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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

#3

FILE:

Office: CALIFORNIA SERVICE CENTER

Date:

APR 07 2010

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.

Handwritten signature of Perry Rhew in black ink.

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 applicant is a citizen of Bulgaria who obtained J-1 nonimmigrant exchange status in February 1990. 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 children, born in 2002 and 1995<sup>1</sup>, would suffer exceptional hardship if they moved to Bulgaria temporarily with the applicant and in the alternative, if they 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 a qualifying relative would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Bulgaria. *Director's Decision*, dated September 16, 2009. The application was denied accordingly.

In support of the appeal, the applicant submits a brief, dated October 14, 2009, and referenced exhibits. In addition, on February 18, 2010, the AAO received a supplemental brief and supporting documentation from the applicant. The entire record was reviewed and considered in rendering this decision.

To begin, the applicant contends that he was not aware of the two-year foreign residence requirement attached to the J-1 requested by the sponsor, nor did he consent to the requirement, and as such, a waiver should be granted to him based on affirmative misinformation. As noted by the applicant,

[A]t the time of the initial adjustment of status to that of an exchange visitor, I had not been aware of and did not consent to the Requirement; that information about the Requirement had been deliberately withheld from me; and that I had been denied opportunity to find out about the very existence of the Requirement. I had been affirmatively misinformed about the conditions of the exchange visitor status. Had I known of the Requirement I would have refused the Fulbright scholarship and the exchange visitor status, as I had other options unencumbered by any similar requirements. In *Slyper* (576 F. Supp. 559, D.D.C., 1983), the waiver was granted because the hardship was created, in part, by the affirmative misinformation given to [REDACTED]. The situation is analogous in my case....

*Brief in Support of Appeal*, dated October 14, 2009.

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<sup>1</sup> The record establishes that the applicant has been married, and divorced, two times and each marriage bore one child. As such, the U.S. citizen children referenced above share a biological father but have different biological mothers.

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.

Irrespective of the applicant's assertion that he should be granted a waiver based on affirmative misinformation, the AAO notes that section 212(e) clearly states that an individual that acquires J status and participates in a program that is government financed is subject to section 212(e) of the Act. There is no exception created by law or statute that exempts individuals who assert that they were not aware of the requirement and/or were affirmatively misinformed. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). It has not been established, by the preponderance of the evidence, that the applicant should be granted a waiver based on his assertion that he was not aware and/or did not consent to the requirements of section 212(e) and/or that there was affirmative misinformation.<sup>2</sup>

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

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<sup>2</sup> The applicant cites to *Slyper v. Attorney General* to support his assertion that a waiver should be granted due to affirmative misinformation provided to him with respect to him obtaining J-1 status. A review of the case law cited by the applicant does not support such an assertion. In *Slyper*, the fact that the plaintiff was affirmatively misinformed by a consular officer that he was not subject to the two-year foreign residence requirement was considered by the court in reference to hardship to the plaintiff's spouse, a U.S. citizen, based on the lack of knowledge regarding this requirement and its implications on her. This factor "tips the balance-if further weight is needed-on favor of a finding of exceptional hardship..." *Slyper v. Attorney General*, 576 F. Supp. 559, D.D.C. 1983. Despite the applicant's contention to the contrary, *Slyper* does not support a finding that the applicant should be granted a waiver strictly because of affirmative misinformation.

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 exceptional hardship would be imposed on the applicant's U.S. citizen children if they remained in the United States while the applicant relocated to Bulgaria for a two-year period. With respect to the applicant's U.S. citizen son, born in 1995, the applicant declares and documents that his son has been diagnosed with Fragile X, a genetic condition rendering him mentally disabled, with a severely deficient IQ, and dependent on care for the rest of his life. Due to his disability, effects of changes in his routines and environment are unpredictable. The applicant notes that he provides the majority of the financial support and health coverage for the child. As he is divorced from his son's mother, were he to relocate abroad, he would not be able to see and spend time with his son regularly, as he does now, thereby causing emotional hardship to the child. Moreover, were the applicant to relocate abroad, he would experience a significant decrease in salary as Bulgaria's average salary is very low, thereby causing financial hardship to his son. *Affidavit of* [REDACTED], dated December 1, 2008.

In support, documentation regarding Fragile X has been provided. In addition, a neuropsychological evaluation has been provided, confirming the applicant's son's diagnosis of Fragile X and outlining the negative ramifications of stress and anxiety on the child's well-being. The report further provides 75 recommendations to improve the applicant's child's daily care and well-being in light of his condition, to support the gravity of the applicant's child's mental health situation. *Neuropsychological Evaluation from* [REDACTED]. Moreover, financial and health insurance coverage documentation have been provided outlining the critical support the applicant provides to his son. Finally, evidence corroborating the applicant's assertion regarding substandard wages in Bulgaria has been provided.

With respect to the applicant's U.S. citizen daughter, born in 2002, the applicant contends that pursuant to court order, he is the primary parent, with sole decision-making authority regarding his daughter's education. His daughter is with him more than 60% of the time. The school she attends is governed by his geographic residence, as the child's biological mother resides in a different county. Were he to relocate abroad, his child would no longer be under the applicant's primary custody, as has been determined to be in her best interests pursuant to the court, and she would have to change schools as her biological mother does not reside in the same county, thereby causing her emotional hardship. Finally, the applicant carries 86% of the child support obligation to his daughter but were he to relocate abroad, as noted above, he would not be able to meet his financial obligations, thereby causing financial hardship to his child. *Supplemental Letter from* [REDACTED], dated February 16, 2010.

In support, a copy of the Supplemental Final Judgment in the Circuit Court of the Sixth Judicial Circuit has been provided, corroborating the applicant's statements regarding the current custodial and financial arrangements for his daughter. *Supplemental Final Judgment in the Circuit Court of the Sixth Judicial Circuit*, dated January 22, 2010. In addition, financial and health insurance coverage documentation has been provided outlining the critical support the applicant provides to his daughter.

Finally, the applicant contends that he is the sole link between the two children, who have a very close sibling relationship despite the fact that they have different biological mothers. Were he to relocate abroad, the applicant contends that his children would suffer as they would be unable to see each other regularly, as occurs now due to his efforts. *Supra* at 4.

Based on a totality of the circumstances, the AAO finds that the applicant's U.S. citizen children would suffer exceptional hardship were the applicant to relocate abroad. The applicant's U.S. citizen son would suffer emotional and psychological hardship, in light of his mental health condition, his attachment to his father and the need for continued stability and lack of stress and anxiety in his life. The record reflects that the applicant's son would also suffer financial hardship. In addition, the applicant's U.S. citizen daughter would suffer were her father to relocate abroad, as he is currently the primary parent, as such arrangement was determined to be in the best interest of the child, pursuant to court documents, and his relocation would require the child to move in with her biological mother, leave her school and friends, and be separated long-term from her step-brother, as the biological mothers live in two different states. The record establishes that the applicant's children need their father's continued presence, stability and financial contributions; a separation from their father would cause hardship beyond that normally suffered by those temporarily separated due to a two-year foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen children would experience exceptional hardship if they resided in Bulgaria for two years with the applicant. The applicant asserts that it would be legally impossible for his children to relocate to Bulgaria due to divorce, child custody arrangement and the need for a court order. As he notes, "That option does not exist and need not be considered." *Supra* at 2.

The documentation in the record establishes that the applicant's U.S. citizen daughter would not be able to relocate to Bulgaria, as the court would only permit her to reside outside the State of Florida, the child's current home state, if it were in the best interests of the child, considering a variety of factors including the feasibility of maintaining the relationship of the child with the nonrelocation parent. In this case, the applicant's child was born and has spent all her life in Pinellas County, Florida. Her biological mother is a U.S. citizen residing in Florida and attending a Ph.D. program. As the applicant asserts, "the denial of any petition to relocate my daughter to Bulgaria while I comply with the Requirement is a foregone conclusion...." *Supra* at 2. Moreover, the AAO notes that the applicant's daughter is integrated into the U.S. lifestyle and educational system. The BIA found that a fifteen-year-old child who lived her entire life in the United States, was completely integrated into the American lifestyle and was not fluent in Chinese would suffer extreme hardship if she relocated to Taiwan. *Matter of Kao and Lin*, 23 I&N Dec. 45 (BIA 2001). The AAO finds *Matter of Kao and Lin* to be persuasive in this case due to the similar fact pattern.

As for the applicant's U.S. citizen son, the record contains extensive documentation regarding his mental health condition, and the need for continued treatment by professionals familiar with his situation. As noted in the Confidential Psychoeducational Reevaluation Report, the applicant's son has been classified as an Other Health Impaired Student and has an Individualized Education Program designed for him. *Confidential Psychoeducational Reevaluation Report, Coweta County School System*, dated March 29, 2006. Although his father plays a critical role in his care as the child lives with his father part-time, the record establishes that the applicant's son also lives with his mother, and due to his medical condition and the need for continued care and treatment, the child's biological mother would not permit her son to relocate to Bulgaria for a two-year period. Even if she were to permit the relocation abroad, the AAO notes that such a move would cause exceptional hardship to the child, in light of his disability, due to a relocation to a country to which he is not familiar, a language to which he is not familiar, far away from his mother, his community, his friends, his teachers, his physicians, and his step-sister.

Based on a totality of the circumstances, the record establishes that the applicant's U.S. citizen children would suffer exceptional hardship were they to relocate abroad to reside with the applicant, due to long-term separation from their biological mothers, their community and their friends, the lack of financial resources due to the low salaries earned in Bulgaria and unfamiliarity with the country, customs and language.

The AAO thus concludes that the applicant has established that his U.S. citizen children would experience exceptional hardship were they to relocate to Bulgaria and in the alternative, were they to remain in the United States without the applicant, for the requisite two-year term. The evidence in the record establishes the hardship the applicant's children would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.

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 his 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 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 Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.