



U.S. Citizenship
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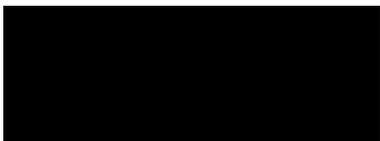
IN RE:



APPLICATION:

Application for Waiver of 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, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Acting Center Director (Director), Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and 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 (WRD).

The record reflects that the applicant is a citizen of China who 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). The applicant obtained J1 nonimmigrant exchange status on February 22, 2002. The applicant's qualifying relatives are her U.S. citizen spouse and stepdaughter and she presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse and stepdaughter.

The director determined that the applicant failed to establish her spouse would experience exceptional hardship if she fulfilled her two-year foreign residence requirement in China. *Director's Decision*, dated September 16, 2004. The application was denied accordingly.

On appeal, counsel asserts that the applicant has established that exceptional hardship would be imposed on her spouse and stepdaughter by the section 212(e) requirement. *Brief in Support of Appeal*, at 4, dated December 7, 2004.

The record includes, but is not limited to, counsel's brief, medical records and letters and statements from the applicant and her spouse. The entire record was considered in rendering this decision.

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, 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 AAO will first address the claim of exceptional hardship to the applicant's spouse.

The first step required to obtain a waiver is to establish that the applicant's spouse would experience exceptional hardship if he moved to China for two years. Counsel asserts that the applicant's spouse has sole

custody of both of his minor children, his ex-wife has no visitation rights by court order and it would be legally and factually impossible for him to live overseas for two years. *Brief in Support of Appeal*, at 5. The record includes the applicant's spouse's separation agreement which verifies that he has sole physical and joint legal custody of his children and his ex-spouse does not have visitation rights. *Separation Agreement*, at 8, dated January 31, 2003. Counsel asserts that if the applicant's spouse relocates to China for two years, he will be deprived of the much needed, proper and continued medical attention available in the United States. *Brief in Support of Appeal*, at 5. The record reflects that the applicant's spouse has been treated for skin cancer, a pituitary tumor, chronic depression and acute social anxiety. *Doctor's Letter*, dated February 18, 2004. The applicant's spouse has been receiving treatment for his skin cancer for over 15 years and acute social anxiety for over five years and appears to have longstanding doctor-patient relationships. *Id.* The record indicates that the applicant's spouse has medical insurance based on his employment. *Separation Agreement*, at 12. Furthermore, counsel asserts that the applicant's spouse would be leaving his daughter behind without physical custody and this is beyond consideration given her psychological conditions. *Brief in Support of Appeal*, at 5. The record indicates that the applicant's spouse's daughter has a history of depression, anxiety and suicidal tendencies. *Doctor's Letter*, dated February 10, 2004. Counsel states that the applicant's spouse is psychologically unstable due to the unpredictable condition of his daughter. *Brief in Support of Appeal*, at 3. Counsel also asserts that the applicant's spouse would be giving up his established career, would have to maintain two separate households and would risk his life in doing so. *Id.* at 6. The record indicates that the applicant's spouse is currently employed as a technical writer, but the extent of the potential financial hardship is unclear. However, AAO finds most of counsel's assertions to be persuasive and finds that departure from the United States would impose exceptional hardship upon the applicant's spouse.

The second step required to obtain a waiver is to establish that the applicant's spouse would suffer exceptional hardship if he remained in the United States during the two-year period. Counsel refers to statements from the applicant's spouse's physicians. His psychiatrist states, "Tim has done much better with Wenyue at his side...If he were to lose Wenyue at this point time, he may also re-experience his severe depression." *Doctor's Letter*, dated November 2, 2004. His dermatologist states, "Many of your skin cancers have been located on your back which would be difficult for you to visualize yourself, without the assistance of your wife...These areas would be impossible for you to reach physically without the assistance of your wife, in regard to necessary wound care after biopsies or excisions or other surgical therapies..." *Doctor's Letter*, dated November 5, 2004. The applicant states that her spouse's health has improved since they have been together. *Applicant's Statement*, at 2, dated December 6, 2004. The applicant states that she is his support system and keeps his spirits positive in order for him to positively deal with life, his tumor has decreased in size and skin cancer lesions have decreased. *See Applicant's Statement*, at 2. The applicant's spouse states that he has seen some improvement in his health since getting married to the applicant and her unconditional support and knowledge of western and eastern medicine have been part of the cause for the improvement. *Applicant's Spouse's Statement*, at 2, dated December 6, 2004.

The Director stated that the applicant has only been married five months and her spouse has been suffering from his medical conditions long before meeting the applicant. *Director's Decision*, at 2. However, the applicant states that she had been in a relationship with her spouse for 16 months before getting married. *See Applicant's Statement*, at 1. The applicant's spouse has a long history of medical problems, but it appears that the presence and care of the applicant has helped partially alleviate his problems and the absence of her presence would result in significant negative effects to the applicant's spouse's health. Therefore, based on

the record, the AAO finds that the applicant has established that exceptional hardship would be imposed on her spouse if he remained in the U.S. while the applicant returned temporarily to China.

As exceptional hardship has been shown to the applicant's spouse, no purpose would be served in addressing the applicant's stepdaughter's hardship.

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 her 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 USIA. Accordingly, this matter will be remanded to the director so that he may request a USIA recommendation under 22 C.F.R. § 514. If the USIA recommends that the application be approved, the application must be approved. If, however, the USIA recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The appeal is sustained and the record of proceeding is remanded to the director for further action consistent with this decision.