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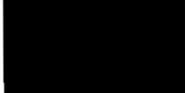
U.S. Citizenship
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FILE:



Office: CALIFORNIA SERVICE CENTER

Date: **MAY 23 2008**

(relates)

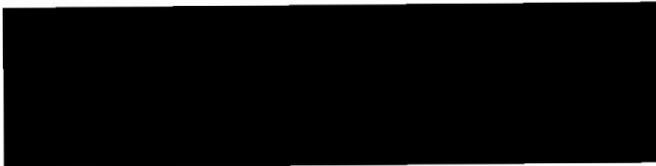
IN RE:



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:



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, 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 is a native and citizen of China who was admitted to the United States in J-1 nonimmigrant exchange status in December 2003. She 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 her two-year residence requirement, based on the claim that her U.S. citizen spouse, her U.S. citizen step-child, born in September 2000, and her lawful permanent resident daughter, born in July 1990, would suffer exceptional hardship if they moved to China temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled her two-year foreign residence requirement in China.

The director determined that the applicant failed to establish that her spouse and/or children would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in China. *Director's Decision*, dated October 10, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides a brief, dated November 6, 2007; a copy of an emergency recusal motion, dated October 31, 2007; a letter from the applicant and her spouse, dated October 28, 2007 and referenced exhibits; two previously issued decisions from the AAO; case law with respect to waivers; a copy of an article about hardship waivers, written by counsel; and a copy of the Notice of Hearing in Removal Proceedings issued to the applicant, dated April 11, 2006. 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 would experience exceptional hardship if he resided in China for two years with the applicant. To support this contention, the applicant's spouse states the following:

[the applicant] and I got married on November 16, 2005.... I have three children, a son [redacted], age 26, married and living in Phoenix, Arizona; a daughter [redacted], age 22, who lives with me; and a son, [redacted], age five, living in shared custody with me in Palo Alto and with his mother in nearby Mountain View, California.... I have a verbal custody and child support agreement with [redacted]'s mother, which specifies that Leo spends two days per week at my home.... We alternate on vacation weeks and professional travel absences. I provide \$2,700 per month in cash, educational, and housing support to [redacted]'s mother. All three of my children are U.S. citizens....

I was married to [redacted] on August 7, 1996.... We were divorced on August 26, 1997.... This was a particularly difficult time in my life. The divorce was traumatic and took a very long time to finish. Despite my sincere attempts to reconcile, my wife left to pursue another relationship in the fall of 1996. I was emotionally devastated.

During and after the divorce, I began to feel tired all the time and unable to concentrate, which are early symptoms of depression. My work and professional relationships with faculty and students suffered greatly. Ultimately, I was forced to resign from my position on the faculty of the University of Illinois in August 1997. After that I became severely depressed and was unable to work for a period of several months....

I was diagnosed with depression with anxious features and dysthymia. I am also prone to a condition known as gastroesophageal reflux disease (GERD), which previously resulted in an ambulatory peptic acid. My doctors informed me that GERD can lead to serious complications so I must take care to reduce and manage stress....

I pursued psychological and medical help and found that counseling and treatment with antidepressants helped alleviate my symptoms....

I have been under regular psychological and psychiatric treatment since 1996. My doctors informed me that my chronic depression may require very long term or even lifetime treatment with antidepressants. For a few short periods, I tried stopping the medications but then I suffered dizziness, confusion, irritability, and unusual auditory sensations.... I could not continue to receive the same quality of care if I were to move to China with [REDACTED]. My insurance would not be valid there and access to psychology and psychiatry resources is extremely limited in China....

...it would be extremely difficult for me to move. Unlike [REDACTED], who is fluent in English, I only know a handful of words in Chinese. But more critically, my children [REDACTED] and [REDACTED] all depend on me financially and emotionally. [REDACTED] and [REDACTED] are in their last and most critical two to three years of college and I am paying their tuition and support. Little [REDACTED] is only five years old and his mother would never allow him to go with me to China. He is at the age where he needs his father in his life for normal and health development. In addition, it would be impossible for me to earn enough money in China to support all of them and visit frequently. The best I could do is teach English in a school or university, earning about \$600 per month. This is impossible for my family's needs, as compared with my current professional income, of which about 30% goes to taxes and the rest is mostly spent on living expenses and tuition for the kids....

Besides my children's needs, my parents [REDACTED] and [REDACTED], are both old and in poor health. They will both turn 80 this year. Last year my mother had a fall and a severe head injury. She underwent corrective neurosurgery for a cerebral contusion. She also has advanced arthritis and cannot move her fingers or her left shoulder very well. My father is healthier than my mom, but he is nearly blind in one eye and frequently suffers from severe abdominal pains due to diverticulosis. Both of them count on me and my brothers for emotional support. Our family is very close and their knowing that I might move to China for two years and the effects that would have on their grandchildren will be an additional stressor....

...there would also be a severe impact on my work if I were to leave for two years. I am currently a NASA employee and I also work on several projects for other government agencies. NASA has granted me long-term leave without pay so that I may develop additional skills and contacts outside the agency. In my present position with Quantum Applied Science and Engineering, I am helping to develop novel bio-sensing applications and algorithms. I am currently the lead scientist on two grants, one for the National Institutes of Health and another for the U.S. Army. Both of these grants need my leadership as I am uniquely skilled in the area of advanced methods for physiological monitoring of operational personnel. For the NIW project, I am developing new sensor technology which may revolutionize the measurement of EEG signals for epilepsy and other brain disorders.... Not only would these projects suffer, but my career would be derailed for those two years. I

would, no doubt, lose the grants and my position and return as a 53-year old scientist without a job.

Affidavit of [REDACTED], dated April 12, 2006.

The applicant and her spouse further outline the hardships the applicant's spouse would face were he to relocate to China:

[REDACTED] [the applicant's spouse] would immediately be forced to quit his job, and at age 53, most likely would never be able to resume his career. He would also be forced to separate from his young son, [REDACTED] (7), his daughter, [REDACTED], and would no longer have the financial means to support them. These consequences of moving to China will be produce exceptional stress, anguish, and strain. At a very minimum, these multiple stressors will seriously harm [REDACTED]'s health, prolonging or preventing his complete recovery. Mostly likely, however, these events will trigger a reversal of his recovery, and lead to another descent into major depression. To make matters worse, in China, he simply will not have the same access to essential psychiatric care and medications that he has here. A recent analysis of mental health care in China reported that there is only one psychiatrist per 100,000 people in China.... Even in the most advanced cities, such as Shanghai, the small number of psychiatrists must limit their practices to treatment of psychosis, epilepsy, and mental retardation. Other illnesses, such a (sic) major depression are left to the care of primary care workers who receive only basic psychiatric training and supervision. In contrast, here in the U.S., [REDACTED]'s depression is being managed by a fully qualified psychiatrist with whom he has visited about every two to three weeks over the past year, and who has adjusted or changed his medications many times. And even if he were to find acceptable care in China, he could probably not afford that care or the expensive medications he takes. [REDACTED] would simply have no reasonable job and no health insurance there. To make things even more frightening, [REDACTED] and [REDACTED] reported that since the 1990s there have been increasing allegations about the political abuse of psychiatry care in China.... This is a terrifying prospect for [REDACTED] who may need to seek long-term mental health care in China as a foreign visitor who has controlled many advanced research projects for the U.S. military during the past 23 years.

[REDACTED] and [REDACTED] need their father's constant love and support and critically depend on his income for their daily needs.... We also ask that you consider that [REDACTED]'s aging parents will suffer with worry and fear for [REDACTED]'s well-being and the well being of his family. That they live on the East Coast is irrelevant. [REDACTED]'s family is very close, and his parents, brothers and sister-in-law, all love him and [REDACTED] dearly....

[REDACTED]

[REDACTED] cannot continue his work in China because it is 100% in service of research grants and contracts from U.S. government institutions and the Department of Defense, and so it must be done here in the U.S.... These experts testified that the kind of mental focus and sustained concentration that [REDACTED]'s work requires will be severely impaired if he must part with his wife or his children for two years or more. In short, whether [REDACTED] must return to China alone or with [REDACTED], his ability to work, sustain his career, and support his children will be taken away....

Letter from [REDACTED] and [REDACTED] dated October 28, 2007

Counsel has provided extensive documentation to corroborate the statements made above by the applicant and her spouse. The AAO thus finds that the hardship the applicant's spouse would encounter were he to relocate to China for a two-year period goes significantly beyond that normally suffered upon the temporary relocation of families based on a two-year home residency requirement. The record indicates that the applicant's spouse has never lived outside the United States, nor is he able to speak, read or write in the native language of China. Moreover, counsel has provided specific documentation which reflects that the applicant's spouse suffers from numerous psychological problems, including acute depression, anxiety and dysthymia, which go beyond the normal. In addition, the record reflects that for the applicant's spouse, relocation abroad would mean significant career disruption, financial instability and long-term separation from his children and parents, thereby causing additional stress and the high probability of a relapse of his psychological disorders. The AAO thus concludes that the applicant's U.S. citizen spouse would experience exceptional hardship were he to accompany the applicant to China for a two-year term.

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 that the applicant resides in China. As stated by the applicant:

[REDACTED] has been working as a research scientist for the U.S. Navy and NASA for a total of 18 years. For three years, he was also a professor at the University of Illinois.... Unfortunately, he suffered from severe depression and anxiety disorder due to the failure of his first marriage eight years ago. His condition eventually improved with the support of physicians, psychiatrists, and therapists, but he has had to keep taking medicine ever since then. As [REDACTED]'s wife, I feel responsible for taking good care of him and supporting him in his career. I am willing to do whatever I can to keep him healthy so his past mental health problems will not bother him again, and he does not need to receive more treatment. We care for each other, support each other, and feel very happy together. He succeeded in getting another big grant for a U.S. Air Force project just a few weeks ago. I try my best to help him in his work, such as data entry, *making project diagrams*, etc. I also help him with the housework.... I truly hope that with my love and care, my husband's physical and mental condition will be better some day and he will not need to depend on any medicine at all....

If I am forced to separate from [redacted] [the applicant's spouse] and return to China for two years, we will have to face tremendous exceptional hardship, especially

With [redacted]'s mental history, he is very likely to suffer another psychological collapse if he has no other choice but to leave me for two years. As the accompanying documents show, he suffered a psychological collapse during his divorce eight years ago. He suffered depression, anxiety disorder, and dysthymia, and was unable to work for six months. He also suffers from gastric problems, which are closely related to depression. We are happy together and emotionally close....

Being a research scientist for NASA, [redacted]'s work is intellectually challenging and demanding. Based on his history, it would be hard for him to stand any more psychological attacks. Forcing him to separate from me for two years would certainly lead to depression and anxiety. Needless to say, his work quality would be seriously affected. These consequences occurred to him twice already. The first time was after his divorce, which lasted two whole years. He had to take a low-level administrative work instead of doing scientific research. The second time were those months after he visited me and came back to the United States alone. His boss and colleagues complained that he was being inefficient and tardy in his work....

Affidavit of [redacted], dated April 12, 2006.

A letter from [redacted] [redacted] an, the applicant's spouse's primary care physician, further attests to the hardships the applicant's spouse would face were the applicant to relocate to China for two years. As Dr. [redacted] states:

I have been [redacted] [redacted] [the applicant's spouse's] primary care provider since November 2002. He has a history of depression associated with anxiety diagnosed in 1997 that has been managed with counseling and multiple medications over the years. His symptoms worsen with work-related and other life stressors and he has found that his wife is a major stabilizing force in his life. He has improved mood, energy, productivity, and general well-being while they have been together. He feels that her support has substantially contributed to improvement in his depression and anxiety. In the past, his depression and anxiety have worsened while they are apart. A very important component in the successful treatment of and recovery from his depression remains his strong supportive relationship with his wife [redacted] [the applicant]. I believe that it is important for [redacted] to remain in this country to support [redacted] emotionally....

Letter from

MD, MS, Palo Alto Medical Foundation, dated February 23, 2006.

██████████, the applicant's spouse's psychiatrist, states the following:

Both myself and ██████████ [the applicant's spouse's] primary care physician, have diagnosed him as suffering from major depression. My examination confirmed this diagnosis and I believe, ██████████ is very fragile and at high risk of a significant relapse especially if he experiences an extreme psychosocial stressor such as an unwanted and extended separation from his wife.

I have met with ██████████ on several occasions, reviewed his history of depression. His depression arose in the midst of a painful divorce and separation from his former wife and children in 1997. This affected his mood and function and behavior that he had to resign his post at University of Illinois in 1997. During the months before and after his resignation, his work suffered, his health worsened. For nearly six months after his resignation, he was unable to work at spent most of his time at home in bed....

There can be no doubt that ██████████ suffers from a significant and debilitating psychiatric illness major depression, recurrent. At times his illness has been moderately controlled by medication in psychotherapy but his stability is very fragile and exceptionally vulnerable to relapse. ██████████ has been difficult to treat because of medication side effects.... For this reason, I see him regularly and I have made considerable adjustments to his medication and doses.... ██████████ requires ongoing professional care that would be impossible to sustain without adequate income and health insurance as well as emotional support from his wife....

It is my opinion that ██████████ is likely to experience a question relapse if he suffers another extreme psychosocial stressor such as forced separation from his wife. This is exactly what initiated his initial depression. ██████████ has been crippled before by his extreme relationship problem, separation anxiety and he is currently terrified at the prospect of losing his wife. He is even more vulnerable at this point being older with more anxieties and more psychosocial stressors including the need to care for his young child, ██████████. If he were to suffer another relapse, it might become impossible for him to work for an extended period of time, he might require hospitalization and the possibility of suicide is always a concern in major depression. In short, I think his prognosis is good if his wife is permitted to remain with him and impaired if she is not....

Overall, I feel that ██████████'s emotional situation is a critical factor of sustaining his health. He is desperately in need of a supportive relationship to help him recover and he finds this relationship with his wife, ██████████ [the applicant].

██████'s uncertain status is contributing further to his symptoms and if she is forced to leave, I am confident his situation will worsen dramatically.... ██████
██████ desperately requires a supportive marital relationship to assist him in his recovery. Her continued presence in his life will greatly help to stabilize and restore his health....

Letter from

Department of Psychiatry, Palo Alto Medical Center, dated April 25, 2007.

Due to the applicant's spouse's documented diagnosis of major depression and anxiety and the need for his continued supervision and treatment, the concerns with respect to his professional career were he to suffer a relapse, and the applicant's spouse's dependence on the applicant for his emotional and psychological well being, the AAO finds that the applicant's departure for a two-year period would cause the applicant's spouse emotional, psychological and financial hardship that would be significantly beyond that normally suffered upon the temporary separation of families.

As such, upon review of the totality of the circumstances in the present case, the AAO finds the evidence in the record establishes that the applicant's spouse would experience exceptional hardship were he to relocate to China and in the alternative, were he to remain in the United States without the applicant, for the requisite two-year term.¹

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 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.

¹ As exceptional hardship to the applicant's U.S. citizen spouse has been established, the AAO does not find it necessary to determine whether exceptional hardship has been established with respect to the applicant's U.S. citizen step-child and/or lawful permanent resident daughter.