

Code of Federal Regulations Section 212.7(c) (9)

(9) Waivers under Pub. L. 103-416 based on a request by a State Department of Public Health (or equivalent). In accordance with section 220 of Pub. L. 103-416, an alien admitted to the United States as a nonimmigrant under section 101(a)(15)(J) of the Act, or who acquired status under section 101(a)(15)(J) of the Act after admission to the United States, to participate in an exchange program of graduate medical education or training (as of January 9, 1977), may apply for a waiver of the 2-year home country residence and physical presence requirement (the "2-year requirement") under section 212(e)(iii) of the Act based on a request by a State Department of Public Health, or its equivalent. To initiate the application for a waiver under Pub. L. 103-416, the Department of Public Health, or its equivalent, or the State in which the foreign medical graduate seeks to practice medicine, must request the Director of USIA to recommend a waiver to the Service. The waiver may be granted only if the Director of USIA provides the Service with a favorable waiver recommendation. Only the Service, however, may grant or deny the waiver application. If granted, such a waiver shall be subject to the terms and conditions imposed under section 214(l) of the Act (as re-designated by section 671(a) (3) (A) of Pub. L. 104-208). Although the alien is not required to submit a separate waiver application to the Service, the burden rests on the alien to establish eligibility for the waiver. If the Service approves a waiver request made under Pub. L. 103-416, the foreign medical graduate (and accompanying dependents) may apply for change of nonimmigrant status, from J-1 to H-1B and, in the case of dependents of such a foreign medical graduate, from J-2 to H-4. Aliens receiving waivers under section 220 of Pub. L. 103-416 are subject, in all cases, to the provisions of section 214(g) (1) (A) of the Act.

(i) Eligibility criteria. J-1 foreign medical graduates (with accompanying J-2 dependents) are eligible to apply for a waiver of the 2-year requirement under Pub. L. 103-416 based on a request by a State Department of Public Health (or its equivalent) if:

(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.

(B) They have entered into a bona fide, full-time employment contract for 3 years to practice medicine at a health care facility located in an area or areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals ("HHS-designated shortage area");

(C) They agree to commence employment within 90 days of receipt of the waiver under this section and agree to practice medicine for 3 years at the facility named in the waiver application and only in HHS-designated shortage areas. The health care facility named in the waiver application may be operated by:

(1) An agency of the Government of the United States or of the State in which it is located; or

(2) A charitable, educational, or other not-for-profit organization; or

(3) Private medical practitioners.

(D) The Department of Public Health, or its equivalent, in the State where the health care facility is located has requested the Director, USIA, to recommend the waiver, and the Director, USIA, submits a favorable waiver recommendation to the Service; and

(E) Approval of the waiver will not cause the number of waivers granted pursuant to Pub. L. 103-416 and this section to foreign medical graduates who will practice medicine in the same state to exceed 30 during the current fiscal year.

(ii) Decision on waivers under Pub. L. 103-416 and notification to the alien--

(A) Approval. If the Director of USIA submits a favorable waiver recommendation on behalf of a foreign medical graduate pursuant to Pub. L. 103-416, and the Service grants the waiver, the alien shall be notified of the approval on Form I-797 (or I-797A or I-797B, as appropriate). The approval notice shall clearly state the terms and conditions imposed on the waiver, and the Service's records shall be noted accordingly.

(B) Denial. If the Director of USIA issues a favorable waiver recommendation under Pub. L. 103-416 and the Service denies the waiver, the alien shall be notified of the decision and of the right to appeal under 8 CFR part 103. However, no appeal shall lie where the basis for denial is that the number of waivers granted to the State in which the foreign medical graduate will be employed would exceed 20 for that fiscal year.

(iii) Conditions. The foreign medical graduate must agree to commence employment for the health care facility specified in the waiver application within 90 days of receipt of the waiver under Pub. L. 103-416. The foreign medical graduate may only fulfill the requisite 3-year employment contract as an H-1B nonimmigrant. A foreign medical graduate who receives a waiver under Pub. L. 103-416 based on a request by a State Department of Public Health (or equivalent), and changes his or her nonimmigrant classification from J-1 to H-1B, may not apply for permanent residence or for any other change of nonimmigrant classification unless he or she has fulfilled the 3-year employment contract with the health care facility and in the specified HHS-designated shortage area named in the waiver application.

(iv) Failure to fulfill the three-year employment contract due to extenuating circumstances. A foreign medical graduate who fails to meet the terms and conditions imposed on the waiver under section 214(l) of the Act and this paragraph will once again become subject to the 2-year requirement under section 212(e) of the Act.

Under section 214(l) (1) (B) of the Act, however, the Service, in the exercise of discretion, may excuse early termination of the foreign medical graduate's 3- year period of employment with the health care facility named in the waiver application due to extenuating circumstances.

Extenuating circumstances may include, but are not limited to, closure of the health care facility or hardship to the alien. In determining whether to excuse such early termination of employment, the Service shall base its decision on the specific facts of each case. In all cases, the burden of establishing eligibility for a favorable exercise of discretion rests with the foreign medical graduate.

Depending on the circumstances, closure of the health care facility named in the waiver application may, but need not, be considered an extenuating circumstance excusing early termination of employment. Under no circumstances will a foreign medical graduate be eligible to apply for change of status to another nonimmigrant category, for an immigrant visa or for status as a lawful permanent resident prior to completing the requisite 3-year period of employment for a health care facility located in an HHS-designated shortage area.

(v) Required evidence. A foreign medical graduate who seeks to have early termination of employment excused due to extenuating circumstances shall submit documentary evidence establishing such a claim. In all cases, the foreign medical graduate shall submit an employment contract with another health care facility located in an HHS-designated shortage area for the balance of the required 3-year period of employment. A foreign medical graduate claiming extenuating circumstances based on hardship shall also submit evidence establishing that such hardship was caused by unforeseen circumstances beyond his or her control. A foreign medical graduate claiming extenuating circumstances based on closure of the health care facility named in the waiver application shall also submit evidence that the facility has closed or is about to be closed.

(vi) Notification requirements. A J-1 foreign medical graduate who has been granted a waiver of the 2-year requirement pursuant to Pub. L. 103-416, is required to comply with the terms and conditions specified in section 214(l) of the Act and the implementing regulations in this section. If the foreign medical graduate subsequently applies for and receives H-1B status, he or she must also comply with the terms and conditions of that nonimmigrant status. Such compliance shall also include notifying the Service of any material change in the terms and conditions of the H-1B employment, by filing either an amended or a new H-1B petition, as required, under §§ 214.2(h)(2)(i)(D), 214.2(h)(2)(i)(E), and 214.2(h)(11) of this chapter.

(A) Amended H-1B petitions. The health care facility named in the waiver application and H-1B petition shall file an amended H-1B petition, as required under § 214.2(h)(2)(i)(E) of this chapter, if there are any material changes in the terms and conditions of the beneficiary's employment or eligibility as specified in the waiver application filed under Pub. L. 103-416 and in the subsequent H-1B petition. In such a case, an amended H-1B petition shall be accompanied by evidence that the alien will continue practicing medicine with the original employer in an HHS-designated shortage area.

(B) New H-1B petitions. A health care facility seeking to employ a foreign medical graduate who has been granted a waiver under Pub. L. 103-416 (prior to the time the alien has completed his or her 3-year contract with the facility named in the waiver application and original H-1B petition), shall file a new H-1B petition with the Service, as required under § 214.2(h)(2)(i)(D) and (E) of this chapter. Although a new waiver application need not be filed, the new H-1B petition shall be accompanied by the documentary evidence generally required under § 214.2(h) of this chapter, and the following additional documents:

(1) A copy of Form I-797 (and/or I-797A and I-797B) relating to the waiver and nonimmigrant H status granted under Pub. L. 103-416;

(2) An explanation from the foreign medical graduate, with supporting evidence, establishing that extenuating circumstances necessitate a change in employment;

(3) An employment contract establishing that the foreign medical graduate will practice medicine at the health care facility named in the new H-1B petition for the balance of the required 3-year period; and

(4) Evidence that the geographic area or areas of intended employment indicated in the new H-1B petition are in HHS-designated shortage areas.

(C) Review of amended and new H-1B petitions for foreign medical graduates granted waivers under Pub. L. 103-416 and who seek to have early termination of employment excused due to extenuating circumstances--

(1) Amended H-1B petitions. The waiver granted under Pub. L. 103-416 may be affirmed, and the amended H-1B petition may be approved, if the petitioning health care facility establishes that the foreign medical graduate otherwise remains eligible for H-1B classification and that he or she will continue practicing medicine in an HHS-designated shortage area.

(2) New H-1B petitions. The Service shall review a new H-1B petition filed on behalf of a foreign medical graduate who has not yet fulfilled the required 3- year period of employment with the health care facility named in the waiver application and in the original H-1B petition to determine whether extenuating circumstances exist which warrant a change in employment, and whether the waiver granted under Pub. L. 103-416 should be affirmed. In conducting such a review, the Service shall determine whether the foreign medical graduate will continue practicing medicine in an HHS-designated shortage area, and whether the new H-1B petitioner and the foreign medical graduate have satisfied the remaining H-1B eligibility criteria described under section 101(a)(15)(H) of the Act and § 214.2(h) of this chapter. If these criteria have been satisfied, the waiver granted to the foreign medical graduate under Pub. L. 103-416 may be affirmed, and the new H-1B petition may be approved in the exercise of discretion, thereby permitting the foreign medical graduate to serve the balance of the requisite 3-year employment period at the health care facility named in the new H-1B petition.

(D) Failure to notify the Service of any material changes in employment. Foreign medical graduates who have been granted a waiver of the 2-year requirement and who have obtained H-1B status under Pub. L. 103-416 but fail to: Properly notify the Service of any material change in the terms and conditions of their H-1B employment, by having their employer file an amended or a new H-1B petition in accordance with this section and § 214.2(h) of this chapter; or establish continued eligibility for the waiver and H-1B status, shall (together with their dependents) again become subject to the 2-year requirement. Such foreign medical graduates and their accompanying H-4 dependents also become subject to deportation under section 241(a) (1) (C) (i) of the Act.

(10) The applicant and his or her spouse may be interviewed by an immigration officer in connection with the application and consultation may be had with the Director, United States Information Agency and the sponsor of any exchange program in which the applicant has been a participant.

(11) The applicant shall be notified of the decision, and if the application is denied, of the reasons thereof and of the right of appeal in accordance with the provisions of part 103 of this chapter. However, no appeal shall lie from the denial of an application for lack of a favorable recommendation from the Secretary of State. When an interested United States Government agency requests a waiver of the two-year foreign-residence requirement and the Director, United States Information Agency had made a favorable recommendation, the interested agency shall be notified of the decision on its request and, if the request is denied, of the reasons thereof, and of the right of appeal. If the foreign country of the alien's nationality or last residence has furnished statement in writing that it has no objection to his/her being granted a waiver of the foreign residence requirement and the Director, United States Information Agency has made a favorable recommendation, the Director shall be notified of the decision and, if the foreign residence requirement is not waived, of the reasons thereof and of the foregoing right of appeal. However, this "no objection" provision is not applicable to the exchange visitor admitted to the United States on or after January 10, 1977 to receive graduate medical education or training, or who acquired such status on or after that date for such purpose; except that the alien who commenced a program before January 10, 1977 and who was readmitted to the United States on or after that date to continue participation in the same program, is eligible for the "no objection" waiver.