

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

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

H₂

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

NOV 04 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:

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

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 appeal will be dismissed.

The applicant is a native and citizen of Bulgaria who obtained J-1 nonimmigrant exchange status in January 1993. He 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 his two-year foreign residence requirement, based on the claim that his U.S. citizen child, born in 2004, would suffer exceptional hardship if she moved to Bulgaria temporarily with the applicant and in the alternative, if she remained in the United States while the applicant fulfilled his two-year foreign residence requirement in Bulgaria.

The director determined that the applicant failed to establish that his U.S. citizen child would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Bulgaria. *Director's Decision, dated December 23, 2008. The application was denied accordingly.*

In support of the appeal, counsel for the applicant submits a brief, dated February 19, 2009, and a psychological evaluation in regards to the applicant's U.S. citizen child, dated January 30, 2009.

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).

Counsel first contends that the applicant has already fulfilled the requirement that he reside in Bulgaria for two years since completing the J-1 program to which a two-year foreign residency requirement attached, and as such, a waiver under section 212(e) is not applicable to the applicant. To support this contention, the applicant has submitted documentation outlining the time he has spent in Bulgaria since completing the J-1 which subjected him to the two-year home residency, in August 1994.

The U.S. Department of State (DOS) has confirmed to the AAO that pursuant to DOS policy, if an individual obtains J status to participate in a program to which a two-year foreign residency requirement attaches, and subsequently, is granted another J to participate in a program to which a two-year foreign residency requirement does not attach, time spent in the home country while participating in any J program does not count towards the two-year foreign residency requirement. In the instant case, the applicant remained in J status until 1998. As such, it has not been established that the applicant has fulfilled his two-year home residency since completing his J program in 1998.¹

¹ The AAO notes that even if counsel were correct, that time spent in the home country while on a J program that does not have a foreign residency requirement attached to it counts towards the two-year home residency requirement attached to a previous J status, the evidence submitted by the applicant does not conclusively establish the specific amount of time spent in Bulgaria. The chart provided by the applicant outlining his time in his home country is general in nature; it provides estimates of months spent in Bulgaria, without specific dates of entry and exits to Bulgaria and/or the United States. Moreover, the documentation in support of the applicant's statements is also general in nature, and contains inconsistencies in relation to the applicant's statements. For example, the applicant notes that he spent an estimated 10 months in Bulgaria between 1994 and 1996, but the letter provided by [REDACTED] Chair of Department of Statistics and Econometrics, University of National and World Economy, states that the applicant was employed full-time as an assistant professor with the entity in Bulgaria between January 1994 and December 1996. The letter from [REDACTED] does not definitively establish the exact dates the applicant was in Bulgaria. Moreover, an assertion by the applicant that he was in Bulgaria for the summer semesters in 2000 and 2002, and for the summers of 2004 and 2006, does not definitively establish the applicant's exact dates in Bulgaria. Nevertheless, as the AAO has already determined that the applicant has not established that he has been in his home country for two years since completing his J program in 1998, the concerns referenced above are irrelevant.

The first step required to obtain a waiver is to establish that the applicant's U.S. citizen child would experience exceptional hardship if she resided in Bulgaria for two years with the applicant. In a declaration, the applicant contends that his daughter would suffer emotional hardship due to unfamiliarity with the country and language. *Letter from* _____ dated June 16, 2008. Counsel further asserts that the applicant's child suffers from Attention Deficit Hyperactivity Disorder (ADHD) and that her condition would exacerbate the hardships she would experience were she to relocate to Bulgaria for a two-year period. *Brief in Support of Appeal*, dated February 19, 2009.

In support of counsel's assertion, a psychological evaluation has been provided by _____ concludes that the applicant's child has ADHD and that said condition would make it very difficult for her to learn a new language and attempt to control herself. *See Psychological Evaluation from* _____, dated January 30, 2009.

Although the input of any mental health professional is respected and valuable, the AAO notes that the submitted letter is based on a single interview between the applicant's child and the psychologist. The record fails to reflect an ongoing relationship between a mental health professional and the applicant's child or any treatment plan with respect to the child's ADHD, to further support the gravity of the situation. Moreover, the conclusions reached in the submitted evaluation, being based on a single interview, do not reflect the insight and elaboration commensurate with an established relationship with a psychologist, thereby rendering the psychologist's findings speculative and diminishing the evaluation's value to a determination of exceptional hardship. Finally, it has not been established that the applicant's child would be unable to attend a solid academic institution in Bulgaria for the two-year period, thereby ensuring scholastic and emotional ease while in Bulgaria and upon the child's return to the United States.

The applicant further contends that his U.S. citizen child will suffer exceptional financial hardship were she to relocate to Bulgaria. He declares that "I am 47 year-old and unfortunately, the Bulgarian law requires the applicants for any faculty...and research positions at all colleges and universities to be not older than 40 years of age. This makes it impossible for me to apply for any position in academia. This legal obstacle will prevent me from obtaining adequate comparable employment in Bulgaria and it will make it impossible for me to provide even basic support.... This will be also the end of my scientific career.... My age will be a big obstacle even for finding any kind of basic employment because the unemployment in Bulgaria and the labor market after the collapse of the previous socialist regime are very prohibitive.... More importantly I do not have any professional contacts in Bulgaria...." *Supra* at 2.

To begin, the AAO notes that the documentation provided to corroborate the applicant's assertion that he is too old to obtain a position in academia is in a foreign language and has not been translated pursuant to 8 C.F.R. § 103.2(b)(3).² In addition, even if it were established that the applicant is unable

² 8 C.F.R. § 103.2(b)(3) states:

(3) Translations. Any document containing foreign language submitted to the Service

to obtain employment in academia, it has not been established that the applicant would be unable to obtain any gainful employment, as the documentation provided by counsel details that the unemployment rate in Bulgaria is only 6.9% and the poverty rate is only 6.1%. *See Translation of Main Results of Labour Force Survey in 2007, Bulgarian National Statistical Institute and List of Countries by Percentage of Population Living in Poverty.* Moreover, the record establishes that the applicant's spouse is currently a tenure track assistant professor of sociology at Queens College, City University of New York, New York; it has not been established that the applicant's spouse would be unable to assist in the finances of the household. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). As such, it has not been established that the applicant's child would suffer exceptional emotional and/or financial hardship were she to accompany the applicant to Bulgaria for a two-year period.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen child would suffer exceptional hardship if she remained in the United States during the two-year period that the applicant resides in Bulgaria. As stated by previous counsel:

[redacted] [the applicant's child's] mother is currently working as a assistant professor on an H-1B visa. She is not an American citizen and her legal status in the United States is based upon her employment with the University of South Carolina. If [redacted] were to remain in the UNITED STATES with her mother while [redacted] [the applicant] is in Bulgaria, she would be potentially placed in a vulnerable situation. If something were to happen to [redacted] [the applicant's spouse's] employment status, such as loss of job or University lay-offs, her H-1B visa status would cease and she would be required to leave the UNITED STATES and return to Bulgaria. If such a situation were to occur, it would leave [redacted] alone and without either parent in the UNITED STATES. By default, such situation would constitute exceptional hardship....

Memorandum in Support of Application for Waiver, dated June 18, 2008.

[now the U.S. Citizenship and Immigration Services (USCIS)] shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

Any documents submitted by the applicant that are not in English and/or are not translated into English are not probative and will not be accorded any weight in this proceeding, as the AAO cannot determine whether said documentation supports the applicant's claims for a waiver.

The AAO concurs with counsel that due to the applicant's spouse's nonimmigrant status and its temporary and revocable nature, it has not been established that the child would be able to remain in the United States during the two-year period that the applicant has to return to Bulgaria. Were the applicant's spouse required to depart the United States at some point in the future, such a predicament would leave the young child in the United States without their parents. This situation would constitute exceptional hardship to the applicant's child.

The record, reviewed in its entirety, does not support a finding that the applicant's U.S. citizen child will face exceptional hardship if the applicant's waiver request is denied. Although the applicant has established that his child would suffer exceptional hardship were she to remain in the United States while the applicant relocated abroad for the requisite two-year period, the applicant has failed to establish that his child would suffer exceptional hardship were she to relocate to Bulgaria for a two-year period. The record demonstrates that the applicant's child faces no greater hardship than the unfortunate, but expected, disruptions, inconveniences, and difficulties arising whenever a parent temporarily relocates abroad based on a foreign residence requirement.

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 not met his burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed. The waiver application is denied.