

identifying data deleted to  
prevent clearly unwarranted  
invasion of pers:

U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

PUBLIC COPY

tlz

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

OCT 09 2009

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:

SELF-REPRESENTED

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.

Perry Rhew  
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 establishes that the applicant, a native and citizen of China, was admitted to the United States in J-2 nonimmigrant status on June 9, 2000, as the derivative spouse of [REDACTED] (who she divorced in April 2006), a J-1 visa holder. 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) based on the Exchange Visitor Skills List to which her former husband is subject. The applicant presently seeks a waiver of the two-year foreign residence requirement, based on the claim that her U.S. citizen spouse would suffer exceptional hardship if he moved to China temporarily with the applicant and in the alternative, if he remained in the United States while the applicant fulfilled the two-year foreign residence requirement in China.

The director determined that the applicant failed to establish that her U.S. citizen spouse would experience exceptional hardship if the applicant fulfilled the two-year foreign residence requirement in China. *Director's Decision*, dated June 16, 2009. The application was denied accordingly.

In support of the appeal, the applicant submits, *inter alia*: the Form I-290B, Notice of Appeal (Form I-290B), dated June 29, 2009; a letter from the applicant's spouse, dated June 29, 2009; documentation in regards to the applicant's spouse's medical and mental health situation; and documentation pertaining to the applicant's spouse's employment. In addition, on August 19, 2009, the AAO received a letter from the applicant's spouse and additional evidence with respect to the applicant's spouse's medical and mental health. 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 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 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 begin, the applicant's spouse asserts that he would suffer hardship as he would have to leave his five children and five grandchildren. In addition, the record establishes that the applicant's spouse suffers from numerous medical and mental health conditions, and a relocation abroad would exacerbate said conditions to an exceptional degree. Moreover, the applicant's spouse would suffer career disruption, as he would have to leave the company for which he has worked for 38 years. *Letter from [REDACTED]*, dated June 29, 2009.

As applicant's spouse's treating psychiatrist, [REDACTED], further elaborates:

I am the treating psychiatrist for [REDACTED] [the applicant's spouse]. He has been under my care from May 7, 2007 to the present.

His diagnoses is major depressive disorder, single episode, in remission. Although [REDACTED] is stable and doing well currently, he is at high risk for relapse and suicide and remains under my care....

[REDACTED] had not experienced any psychiatric problems during his life until December 2006 when he developed severe depressive symptoms. He attempted suicide twice by overdose, which was unsuccessful.... On January 30, 2007 he again attempted suicide by shooting himself twice in the abdomen with his 22 rifle. His intent was to die, but fortunately, he did not. The gun shots damaged his kidney and pancreas and required months of recovery from the trauma. Soon after the suicide attempt he was started on the antidepressant Citalopram....

█'s suicide attempt is one of the most serious and potentially lethal attempts I have seen in a long time. He requires continued monitoring and may need treatment with medication....

If █ was to reside in China with his wife [the applicant] for two years, most of the environmental factors which help to maintain his stability would be disrupted—work, hobbies, contact with his adult children. Additionally there would be the challenge of finding adequate psychiatric care in a new country. He would experience additional stressors—language barriers, cultural differences and possibly financial difficulties which could very likely result in social isolation and despair. The risk of depression relapse would be high, and given his history, risk of suicide is of great concern....

*Letter from █ St. Lawrence County Community Services Mental Health Clinic, dated July 6, 2009. Extensive medical documentation, including medical bills and a letter from the applicant's spouse's family medicine physician, has been provided to supplement the information outlined above.*

The AAO finds that the hardship the applicant's U.S. citizen 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 foreign residency requirement. The record indicates that the applicant's spouse is unfamiliar with the culture and language in China. Moreover, the applicant has provided specific documentation which reflects that her spouse suffers from numerous medical and psychological problems, including renal disease, history of diabetes that is insulin requiring, and major depressive disorder, which go beyond the normal. In addition, the record reflects that for the applicant's spouse, a relocation abroad would mean significant career disruption, financial instability and long-term separation from his children and grandchildren, thereby causing additional stress and the high probability of a relapse of his psychological disorder and the risk of another suicide attempt. 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 period.

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 noted by █

If █ [the applicant] was to return to China alone for two years, █ [the applicant's spouse] would lose a very important stabilizing factor (having a partner is known to reduce the risk of suicide). Additionally, her presence in the home is a safety net for him—if he begins to develop symptoms of depression and does not seek help, his wife is there to seek help for him. Given that he did not think to seek help

prior to his suicide attempt in January 2007, her presence could be life-saving for him....

*Supra* at 2.

The applicant's spouse further asserts:

With [REDACTED] Love and great care I have made a marvelous recovery. She has become the center of my live [sic]. If she would have to return to China I am fearful that I would have a relapse into a state of melancholy. She is my strength....

*Letter from* [REDACTED]

Due to the applicant's spouse's documented diagnosis of major depressive disorder and numerous other medical conditions, as outlined above, which call for continued diagnosis and treatment by practitioners familiar with his conditions, 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 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 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 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.