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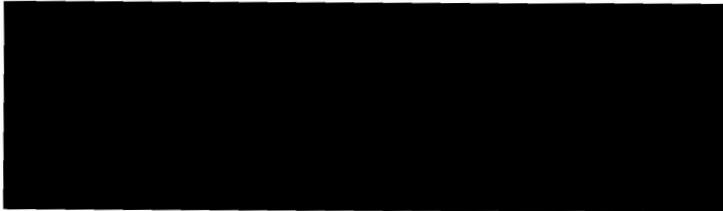
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FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: FEB 06 2008

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:



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, 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 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, [REDACTED], is a native 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). [REDACTED] was admitted into the United States on September 17, 2000 as a J-1 nonimmigrant exchange visitor whose program covered the period of September 1, 2000 to August 3, 2001. His J-1 status was subsequently extended from August 18, 2001 to August 18, 2003, and from August 25, 2003 to October 1, 2007. [REDACTED]'s J-1 nonimmigrant exchange visitor status expired on October 1, 2007, and he is presently out of status. On December 28, 2005, [REDACTED] married a naturalized citizen of the United States, [REDACTED]. [REDACTED] and his wife have U.S. citizen children, born on December 31, 2005, and October 22, 2006; and he has a U.S. citizen stepdaughter who was born on February 8, 1990. [REDACTED] seeks a waiver of the foreign residence requirement based on the claim that his U.S. citizen wife and children would suffer exceptional hardship if they are separated from the applicant for two years.

In denying the waiver, the director concluded that [REDACTED] established that his wife and children would suffer exceptional hardship if they joined him to live in China during his fulfillment of the J-1 foreign residence requirement. However, the director found that [REDACTED] failed to establish that his wife and children would suffer exceptional hardship if they remained in the United States while he fulfills the two-year foreign residence requirement in China.

Counsel asserts on appeal that [REDACTED] and her children would experience exceptional hardship if they remained in the United States while [REDACTED] fulfills his two-year foreign residence requirement in China. Counsel states that the evidence shows that [REDACTED]'s income is not sufficient to support her family; their child, [REDACTED], has serious health problems requiring constant attention; and owing to her disability, [REDACTED]'s mother is unable to baby-sit. Counsel states that as part of his doctoral studies [REDACTED] has made unique medical contributions as a medical researcher at Hunter College of The City University of New York.

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, [s]hall 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 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. . . 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 (the BIA) stated that, "[t]emporary 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 *Matter of Bridges*, 11 I&N Dec. 506 (BIA 1965), the BIA stated:

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 record contains the following documents: a letter dated October 3, 2007 by [REDACTED], the physician for [REDACTED]'s mother [REDACTED]; the X-ray exam of the foot of [REDACTED] a letter dated October 4, 2007 by Ms. [REDACTED], Licensed Clinical Social Worker, [REDACTED]; a letter dated September 25, 2007 by [REDACTED], M.P.H., F.A.A.P; letters pertaining to [REDACTED]'s research; a marriage certificate; a naturalization certificate; birth certificates; a letter dated March 10, 2007 by [REDACTED], M.D.; a letter dated April 3, 2007 by [REDACTED], FNP-C; medical records of [REDACTED]; a hospital discharge certificate; letters from medical doctors in China attesting to the nonavailability of medical care for [REDACTED] in China; a list of the income and expenses of the [REDACTED] household; employment letters and wage statements; a copy of the permanent resident card of [REDACTED] school records; invoices; social security benefit payment records; and other documents.

The March 10, 2007 letter by [REDACTED], the pediatrician for [REDACTED] conveys that [REDACTED] was born as a premature 25-week-old baby with complications such as low birth weight, respiratory distress syndrome, bronchopulmonary dysplasia, pulmonary interstitial emphysema, patent ductus arteriosus, patent foramen ovale, anemia, gastroesophageal reflux, hyperbilirubinemia, and sepsis. [REDACTED] states that since birth [REDACTED] has had respiratory distress, has been placed on a ventilator for more than one week, and has required blood transfusions. [REDACTED] states that although [REDACTED] was discharged home, she needs constant monitoring for lack of oxygen supply to her lungs and stand-by oxygen supply at home. [REDACTED] states that throughout her life [REDACTED] will have frequent wheezing and will be prone to lung infection. [REDACTED] states that according to the neonatologist, [REDACTED] had intracranial bleeding which may cause developmental delay, speech delay, cognitive disorders, learning disabilities, and seizure disorders at some point in her life. [REDACTED] states that the nature of the intracranial bleeding requires [REDACTED] to be kept under constant observation and close parental tender loving care to increase her growth and development process and catch up to normal children. Dr. [REDACTED] states that [REDACTED] is being observed by the pediatric cardiologist to prevent acute heart failure due to congenital heart disease, which can go into failure between six months of age to two years of age. [REDACTED] states that open heart surgery is the only option to solve heart failure. [REDACTED] states that [REDACTED] is at high risk for myopia, retinal changes, strabismus, and other ocular effects of prematurity. [REDACTED] indicates that [REDACTED] will see the pediatric development specialist for growth and development assessment, and the occupational physiotherapist for neuromuscular development. [REDACTED] states that the visiting nurse has helped [REDACTED] with her daily routine functions and regular neuromuscular development therapy.

The September 25, 2007 letter by [REDACTED] states that [REDACTED] has been constantly observed by the pediatric cardiologist to prevent acute heart failure, and is regularly seen by a pediatric ophthalmologist to rule out retinopathy of newborn. [REDACTED] states that [REDACTED] is also evaluated regularly by a pediatric development specialist, by an occupational and physiotherapist for her neuromuscular development, and a visiting nurse to help with daily routine functions and regular neuromuscular development therapy.

The April 3, 2007 letter by [REDACTED], FNP-C, states that [REDACTED] was discharged from the [REDACTED] neonatal intensive care unit on January 17, 2007 "in a medically fragile condition with a pulse oximeter, apnea monitor, and oxygen therapy." She states that "this infant's parent's have been instructed in her care and must be present around the clock to participate, coordinate, and administer her care and safety," and that "[n]umerous pediatric, ophthalmology, and cardiology follow-up appointments are needed to monitor her condition."

The discharge letter dated February 2, 2007 reflects that Aygul was born on October 22, 2006 and was discharged from the neonatal intensive care unit on January 17, 2007.

The October 3, 2007 letter by [REDACTED], conveys that in 2005 the Social Security Administration judged [REDACTED] as disabled for pain in her foot. [REDACTED] states that [REDACTED] has difficulty walking, is not responding well to medical treatment, and is not suitable as a babysitter.

The October 4, 2007 letter by [REDACTED], licensed clinical social worker with [REDACTED] states that the parents of [REDACTED] "spent a considerable amount of time preparing to take the baby home. They took the baby saver CRP course and stayed and assumed complete care of the infant in the NICU for 24 hours." She states that "[u]pon discharge [from] the NICU the infant needed supportive services of [the] Early Intervention Program and VNS, as well as the pediatrician/ophthalmology/cardiology/and neurology."

The Monthly Budget Statement of the [REDACTED] family reflects a salary of \$3,841 for [REDACTED], \$1,877 for Mr. [REDACTED] and supplemental security income of \$502 for [REDACTED]. The total monthly expenses are shown as \$6,218.

The April 5, 2007 letter by [REDACTED] of Hunter College states that [REDACTED] earns \$1,245 every two weeks.

The January 22, 2007 letter by [REDACTED] states that [REDACTED] earns \$88,000 per year and has worked with Morelle Products Limited since June 1997.

After carefully considering the documentation in the record, the AAO finds that it establishes that [REDACTED] and her children would experience exceptional hardship if they remained in the United States while Mr. [REDACTED] fulfilled the two-year foreign residence requirement in China.

The documentation in the record evinces that [REDACTED] is youngest daughter has serious medical problems that have required, and continue to require, constant medical care and observation. The record shows that Mr. [REDACTED] and his wife have been instructed in how to care for their daughter, and need to be present to participate, coordinate, and administer her care and safety, which includes being regularly seen by a pediatric cardiologist, a pediatric ophthalmologist, a pediatric development specialist, an occupational physiotherapist, and a visiting nurse.

The documentation in the record, including the wage statements, employment letters, and invoices shows that [REDACTED] requires her husband's income to meet monthly household expenses. The AAO notes that the record does not establish that [REDACTED] mother is physically able to care for [REDACTED] and the AAO finds that even if the record were to establish that she were able to care for [REDACTED] which would alleviate the expense of a babysitter, [REDACTED]'s income would still not be sufficient to meet monthly household expenditures.

Accordingly, the AAO finds that the evidence contained in the record establishes that the applicant's wife and children, particularly his youngest daughter, would suffer hardship beyond that normally suffered by family members if they are temporarily separated from him for two years.

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 his 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 WRD. Accordingly, this matter will be remanded to the director so that he may request a WRD recommendation under 22 C.F.R. § 514. If the WRD 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 WRD 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.