

## DEPARTMENT OF JUSTICE

## Immigration and Naturalization Service

## 8 CFR Parts 212, 245, and 248

[INS No. 1688-95]

RIN 1115-AD89

**Waiver of the Two-Year Home Country Physical Presence Requirement for Certain Foreign Medical Graduates**

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

**SUMMARY:** This final rule amends the Immigration and Naturalization Service (Service) regulations relating to waivers of the 2-year home country residence and physical presence requirement (2-year requirement) pursuant to a request by a State Department of Public Health, or its equivalent. These waivers are intended to ease health care shortages by allowing certain foreign medical graduates (FMGs) to work at health care facilities located in geographic areas designated by the Secretary of Health and Human Services (HHS) as having a shortage of health care professionals (HHS-designated shortage areas).

EFFECTIVE DATE: April 16, 1997.

**FOR FURTHER INFORMATION CONTACT:** Sophia Cox, Adjudications Officer, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-5014.

**SUPPLEMENTARY INFORMATION:** On October 25, 1994, Congress enacted the Immigration and Nationality Technical Corrections Act of 1994 (the 1994 Technical Corrections Act), Pub. L. 103-416, 108 Stat. 4310, 4319-4320. Section 220 of the 1994 Technical Corrections Act amended section 212(e) of the Immigration and Nationality Act (Act) to allow a State Department of Public Health (or its equivalent), in addition to a United States Government agency, to request the United States Information Agency (USIA) to recommend a waiver of the 2-year requirement for a J-1 foreign medical graduate.

Section 220(c) of the 1994 Technical Corrections act provides that the statutory amendments to section 212(e) of the Act enabling a State Department of Public Health to submit waiver requests directly to USIA for FMGs practicing medicine in HHS-designated shortage areas applies to aliens admitted to the United States in J-1 status, or who acquire J-1 status after admission before, on, or after the enactment, and before June 1, 1996. In an interim rule, published in the **Federal Register** on

May 18, 1995, at 60 FR 26676, the Service interpreted this provision to mean that any FMG who entered the United States in J-1 status or acquired J-1 status upon arrival to pursue graduate medical education or training before June 1, 1996, is eligible to apply for a waiver based on a request by a State Department of Public Health, and for subsequent change of nonimmigrant status to H-1B, if eligible.

In addition, section 220 of the 1994 Technical Corrections Act created a new section 214(k) of the Act, setting forth the terms and conditions imposed on State-based waivers. These terms and conditions include, among other things, that the FMG:

(1) Submit to USIA a "no objection" statement from the government of his or her home country, if he or she is contractually obligated to return to that country;

(2) Demonstrate an offer of full-time employment at a health care facility located in an HHS-designated shortage area and agree to begin employment within 90 days of receiving the waiver approval;

(3) Agree to practice medicine for that health care facility for at least 3 years; and

(4) Agree to practice medicine only in HHS-designated shortage areas during this 3-year period. The statute limits the number of State-based waivers that can be granted to each State to 20 per fiscal year.

In addition to stipulating the terms and conditions attached to the waiver, section 214(k) of the Act also eased the change of status restrictions under section 248(2) of the Act, to allow an FMG who has been granted a State-based waiver to apply for change of status from J-1 to H-1B, provided the remaining eligibility criteria have been satisfied. By implication, under this statutory provision, the FMG's dependent spouse and children, if otherwise eligible, may apply for change of nonimmigrant status from J-2 to H-4. This provision, however, does not ease the annual numerical limitations imposed on the H-1B specialty occupation worker category under section 214(g)(1)(A) of the Act. Therefore, the Service would be statutorily precluded from according H-1B status to an FMG if the annual numerical limitation imposed on the issuance of H-1B visas under section 214(g)(1)(A) of the Act were reached.

As explained in the preamble to the interim rule, the FMG must fulfill the required 3-year employment contract as an H-1B. This provision is consistent with Congress' intent that the FMG fulfill the 3-year employment contract

before applying for change of status to L or another H nonimmigrant classification, for adjustment of status or for an immigrant visa. In addition, this regulatory provision allows the Service to maintain control over the FMG's stay in the United States by ensuring compliance with the conditions imposed on the waiver under section 214(k) of the Act.

An FMG who does not fulfill the terms and conditions of the waiver imposed under section 214(k) of the Act again becomes subject to the 2-year requirement under section 212(e) of the Act. Consequently, the FMG becomes ineligible to apply for an immigrant visa, permanent residence, or for any other change of nonimmigrant status until he or she has resided and been physically present in his or her country of nationality or last residence for an aggregate of 2 years following departure from the United States. The Attorney General may excuse early termination of the FMG's employment due to extenuating circumstances, which may include hardship to the FMG or the closure of the facility. In order to avoid resubjecting himself or herself to the 2-year requirement, the FMG, however, should be prepared to submit an employment contract for the balance of the required 3-year period with another health care facility in an HHS-designated shortage area.

On May 18, 1995, the Service published an interim rule in the **Federal Register** implementing section 220 of the Technical Corrections Act, and requested public comment. See 60 FR 26676-26683. The public comment period ended on July 17, 1995. The Service received only two comments in response to the interim rule. In general, one commenter stated the rule is helpful to FMGs, and the other stated that it is contrary to immigration reform efforts.

**Discussion of Comments**

One commeter supported the waiver policy as promulgated in the Service's interim rule, and noted that the newly created State-based waivers are helpful to FMGs in psychiatric residencies, because they will assist our country in meeting it needs for psychiatrists and other medical specialists in work force shortage areas.

The other commenter disagreed with the Service's interim rule, on the ground that it was contrary to the recommendations of the U.S. Commission on Immigration Reform to curtail the levels of immigration to the United States. The Service lacks discretion in this regard. The purpose of the interim rule was solely to implement section 220 of the Technical

Corrections Act, in a manner consistent with Congressional intent. The rule was based on an express statutory amendment that expanded eligible 212(e) waiver recommending agencies to include State Departments of Public Health, and incorporates statutory terms and conditions to the waiver so as to ensure that the public receives the intended benefit.

#### Developments Following Publication of the Interim Rule

In the preamble to the interim rule, the Service clarified the terms "FMG," "State Department of Public Health, or its equivalent," and "HHS-designated shortage area," and discussed a broad range of issues. Subsequent to the publication of the interim rule, there were policy developments concerning what constitutes an "HHS-designated shortage area," and what is meant by the term "contractually obligated," for purposes of determining whether a "no objection" statement is required. The Service does not believe it is necessary to incorporate these policy developments into the final regulation itself. In addition, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) redesignated section 214(k) of the Act as section 214(l) of the Act, and amended the 1994 Technical Corrections Act to extend the State-based waiver program and impose terms and conditions on FMGs granted waivers of the 2-year requirement based on a request by a U.S. Government agency. The developments that occurred following publication of the Service's interim rule are summarized immediately below.

#### HHS-Designated Shortage Areas

Section 214(l)(1)(C) of the Act provides that the FMG must agree to practice medicine in accordance with section 214(l)(2) of the Act for at least 3 years "only in the geographic area or areas which are designated by the Secretary of Health and Human Services as having a shortage of health care professionals." In the preamble to the interim rule, the Service stated that it is bound by HHS' determination of what constitutes an HHS-designated shortage area.

Subsequent to the publication of the Service's interim rule, HHS published a notice in the **Federal Register** on September 19, 1995, at 60 FR 48515-48516. This notice stated that both Health Professional Shortage Areas (HPSAs) and Medically Underserved Areas/Medically Underserved Populations (MUAs/MUPs) are geographic areas having a shortage of health care professionals for purposes of

State-based waivers of the 2-year requirement. As section 214(l)(1)(C) of the Act assigns authority to HHS to designate health care shortage areas, HPSAs and MUAs/MUPs shall be deemed designated shortage areas for purposes of State-based waivers under section 212(e) of the Act until such a time as HHS further revises or amends the designations.

#### No Objection Statements

On the issue of "no objection" statements, the Service noted that section 214(l)(1)(A) of the Act provides that "in the case of an alien who is otherwise contractually obligated to return to a foreign country, the government of such country [must] furnish [ ] the Director of the United States Information Agency with a statement in writing that it has no objection to the waiver." This requirement applies only in the case of State-based waivers under section 212(e) of the Act.

Following the publication of the Service's interim rule, USIA clarified the term "otherwise contractually obligated" for purposes of determining when a "no objection" statement is required in its final rule implementing section 220 of the Technical Corrections Act. See 60 FR 53122-53126 (October 12, 1995). The USIA's final rule provides that the term "otherwise contractually obligated \* \* \*" refers only to those FMGs whose medical education or training has been funded by the government of his or her home country. Since the Service may not grant a section 212(e) waiver without the favorable recommendation of the USIA, the Service defers to the USIA with respect to the proper interpretation of the term "otherwise contractually obligated \* \* \*" in determining when a "no objection statement" is required.

#### IIRIRA Changes

On September 30, 1996, the President signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208. Section 622(a) of IIRIRA amended section 220(c) of the 1994 Technical Corrections Act to extend the State-based waiver program until June 1, 2002. Therefore, the regulation will be amended at 8 CFR 212.7(c)(9)(i)(A) to reflect the FMGs who entered the United States in J-1 status or acquired J-1 status upon arrival before June 1, 2002, may apply for a waiver based on a request by a State Department of Public Health. This amendment is made to ensure the regulation reflects the correct expiration date of the State-based waiver program. This change became effective on

September 30, 1996, the IIRIRA enactment date. Because section 622(a) of IIRIRA amended section 220(c) of the 1994 Technical Corrections Act, the enabling legislation, there effectively has not been any interruption in the State-based waiver program. See *Trichilo v. Secretary of Health and Human Services*, 825 F.2d 702, 705-07 (2d Cir. 1987).

In addition, sections 622 (b) and (c) of IIRIRA amended section 214(k) of the Act to impose new terms and conditions on waivers of the 2-year requirement granted to FMGs based on a request by an interested Federal agency. These statutory changes will be implemented in a separate rulemaking. While sections 622 (b) and (c) of IIRIRA 96 Act amended section 214(k) of the Act, section (a)(3)(A) of the 96 Act subsequently redesignated section 214(k) of the Act as section 214(l) of the Act, which unintentionally resulted in two different sections 214(l) of the Act, as section 625 of the 96 Act also created a section 214(l) of the Act to impose new terms and conditions on F-1 academic students. The Service is seeking a technical correction to resolve this discrepancy.

#### Effective Date of Final Rule

Since the two technical changes resulting from section 622 of the 96 Act, relating to the extension of the eligibility date from June 1, 1996, to June 1, 2002, and the redesignation of section 214(k) of the Act as section 214(l) of the Act, became effective on September 30, 1996, the Service feels that "good cause" exists under 5 U.S.C. 553(d)(3) to have this final rule become effective upon date of publication in the **Federal Register**.

#### Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this final rule will not have a significant economic impact on a substantial number of small entities because only 20 waivers are authorized per State annually to FMGs under Pub. L. 103-416.

#### Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the

Unfunded Mandates Reform Act of 1995.

#### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **Executive Order 12866**

This final rule is not considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review, and the Office of Management and Budget has waived its review process under section (6)(a)(3)(A).

#### **Executive Order 12988**

This final rule meets the applicable standards set forth in sections (3)(a) and (3)(b)(2) of E.O. 12988.

#### **Executive Order 12612**

This regulation will not have a substantial direct effect on the States, on the relationships between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. It merely implements section 220 of Pub. L. 103-416, which grants the States, in limited circumstances, the authority to submit requests for waiver recommendations to the Director of the USIA on behalf of certain foreign medical graduates. Therefore, in accordance with E.O. 12612, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

#### **List of Subjects**

##### **8 CFR Part 212**

Administration practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

##### **8 CFR Part 245**

Aliens, Immigration, Reporting and recordkeeping requirements.

##### **8 CFR Part 248**

Aliens, Reporting and recordkeeping requirements.

Accordingly, the interim rule amending 8 CFR parts 212, 245 and 248, which was published at 60 FR 26676-26683 on May 18, 1995, is adopted as a final rule with the following changes:

#### **PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE**

1. The authority citation for part 212 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1187, 1225, 1226, 1227, 1228, 1252; 8 CFR part 2.

##### **§ 212.7 [Amended]**

2. Section 212.7 is amended in the fifth sentence of paragraph (c)(9) introductory text, by revising the reference to "section 214(k) of the Act" to read: "section 214(l) of the Act (as redesignated by section 671(a)(3)(A) of Pub. L. 104-208)".

3. Section 212.7 is amended by revising the reference to "section 214(k)" to read: "section 214(l)" wherever it appears in the following paragraphs:

- a. Paragraph (c)(9)(iv); and
- b. Paragraph (c)(9)(vi).

3. Section 212.7 is amended by revising the reference to "section 214(k)(1)(B)" to read: "section 214(l)(1)(B)" in the first sentence of the unnumbered paragraph immediately after paragraph (c)(9)(iv).

4. Section 212.7 is amended by revising paragraph (c)(9)(i)(A), to read as follows:

##### **§ 212.7 Waiver of certain grounds of excludability.**

\* \* \* \* \*

(c) \* \* \*

(9) \* \* \*

(i) \* \* \*

(A) They were admitted to the United States under section 101(a)(15)(J) of the Act, or acquired J nonimmigrant status before June 1, 2002, to pursue graduate medical education or training in the United States.

\* \* \* \* \*

Dated: February 26, 1997.

**Doris Meissner,**

*Commissioner, Immigration and Naturalization Service.*

[FR Doc. 97-9831 Filed 4-15-97; 8:45 am]

BILLING CODE 4410-10-M

#### **DEPARTMENT OF JUSTICE**

#### **Immigration and Naturalization Service**

#### **8 CFR Parts 214 and 274a**

[INS 1653-94]

RIN 1115-AC72

#### **Foreign Employers Seeking To Employ Temporary Alien Workers in the H, O, and P Nonimmigrant Classifications**

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Immigration and Naturalization Service (the Service) regulations by precluding foreign employers from directly filing petitions for O and P nonimmigrant aliens. Prospective foreign employers seeking to file petitions in these two classifications will be required to use the services of an agent in the United States. This rule also amends the H nonimmigrant regulations by requiring foreign employers seeking to petition for H-2B nonimmigrant aliens to use the services of an agent in the United States, removes the current reference to the term "representative" from the H-2B regulations, expands the definition of an agent with respect to the H, O, and P nonimmigrant classifications, and codifies existing policy with regard to the filing of nonimmigrant petitions for certain professional athletes. This rule brings the H, O, and P nonimmigrant regulations into conformity with the employer sanctions provisions of section 274A of the Immigration and Nationality Act ("the Act").

**EFFECTIVE DATE:** April 16, 1997.

**FOR FURTHER INFORMATION CONTACT:** John W. Brown, Adjudications Officer, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-3240.

**SUPPLEMENTARY INFORMATION:** The employer sanctions provisions of the Immigration and Nationality Act were created by the Immigration Reform and Control Act of 1986, Public Law 99-603, and are codified in section 274A of the Act, as amended. Among other things, section 274A of the Act contains provisions making it unlawful for a person or entity to hire an alien knowing the alien is not entitled to engage in employment. Section 274A of the Act also requires the employer to examine certain documentation in order to verify an individual's identity and eligibility to work in the United States. Civil and criminal penalties may be imposed upon employers who do not