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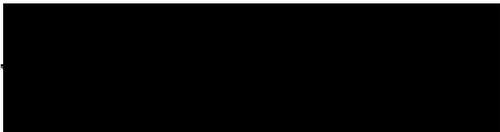
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U.S. Citizenship  
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H13



FILE:



Office: CALIFORNIA SERVICE CENTER

Date: SEP 02 2005

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 Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of China. He was admitted to the United States as a J1 Nonimmigrant Exchange Visitor on September 5, 2000 to participate in a program sponsored by the University of Minnesota. The applicant 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 record reflects that the applicant married [REDACTED] a United States citizen (USC), on November 13, 2003 and that [REDACTED] has two USC daughters from a prior relationship; [REDACTED] nine years old and [REDACTED] is eleven years old. The applicant seeks a waiver of his two-year residence requirement in China, based on the claim that his wife and stepdaughters would experience exceptional hardship if they moved to China with the applicant for the two years he is required to live there, or if they remained in the United States.

The director concluded that the applicant had not established that exceptional hardship would be imposed upon his spouse and denied the I-612 Application for Waiver of the Foreign Residence Requirement accordingly. *Decision of the Director, California Service Center, dated January 21, 2005.*

On appeal, counsel contends that [REDACTED] and her daughters will suffer exceptional hardship if they accompany the applicant to China for two years, or if they stay in the United States while the applicant lives in China for two years. In support of the appeal, counsel submitted a brief; portions of the *United States Department of State Country Reports on Human Rights Practices in China -- 2003*; and statistics on the cost of living in China. The entire record was 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 at 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 the Immigration and Naturalization [now, the Director of 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, "[E]ven 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)."

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.)

**I. Potential Hardship to [REDACTED] and Her Daughters if They Accompany the Applicant to China**

First analyzed is the potential hardship [REDACTED] and her daughters will experience if they live with the applicant in China for two years. [REDACTED] has been married to the applicant for approximately two years. She has limited familiarity with Chinese culture and does not speak the language, so adjusting to life in China, including finding suitable employment, could be difficult. Furthermore, as a Christian and active

member of Grace Baptist Church, the applicant may not be able to fully practice her religion in China. Also, [REDACTED] has extensive family ties in the United States, and separating her from her family would cause her to experience hardship.

[REDACTED] daughters are nine and eleven years old. They are fully integrated into an American way of life and would experience hardship if they had to live in China for two years.

The AAO finds that [REDACTED] and her daughters would experience exceptional hardship if they lived in China for two years.

## II. Potential Hardship if [REDACTED] and Her Daughters Remain in the United States

Next examined is the potential hardship to [REDACTED] and her daughters if they stay in the United States during the two years the applicant is required to live in China. As United States citizens, [REDACTED] and her daughters are not required to accompany the applicant to China. In his affidavit in support of the original waiver application, the applicant stated:

If my wife remains in the United States while I am in China, there will be rocket high expenses to maintain two separate residences. It is also impossible for my wife to visit me in China on a regular basis because she will have to take care of her work and her family and we are not financially well-off. The long-distance communication will also incur heavy financial burden on us. I'm afraid all those factors will seriously damage our normal family life and throw great danger to our relationship.

Counsel has not shown that the effect of a two-year separation would go beyond what is normally expected and cause [REDACTED] or her daughters to experience exceptional hardship. First, counsel presented no evidence establishing that [REDACTED] will be unable to support herself and her daughters in the United States. The record indicates that [REDACTED] works as an executive assistant at Long March International and that she earned \$24,000 in 2002. She also has extensive family in the United States who may be able to assist her. Second, the fact that [REDACTED] would be unable to visit the applicant in China on a regular basis does not establish that a two-year separation will cause exceptional hardship. Third, the applicant does not explain how "all those factors will seriously damage our normal family life and throw great danger to our relationship."

Counsel asserts that:

Because the applicant has been out of status since September 2003, if he goes back to China to fulfill his 2-year foreign residence requirement, he will be barred from reentering into the U.S. for 10 years. Under such circumstance, if the wife remains in the U.S. while the applicant is abroad, the separation for 10 years will no doubt lead to the break-up of the family.

The AAO notes that the applicant was responsible for maintaining legal status in the United States, and that he was expected to return to China at the conclusion of his exchange visitor status. Counsel cannot use the consequences of the applicant's failure to maintain legal status as a factor to be considered in determining whether a qualifying relative will experience exceptional hardship if a waiver application is denied. The

AAO further notes that counsel's assertion that the applicant would be barred from reentering the United States for ten years is unsupported by the record. The applicant's wife filed an I-130 Petition for Alien Relative with the applicant as beneficiary on January 9, 2004, and on that same date, the applicant filed an I-485 Application to Register Permanent Residence or Adjust Status. The proper filing of an affirmative application for adjustment of status has been designated by the Attorney General [Secretary] as an authorized period of stay for purposes of determining bars to admission under section 212 (a)(9)(B)(i)(I) and (II) of the Act. *See Memorandum by Johnny N. Williams, Executive Associate Commissioner, Office of Field Operations dated June 12, 2002.* Accordingly, the applicant was out of status for just over four months, from September 2003 until January 9, 2004. If the applicant now left the United States to fulfill his two-year residency requirement, he would have accrued four months of unlawful presence, which is not enough time to trigger inadmissibility under section 212(a)(9)(B)(i) of the Act.

### **III. Conclusion**

The AAO finds that the evidence in the record establishes that the applicant's wife and stepchildren would experience exceptional hardship if they lived in China for two years with the applicant. The AAO also finds that the evidence in the record fails to establish that the applicant's wife and stepchildren would experience exceptional hardship if they remained in the United States while the applicant returned temporarily to China.

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 not met her burden. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.