

identifying data deleted to
prevent disclosure of information
invasion of personal privacy



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

tl3



FILE:



Office: CALIFORNIA SERVICE CENTER

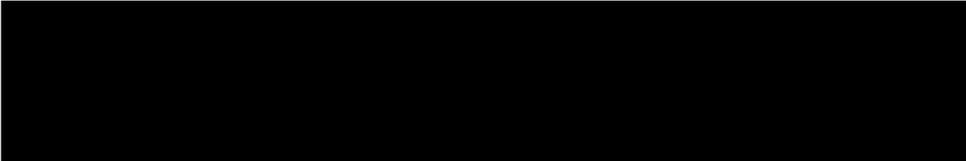
Date: NOV 30 2007

IN RE:



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 dismissed.

The record reflects that the applicant is a citizen of China who is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act. The applicant was admitted to the United States in J1 nonimmigrant exchange status on September 19, 2005. The applicant's spouse is a U.S. citizen. The applicant presently seeks a waiver of the two-year foreign residence requirement based on exceptional hardship to her spouse.

The director determined that the applicant failed to establish her spouse would experience exceptional hardship if she fulfilled the two-year foreign residence requirement in China and the application was denied accordingly. *Director's Decision*, dated March 7, 2007.

On appeal, counsel asserts that the application was decided on an incorrect regulatory basis and contrary to the evidence submitted. *Form I-290B*, dated April 2, 2007.

The record includes, but is not limited to, counsel's brief, a copy of the applicant's spouse's army identification card and the applicant's statement. The entire record was considered in rendering this decision.

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, Department of Homeland Security (DHS), "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 states that the applicant has requested a no objection letter from the Chinese government, is following the instructions provided by the Office of Visa Services of the U.S. Department of State, and is requesting that the waiver denial be reconsidered upon receipt of a no objection letter from the Chinese government. *Brief in Support of Appeal*, at 2, undated. There is no evidence that a no objection letter was sent to the Director of the U.S. Department of State, Waiver Review Division as required by 22 C.F.R. § 41.63(d) and that the Director has favorably recommended a waiver based on the no objection letter.

22 C.F.R. § 41.63(d) states in pertinent part that:

Applications for waiver of the two-year home-country physical presence requirement may be supported by a statement of no objection by the exchange visitor's country of nationality or last legal permanent residence. The statement of no objection shall be directed to the Director through diplomatic channels; i.e., from the country's Foreign Office to the Agency through the U.S. Mission in the foreign country concerned, or through the foreign country's head of mission or duly appointed designee in the United States to the Director in the form of a diplomatic note.

In the event that the Director favorably recommends a waiver based on a no objection letter, the California Service Center would issue a decision based on the no objection letter. The AAO also notes that Form I-612 is used for waiver applications which are based on claims of exceptional hardship or persecution on account of race, religion or political opinion. Accordingly, the AAO will review the exceptional hardship claim made by the applicant.

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. (Quotations and citations omitted).

[REDACTED] (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. Counsel states that the applicant's spouse is a member of the U.S. military who has been called for active duty in Iraq. *Brief in Support of Appeal*, at 1. The record does not include substantiating evidence that the applicant's spouse is currently in Iraq, however, it includes a copy of the applicant's spouse's current army identification card. Therefore, it would not be possible for the applicant's spouse to relocate to China for two years due to his membership in the U.S. military. As such, the record demonstrates that exceptional hardship would be imposed on the applicant's spouse upon relocation to China for two years.

The second step required to obtain a waiver is to demonstrate that a qualifying relative would suffer exceptional hardship by remaining in the United States during the two-year period. The applicant states that her departure would be financially and emotionally devastating to her and her spouse. *Applicant's Statement*, undated. The record does not include substantiating evidence of this claim. The record does not include substantiating evidence that the applicant's spouse is currently in Iraq and if he is in Iraq, how the applicant's departure to China for two years would affect him. In addition, there is no evidence of any other relevant hardship. Going on record without supporting documentation will not meet the applicant's burden of proof in this proceeding. *See Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft* [REDACTED] (Reg. Comm. 1972)). The record does not demonstrate that exceptional hardship will be imposed on the applicant's spouse during the two-year period.

The burden of proving eligibility for a waiver under section [REDACTED] 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 not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.