PUBLIC COPY

U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

H3

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 4 2004

IN RE: Applicant: [redacted]

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:

[redacted]

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, Nebraska Service Center. A subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a motion to reopen. The motion will be granted and the previous decision of the AAO will be affirmed.

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).

The applicant was admitted to the United States as a nonimmigrant exchange visitor on November 4, 1986, as a research scholar. At the completion of his program in January 1988, the applicant moved to Canada, and he was granted political asylum in Canada in 1989. The applicant became a Canadian citizen in 1993. 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. He 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 asserted that the applicant was 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 as a citizen of China. Counsel asserted that the applicant's two sons are U.S. citizens and that they would suffer exceptional hardship if they were separated from the applicant for two years, or if they moved with the applicant to China. Counsel asserted further that the applicant is no longer a citizen of China, that he would not be able to return to live and work there, and that he could be subjected to political repression in China due to his asylee status in Canada.

The AAO found on appeal that the applicant had failed to establish that he would be unable to live or work in China, or that he would be subjected to political repression if he returned to China. The AAO found further that although the applicant had established that his two U.S. citizen children would suffer exceptional hardship if they traveled with the applicant to China for two years, the applicant had not established that the children would suffer exceptional hardship if they returned to Canada with their Canadian citizen mother for two years.

8 C.F.R. § 103.5(a) states in pertinent part:

> (a) Motions to reopen or reconsider . . . .
>
> > (2) Requirements for motion to reopen. A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence.

Counsel asserts on motion, that a new psychological evaluation, school records and financial evidence establish that the applicant's 5-year-old and 2-year-old sons would suffer exceptional emotional and financial hardship if they were required to return to Canada with their mother for two years while the applicant fulfilled his residency requirements in China.

Specifically, counsel submits the following new evidence[1]:

- A September 12, 2003, psychological report by psychologist, Hannah Frisch, Ph.D.

The report reflects that based upon a September 8, 2003, interview of undetermined length, with the applicant and his family, D observed that the applicant's five-year-old son attended the University of Chicago Lab school kindergarten-nursery-school, and that he would have to attend a lower quality school and would lose stable friendships if he moved to Canada with his mother. Based on running to his father and jumping into his lap when asked which of his teachers he loved the best, Dr. additionally observed that is attached to his father. In addition, Dr observed that appeared shy and reluctant to answer her questions, in contrast to his parents' description of his normal behavior. Dr. believed the contrast was due to his parents' worry and tension about the family's situation.

Dr. observed that the applicant's 21-month-old son sat on his mother's lap and faced away from Dr. and appeared very shy. Dr. report additionally observed that ends to be dominated by his older brother and that according to his parents, repeatedly asks about his father if he does not come home at night.

Based on her interview with the applicant's wife (Ms. Dr. additionally observed that Ms. was emotionally dependent on her husband and that the economic and emotional stress of his absence would affect Ms ability to nurture and care for and

Dr. states in her summary that research suggests that a separation from a father puts children at risk for development of depression, separation anxiety disorders and symptoms of isolation. Dr. states that the loss of their father, their school and high quality education, their friends and their mother's time, attention and emotional presence, would cause the applicant's children to suffer exceptional hardship.

- A September 15, 2003 letter by child and adult psychiatrist, M.D.

The letter reflects that Dr met with the applicant and his family once on September 12, 2003, and once on September 15, 2003, for undetermined lengths of time. Based on the two meetings, and Dr. eview of school records, she notes that intelligent, creative and enthusiastic, but that he has exhibited "anxiety, impulsivity and resistance or opposition to external demands or change." Dr dditionally notes Ms. belief that her family would turn to her for support if she returned to Canada. Dr. concludes:

> I think it is quite fair to say that this child already at risk for a behavioral/psychiatric disorder, and who suffers from chronic asthmas and multiple

[1] The AAO notes that its previous decision determined that the applicant had failed to establish his safety would be at risk in China, or that he would be unable to reside or work there. The issue will therefore not be re-discussed.

allergies and requires daily doses of steroid medication will fare poorly indeed should he be forced to abruptly lose all that is predictable and reassuring in his life. He will not developmentally be able to fathom why his father has abandoned him nor why they will need to move to an utterly strange place with a newly single mother overwhelmed by her own sadness and responsibilities.

- A September 15, 2003 letter by child, adolescent and adult psychiatrist, M.D.

The letter reflects that Dr interviewed for 45 minutes and observed with his mother for 20 minutes, in addition to interviewing Ms. for 35 minutes, two teachers for 30-45 minutes, and the applicant for one hour. Dr. concludes that is a "psychologically disturbed child" who "will require especially skilled management in the classroom, a stable home environment, expert support for his parents in raising him, and almost certainly skilled psychiatric evaluation and treatment in the near future." The conclusion is based on Dr. observation that seems unable to tolerate limits being set on his conduct, is obstinate in his persistence in pursuing his goals, has an apparent need for continuity, and experiences anxiety and anger if he is not allowed to engage in an activity he has set his mind on. Dr. states further that although appears to be developing well, "he is likely over time to be challenged by his older brother's psychopathology in that Kelvin is absolute in his belief in his rights to toys and parental attention."

- A September 20, 2003 letter by child and adolescent psychiatrist, M.D.

The letter states that Dr. did not examine the children directly, but that in general, research suggests that "children being reared apart from their families are at considerably increased risk for a myriad of disorders and disability." Dr states that the fact that Ms. brother suffers from schizophrenia as well as Ms. family history and obligations would place and t increased risk for disorders or disabilities.

- A September 15, 2003 letter from eachers M.Ed. and M.A.) discussing general performance in their class.

- An affidavit from Ms. discussing her family history and concerns that she and her children will face family pressures, will receive no family support, and will face financial hardship in Canada.

The AAO finds that the evidence submitted on motion fails to establish that the applicant's children or wife suffer from any type of psychological condition that would cause the children to experience exceptional hardship if they were required to move to Canada with their mother. The AAO notes that the conclusions reached in the psychological evaluations are unsupported by any information on scientific methods or tests used to reach the conclusions. Moreover, none of the psychological evaluations submitted on motion formally diagnose the applicant's children or his wife with an actual psychological or mental condition requiring treatment. The AAO notes further that the psychological evaluations were done as a direct response to the August 2003, AAO denial of the applicant's waiver application, and that none of the evaluations

contain evidence to indicate that the applicant's children or wife have previously required treatment for a psychological condition. Moreover, none of the evaluations recommend or prescribe a present treatment plan for the applicant's children or wife. The AAO notes further that even if the psychological evaluations had established that the applicant's children or wife required psychological treatment, the evidence in the record fails to establish that psychological or psychiatric treatment cannot be obtained in Canada.

In addition, the AAO notes that the financial evidence submitted on motion simply establishes the maximum amount of earnings allowed by the Canadian government in order to qualify for a government sponsored childcare subsidy. The AAO finds that this financial evidence fails to establish that the applicant's wife would be unable to find work in Canada, or that, as a Quality Assurance Technician in Canada she would presently be unable to earn enough money to support her family.

In *Matter of Bridges,* 11 I&N Dec. 506 (BIA 1965), the Board of Immigration Appeals (Board) states that, "[t]emporary separation 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 *Shooshtary v. INS,* 39 F.3d 1049, 1051 (9th Cir. 1994), the Ninth Circuit Court of Appeals found that the extreme hardship waiver "[w]as not enacted to insure that the family members of excludable aliens fulfill their dreams or continue in the lives which they currently enjoy." *Matter of Bridges, supra,* stated further that:

> In determining the merits of an application for a waiver of the foreign residence requirement, we must consider the Congressional intent of the statute . . . the Subcommittee reiterates and stresses the fundamental significance of a most diligent and stringent enforcement of the foreign residence requirement. The report states, "It is believed to be 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 this country would cause personal hardship."

The AAO finds that in the present case, the totality of the evidence demonstrates that the applicant's children will not suffer exceptional hardship if the applicant is required to fulfill his two-year residency requirement in 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 the applicant has not met his burden. Accordingly, the prior AAO decision will be affirmed.

ORDER: The motion to reopen is granted and the prior AAO decision is affirmed.