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U.S. Department of Homeland Security
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U.S. Citizenship
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[REDACTED]

FILE: [REDACTED] Office: VERMONT SERVICE CENTER Date: JUN 03 2008

IN RE: [REDACTED]

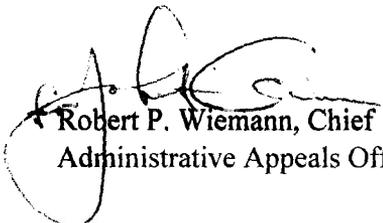
APPLICATION: Application for Waiver of of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

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, Chief
Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Center Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Center 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 obtained J-1 status in August 1997 and 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 foreign residence requirement, based on the claim that her U.S. citizen spouse and child, born in November 2002, 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 center director determined that the applicant failed to establish that her U.S. citizen spouse and/or child would experience exceptional hardship if the applicant fulfilled her two-year foreign residence requirement in China. *Center Director's Decision*, dated August 20, 2007. The application was denied accordingly.

In support of the appeal, counsel for the applicant provides the following documentation: a brief, dated September 19, 2007; a letter from the applicant and her spouse, dated September 16, 2007; a letter from the applicant's spouse's physician, dated September 17, 2007; two decisions issued by the AAO; and case law with respect to hardship waivers. 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 and/or child would experience exceptional hardship if they resided in China for two years with the applicant. To support this contention, the applicant’s spouse states the following:

My family has deep roots in the United States.... I grew up on my mother’s family farm in the Colesville area of Montgomery County, Maryland. My mother and father worked for the federal government. I had two old brothers and one younger sister. I still have family in Maryland....

█’s [the applicant’s] former school authority was angry and disapproved of her advanced education in the United States. What’s worse is that they will make it an impossible and difficult environment for her to live there again, economically, socially and politically. I am afraid that it would be very hard for my family to start a life there. █ was fired from her job after she enrolled in the Master’s program in the United States. In China, the government owns most industries, which are supposed to provide stable salaries. But under the authority’s persecution, it would be almost impossible for her to find a job as a teacher in China. She might be able to get some kind of job in private companies, but those prospects are few and the competition for them is intense. It seems impossible for me to get meaningful employment in China. For one thing, I do not speak Chinese. █ would be the only breadwinner for the family if we all went to China. With such limited job choices for us, the likelihood of providing basic financial support for our family seems unlikely. We would be in greater emotional stress and would be living a life with a lot more instability.

Comparing China to America today: A lot of people still live in poverty without hot water or heated houses. Environmental pollution is on the raise [sic] as the country enters into an increased industrialization period.... Private health insurance is not readily available. Certain diseases and epidemics are still not under control.... The education system in China is rigid and has proved less effective. The objective is to get high scores through memorization of facts, instead of empowering students’ individual thinking....

We want to encourage and support our son’s education to explore the world of learning with the freedom to discover his talents, gifts, and passions and pursue them in whatever direction that may take him. Families in China don’t have a lot of freedom to make the choices that are best for them or their children....

The applicant further attests as follows:

My former school authority was angry and disapproved of my advanced education in the United States. They think my decision was a betrayal. In China, once you are in that category, you will be branded with that all your life no matter what you do. What's worse is that they will make it an impossible and difficult environment for such people to live there again.... Taking my American husband and son with me to China would create even more animosity. It would be very hard for my family to start a life there. It would be a very new and strange environment in China for my family, especially since they are Americans and don't understand Chinese....

I was not only fired from my job, but also I have been deprived of the ability to earn money in other places. In China, the government owns most industries that are supposed to provide stable salaries. But under the authority's persecution, it is almost impossible for me to find a job in those areas.... My husband does not speak, read, or write Chinese. It is impossible for him to get employed in China.... With such limited job choices for me, I would not be able to provide basic financial support for my family....

I have lost quite a few friends in my former workplace due to the adverse reaction and propaganda from school officials. Some of them were told—and even threatened—not to have contact or be friends with me....

My sister works in the local education commission in the same town. Because of the accusations toward me, she has been very obviously unfairly treated in her job. She lost opportunities for promotion and salary raises because of me.... Years ago in old China, when one person in the family made a mistake, the whole family was blamed and would be killed. But now it is China today! I don't understand why they are still treating people like that.... If I take my family there, my husband and son will be treated as strangers.... With this kind of environment, being mistreated and misunderstood, I don't believe it is a healthy and nurturing place to bring up my son and raise my family there.

My Chinese ex-husband is a schizophrenic and has been diagnosed as such. He has very unstable behaviors.... He emailed me saying that he would see me sooner or later. I feel threatened by what he said, since he is a sick person who does not have normal behavior. It is possible that his resentment, with the tacit approval of the local government, could do damage to my family....

Hardship of going to China only with my son.... I would be the only one raising my son. Culturally, it is not acceptable to be a single parent.... Physically, it

would be extremely difficult. I don't even know when or whether I would be employed in China. My financial ability to raise my son is unknown. My husband would have a double loss. He would not have his wife or his son....

Affidavit of [REDACTED], dated February 22, 2006.

Based on the applicant's spouse's and child's unfamiliarity with the language and customs in China, the financial hardships they would face due to the applicant's and her spouse's inability to obtain employment in China, as documented in the record, and career disruption and separation from immediate relatives with respect to the applicant's spouse, the AAO concludes that the applicant's spouse and child would suffer exceptional hardship were they to relocate to China with the applicant.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or child would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in China. As stated by the applicant's spouse,

If [REDACTED] [the applicant] goes back to China to fulfill the J-1 foreign residence requirement by herself, I would be left without my loving wife, and my son would be left without his caring Mom for at least two years. There seems to be no certainty that [REDACTED] would be granted a return visa out of China.... [REDACTED]'s returning to China alone would be a tremendous hardship and could potentially be a disaster to our family. I already have a history of depression, job stress, and employment instability, and my health is getting worse.... I don't think I could cope if I lost [REDACTED]

I need [REDACTED] in my life everyday. She provides stability day-to-day and supports everything as we build our life here in Maryland. I am struggling to gain a foothold in the mortgage industry as a loan originator. My income is based solely on commission. I devote lots of hours, including weekends, trying to make it work. Without [REDACTED]'s care and managing the household, I would not be able to concentrate on the complexities of loan origination and getting paid. Without [REDACTED] my career as a mortgage originator would most likely be over. I would lose my ability to support my family financially and would be forced to seek new employment....

Things are so potentially dangerous for [REDACTED] in China, that I feel I would have to keep my son with me because I would not want to put him at risk. It would be very difficult for me to care for him while working a high-stress job.... I cannot imagine how [REDACTED] [the applicant's child] would survive without his mother. He would never be able to understand her prolonged absence....

Supra at 6-8.

The applicant further elaborates,

If I went back to China...my husband would be left without his wife and my son would be left without his Mom for at least two years.... Emotionally, nobody can handle that. I would lose the chance to raise my son when he needs his mother most. Psychologically, my son would be deeply affected as an innocent victim. He is too young to understand why his mother would not be around....

Family is made of love, care, support, encouragement, and commitment. My husband is a kind and loving person. He needs me as a support to his career and life. He is in the mortgage industry. As a person who is self-employed, he has to work a lot of extra hours, including every weekend.... Without my help with the family, he would not be able to concentrate on his job. It would ruin his career....

If I went back to China by myself, there would be no one to take care of my three-year-old son. My husband either works or cares for our son. He needs to make enough money to pay for our son's daycare. [redacted] [the applicant's spouse] is on 100% commission. Sometimes he gets very little pay....

was treated for depression in 2002.... It is a certainty that he would become clinically depressed again if forcibly separated from me.

Physically, he has to be totally involved in our son's activity. My parents-in-law are elderly. They are both over seventy. They are not in good health. My father-in-law has had arterial surgery. My mother-in-law has a severe knee problem. It is physically difficult and impossible for them to look after our son.

Since I am not permitted to work, he is the only moneymaker in the family now; our finances are very tight. I want to help but I cannot.... If I go back to China myself, I won't be financially able to help my family. I wouldn't be allowed to come to the United States, even for a visit, and financially my husband and son wouldn't be able to afford to visit me in China. So when we talk about two years, it would be absolutely two years of torture for this family....

Supra at 9-11.

The applicant and her spouse provide a joint statement as well. As they state,

...we are suffering from extreme stress and emotional hardship as a result of the financial pressures and the immigration status we are currently facing. Now the financial hardship has brought us to the brink of bankruptcy. [redacted] [the

applicant's spouse] has had a challenging 100% commission job as a loan officer and the steady decline of this industry has made our family income well below the average in the past few years, especially in 2006 when his earnings were about \$11,669. We depleted all of our little savings including 401K to maintain our simple apartment and meager family lifestyle.... For the first time we are in credit card debt in order to pay bills for food, gas, utilities and other basics in life.

is seeking an additional employment while attempting to earn the commission.... I have an American master's degree and could help greatly, but as a wife without being able to work to help [redacted] and family, I am heartbroken and devastated.... Without your approval of granting a waiver, I won't be able to help the family out financially. And the future of our family is going to be the abyss of suffering.

.. has been burdened as the only breadwinner in the family. His shoulders have been pressured with the family financial responsibilities. His physical pains like headache, neck and back pain and insomnia are not going away. The doctor recommended him to go through physical therapy. But we could not afford it.

Understandably I [the applicant's spouse] have been going through stress and anxiety with the mortgage industries down cycle and declining income. The time demanding of my position as a Loan Officer with Countrywide Home Loans has not decreased, as a matter of fact, I have had to increase my hours and take on a wider range of referral contacts. The ratio of loan inquiry to loan application has been 30:1. That's 30 customer inquiries to one potential loan application. In 2006 my pipeline of loans saw a 60% fall through rate. That means 6 out of the 10 loan application submitted to Countrywide did not fund and I did not get paid on all my work....

Letter from [redacted] and [redacted], dated February 8, 2007.

[redacted], M.D. affirms the applicant's spouse's need for his wife to remain in the United States. As [redacted] states:

[The applicant's spouse] is currently under my care.... The [redacted]'s do have a young son and Mrs. [redacted] [the applicant] is responsible for the bulk of his care due to [the applicant's spouse's] demanding work schedule. [redacted] is currently under a great deal of stress. In addition to his wife's immigration related struggle, he and his family are experiencing severe financial challenges as well.

is presently being treated for stress related illnesses. He suffers from chronic tension headaches. He is treated for chronic stress related cervical pain and spasm. [REDACTED] is also under treatment for chronic insomnia. He does have a history of medically important depression.

It is my belief that a mandated break up of the [REDACTED] family would likely result in a marked deterioration of his ongoing medical problems. Further, he is clearly at risk for a potentially catastrophic recurrence of major depression....

Letter from [REDACTED], M.D., Crossroads Medical Associates, LLC, dated February 13, 2007

In addition, on September 17, 2007, Dr. Eversley provided a follow up letter, confirming that he continues to treat the applicant's spouse for the above-referenced medical and mental health issues. *See Letter from [REDACTED] M.D., Crossroads Medical Associates, LLC, dated September 17, 2007.*

Based on the above statements and the documentation provided by counsel, the AAO concludes that the applicant's spouse would encounter exceptional emotional, psychological, professional and financial hardship were the applicant to relocate abroad while he remains in the United States. His hardship if he remained in the United States without the applicant would go significantly beyond that normally suffered upon the temporary separation of a spouse from his wife. Moreover, the AAO concurs with counsel that separating the applicant's young child from his mother, his primary caretaker, for at least two years, would cause the young child exceptional emotional and/or psychological hardship.

As such, upon review of the totality of the circumstances, the AAO finds the evidence in the record establishes that the applicant's U.S. citizen spouse and child would experience exceptional hardship were they to relocate to China and in the alternative, were they to remain in the United States without the applicant, for the requisite period.

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 center director so that he 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 center director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.