sons would suffer emotional, financial, political and social hardship if they moved with their father to China for two years, and that, in the alternative, they would suffer emotional and financial hardship if they returned to Canada with their Canadian mother for two years while the applicant fulfilled his residency requirements in China. Although counsel's assertion regarding hardship to the children if they moved to China is compelling, counsel failed to establish that the emotional and financial hardship the boys would suffer if they returned to Canada with their mother, constitutes exceptional hardship.

Counsel correctly points out that "exceptional hardship" is not defined within the statute and that federal courts have held that the requirements for establishing "exceptional hardship" for waiver purposes should be compared with similar requirements found elsewhere in immigration law. See *July 25, 2002, Appeal Brief* at 4. See also *Ramos v. Immigration and Naturalization Service*, 695 F.2d 181, 187 (5<sup>th</sup> Cir. 1983) (referring to "exceptional hardship" and "extreme hardship" interchangeably).

Counsel refers to several legal cases to support his assertion that the applicant's children would suffer exceptional hardship if they were separated from their father for two years. A review of the cases reflects, however, that all of the cases involve hardship to a U.S. citizen or lawful permanent resident spouse. In the applicant's case, his spouse is a Canadian citizen with no citizenship or lawful permanent resident claim in the United

States. Based on the evidence in the record, the applicant's wife was born and raised in Canada and her entire family is in Canada. Moreover, the applicant's spouse has been employed in Canada in the past, and there is no indication in the record that childcare or family support would not be available to her if she returned to work in Canada.

U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9<sup>th</sup> Cir. 1991). For example, *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. Moreover, in *Perez v. INS*, 96 F.3d 390 (9<sup>th</sup> Cir. 1996), the Ninth Circuit Court of Appeals defined "extreme hardship" as hardship that is unusual or beyond that which would normally be expected upon deportation. The court then reemphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that his U.S. citizen children would suffer exceptional hardship if his waiver is not granted.

Based on the evidence in the record, counsel has additionally failed to establish that the applicant would be subject to persecution on account of his race, religion or political opinion in China. It is noted that in order to obtain a waiver based on persecution pursuant to section 212(e)(iii) of the Act, it must be established that the applicant "would" be subject to persecution. The fact that the Chinese government does not recognize dual citizenship, and that, upon obtaining Canadian citizenship, the applicant lost his Chinese citizenship through the automatic operation of the Republic of China's citizenship law, does not, in itself, establish that the applicant would be subject to persecution in China. Moreover, despite counsel's assertion that the applicant obtained asylum in Canada based on his opposition to the Chinese government's 1989 actions in Tianamen Square, the record contains no evidence of the applicant's asylee status in Canada. Nor does the record contain evidence that the applicant has been involved in any activity that would cause the Chinese government to persecute him in China.

Counsel asserts that through the automatic loss of his Chinese citizenship in 1993, the applicant is no longer

entitled to residence, employment, travel, or other rights of a Chinese citizen, and that as a result it may be impossible for the applicant to fulfill the section 212(e) employment and residency requirements. Counsel presented no proof, however, that the applicant would not be able to work and reside in China for two years. For example, counsel presented no evidence that the applicant attempted to restore his citizenship in China or that he tried and was unable to obtain a visa to reside and work in China. See August 7, 1998, *Federal Register Summary of 22 CFR part 514*, submitted by counsel as Exhibit 2 (requiring proof that fulfillment of section 212(e) requirements is impossible).<sup>1</sup>

Counsel has failed to establish that the applicant's U.S. citizen children will suffer exceptional hardship if the applicant is required to return to China for two years. Counsel additionally failed to establish that the applicant would be persecuted by the Chinese government if he returned to China, and he failed to demonstrate that fulfillment of the section 212(e) requirements are impossible based on the automatic revocation of the applicant's Chinese citizenship when he became a Canadian citizen.

The burden of proving eligibility in this case rests with the applicant. See section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed

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<sup>1</sup> As noted by the director in his decision, dated October 3, 2002, the applicant is not required to fulfill the two-year residency requirement in the country of his last habitual residence (Canada) because Canada has not been designated as a country on the Exceptional Skills list, and the applicant did not participate in a section 101(a)(15)(J) program after becoming a citizen of Canada.