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U.S. Citizenship  
and Immigration  
Services

H3

[REDACTED]

FILE:

[REDACTED]

Office: CALIFORNIA SERVICE CENTER

Date: MAY 21 2007

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.

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 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 is a native of China and citizen of Canada 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). The applicant was last admitted to the United States in J-1 nonimmigrant exchange status on September 29, 1986. The applicant's spouse and two daughters are lawful permanent residents and the applicant seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse and daughters.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled the two-year foreign residence requirement. *Director's Decision*, dated September 28, 2005. The application was denied accordingly.

On appeal, counsel asserts that the director denied the case despite no clear evidence of ineligibility, failed to apply relevant law appropriately and misstated facts established by submitted evidence. *Brief in Support of Appeal*, at 1, received October 28, 2005.

The record includes, but is not limited to, counsel's brief, counsel's supplemental brief, the applicant's spouse's statement, the applicant's statement, a social worker's evaluation of the applicant's family, a statement of the applicant's finances, material related to the applicant's daughters' academic achievements and information on conditions in China. The entire record was considered in rendering this decision.

Counsel asserts that the application was denied without issuance of a Request for Evidence (RFE) despite a February 16, 2005 Citizenship and Immigration Services (CIS) policy memorandum that requires one when it is determined that initial evidence is missing. *Id.* 8 C.F.R. § 103.2(b)(8) states, in pertinent part:

Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence of or eligibility information is missing or the Service finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, the Service shall request the missing initial evidence and may request additional evidence, including blood tests.

The RFE memorandum states that when the evidence raises underlying questions regarding eligibility or does not fully establish eligibility, issuance of an RFE is usually discretionary, but strongly recommended. *CIS Interoffice Memorandum*, at 3, dated February 16, 2005. Therefore, neither the regulations nor the RFE memorandum require the issuance of an RFE when the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility.

In addition, as counsel has supplemented the record on appeal, no purpose would be served in remanding the case to the director for the purpose of having the record supplemented with new evidence.

Section 212(e) of the Act states in pertinent part that:

(e) 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 [now the Director, U.S. Department of State, Waiver Review Division (WRD), "Director"] 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.

Counsel asserts that the applicant was a citizen of China when she acquired J-1 status, but that she is no longer a citizen of China and has resided for the required two years in Canada, the country of her current nationality. *Supplemental Brief*, at 1, undated. Counsel asserts that it is clear from the plain language of the statute that two years of residence in the applicant's country of nationality satisfies the two-year rule and the

only the nationality that the applicant enjoys is Canadian nationality. *Supra*. The AAO finds this contention unpersuasive. The plain language of the statute states that an applicant, "...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." The term "last residence" indicates that the statute is referring to a country that an applicant has resided in before entering the United States on a J-1 visa. Likewise, the AAO interprets the term "country of nationality" to refer to the country of nationality of an applicant before entering the United States on a J-1 visa. In this case, the applicant's country of nationality before entering the United States was China.

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 demonstrate that a qualifying relative would suffer exceptional hardship upon relocation to China for two years. The AAO will first analyze exceptional hardship in regard to the applicant's spouse. In regard to financial hardship, the applicant's spouse states that he does not speak Chinese and the Chinese and Vietnamese are rivals, and that this will have negative implications for him finding employment. *Applicant's Spouse's Statement*, at 2, 12, dated July 16, 2005. Counsel states that it would be next to impossible for the applicant's spouse to obtain a work visa in China as he does not speak the language. *1-612 Memorandum*, at 12, dated July 20, 2005. Although the record contains no evidence that would support the assertions from the applicant's spouse and counsel regarding the extent of the difficulties that would face the applicant's spouse in obtaining employment in China, the AAO acknowledges that the applicant's spouse does not speak Chinese which would make entry into the Chinese economy more difficult.

The applicant's spouse states that moving to China would result in serious social-cultural hardships. *Id.* at 2. The applicant's spouse states he was born and raised in Vietnam. *Id.* at 3. The applicant's spouse's social worker details the applicant's spouse's life experiences which include bombings of his native Hanoi, his

departure from Vietnam after the Chinese invasion, his escape from Vietnam in an unsafe boat, and his time in a refugee camp before obtaining residence in Canada. *Evaluation from [REDACTED]* at 1, dated July 19, 2005. The social worker asserts that a serious disruption in the applicant's spouse's lifestyle would place him at heightened risk for anxiety and intense detached social behavior. *Id.* at 2. The AAO notes that this is a one-time evaluation, however, in light of the applicant's spouse's background, the social worker's assertions that he is at risk for heightened symptoms of anxiety and detached social behavior due to a change in lifestyle are plausible.

The record includes numerous documents related to the applicant's children's academic and extracurricular accomplishments, and evidence of their integration into the American lifestyle as evidence of their own hardship upon residing in China. Therefore, the applicant's spouse would be raising two children who are also experiencing hardship.

The applicant's spouse states that his career would be disrupted. *Applicant's Spouse's Statement*, at 2. The applicant states that her spouse's job is essential to his ego, a two-year interruption in his career would set him back, and he would lose his identity. *Applicant's Statement*, at 16, dated July 16, 2005. The record includes a letter detailing the applicant's spouse's critical job as a senior operations engineer who helps provide electricity for the state of California. *Letter from California ISO*, dated July 18, 2005. The effect of losing his employment on the applicant's spouse is also noted by the social worker who states that his current profession is a large component of his identity and that without it he will falter in the most basic ways. *Evaluation from [REDACTED]*, at 7.

Considering the aforementioned issues in totality, the AAO finds that the applicant's spouse would experience exceptional hardship if he relocated to China for the two-year period.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship upon remaining in the United States during the two-year period. The applicant's spouse states that subsequent to his experiences during the bombings of Hanoi in the Vietnam War, he stayed in a refugee camp in Hong Kong and this experience left him with an enduring fear of separation from loved ones and fear and anxiety about their safety. *Applicant's Spouse's Statement*, at 1. The applicant's spouse states that he has not done well in the past when separated from the applicant as he has become depressed and anxious. *Id.* at 10. The applicant's spouse's social worker states that his psychological symptoms include depression, anxiety and post-traumatic stress disorder with recurrent nightmares which relate heavily to his experiences during and after the Vietnam War. *Evaluation from [REDACTED]* at 1. The social worker states that the applicant's spouse's experiences have contributed to his protectionism of his family and his social isolation as methods for achieving a sense of peace, security and ability to function. *Id.* at 6. The social worker also asserts that a serious disruption in the applicant's spouse's support group or his lifestyle would place him at heightened risk for anxiety and intense detached social behavior. *Id.* at 2. The social worker further contends that the ability of the applicant's spouse to perform his job duties and to maintain his focus depends upon the stability of his home life and without that stability he may be totally unable to function in his profession. *Id.* at 7. The AAO notes that this is a one-time evaluation and there is no evidence that the applicant's spouse is receiving treatment from a mental health professional. However, in light of the applicant's spouse's background, the social worker's assertions that he is at risk for heightened symptoms of anxiety and detached social behavior, and would have difficulty functioning in the applicant's absence are plausible.

The record reflects that the applicant would face difficulties in raising his daughters without the applicant. He states that his daughters would not have their mother to assist with adolescent situations and without her support in academic pursuits, their self-confidence could be damaged. *Applicant's Spouse's Statement*, at 2. The applicant's spouse states that the applicant gives their lives structure, she makes the rules and schedules, and she is actively involved in their academic and extracurricular activities. *See id.* at 4-5. The applicant's spouse states that his job is much more demanding than the applicant's, and he cannot supervise his daughters and their educational and other progress the way the applicant does. *Id.* at 5. The applicant's spouse states that they have no other relatives in the United States in case of an emergency. *Id.* at 7. The applicant's spouse states that according to his culture, the mother is supposed to talk to her daughters about changes related to adolescence. *Id.* at 9. The applicant states that her children are focused on their academic excellence, this is tied to their self-esteem, she contributes eighty-percent of the effort required to raise the daughters and take care of the house, her spouse has limited domestic abilities, and her spouse would be unable to deal with her older daughter's adolescent transition. *Applicant's Statement*, at 3. The applicant states that there is a socio-cultural boundary in her family and typically in Asian culture that mothers are involved in raising their daughters and acquainting young girls with the path to becoming a woman. *Id.* at 8.

In regard to financial hardship, the applicant's spouse states that more than half of the family income comes from the applicant. *Applicant's Spouse's Statement*, at 11. The record includes a list of the applicant's family expenses, indicating that they would face some financial difficulty without the applicant's income. The AAO notes, however, that the record does not include substantiating evidence of the financial expenses. The applicant's spouse states that the applicant would have to obtain a work visa in China as she is no longer a Chinese citizen, and this would decrease her chance of finding employment. *Id.* at 11. The applicant's spouse states that the applicant is not trained to perform her job in Chinese, and power systems companies would be hesitant to hire someone who has renounced her citizenship and has resided in the United States for twenty years. *Id.* While the AAO notes the assertions made by the applicant's spouse, it finds no evidence in the record that indicates that the applicant could not obtain employment in China for a two-year period.

Considering the unique emotional, family and social issues present in this case, the AAO finds that the applicant's spouse would experience exceptional hardship if he remained in the United States without the applicant.

As exceptional hardship has been found for the applicant's spouse, no purpose would be served in addressing the other qualifying relatives.

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 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 acting 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.