



U.S. Department of Justice
Immigration and Naturalization Service

HQ 70/6.1.3-P

Office of Field Operations

425 I Street NW
Washington, DC 20536

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MEMORANDUM FOR REGIONAL DIRECTORS
DISTRICT DIRECTORS
OFFICERS-IN-CHARGE
SERVICE CENTER DIRECTORS

FROM: William R. Yates /S/
Deputy Executive Associate Commissioner
Immigration Services Division
Office of Field Operations

SUBJECT: National Interest Waivers for Second Preference Employment-Based Immigrant Physicians Serving in Medically Underserved Areas or at Veterans Affairs Facilities and Section 214(l)(2)(B) of the Act.

This memorandum supplements the October 3, 2000, policy guidance on the above noted subject. It also supplements the October 4, 1999, policy guidance regarding waivers of the 2-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act) for alien physicians, insofar as that memorandum discusses section 214(l) of the Act, to account for the special circumstances applicable to alien physicians with National Interest Waivers (NIW). In particular, this memorandum clarifies the Immigration and Naturalization Service (the Service) policy on alien physicians filing adjustment of status applications while fulfilling the requirements of section 214(l)(2)(B) of the Act.

Issue

Should the Service accept an adjustment of status application from an alien physician who is the beneficiary of an approved Form I-140 with an approved NIW request based on service in a medically underserved area, who is still fulfilling his or her three-year medical service requirement in H-1B status pursuant to section 214(l) of the Act?

Decision

Based on the following discussion, Service Centers are directed to accept the *filing* of an adjustment of status application from an alien physician who is the beneficiary of an *approved* Form I-140 with an *approved* NIW request under section 203(b)(2)(B)(ii) of the Act, even if the alien physician received a waiver of the § 212(e) foreign residence requirement under section 214(l) of the Act and who is still fulfilling a three-year medical service requirement in H-1B status pursuant to section 214(l) of the Act. The Service Center may not *approve* the adjustment of status application, however, until the alien physician has fully complied with the service requirements for both the waiver under section 214(l) and the NIW under section 203(b)(2)(B)(ii).

Discussion

Questions have arisen over whether a physician who is in the process of fulfilling his or her service requirements under section 214(l) of the Act in H-1B status may file an adjustment of status application based upon an approved I-140 with an approved NIW request for either 3 or 5-years of service in an underserved area. In part, section 214(l)(2)(B) of the Act says that no one who has received a waiver but *failed* (emphasis added) to complete the stated requirements can apply for permanent residence without first complying with the requirements of section 212(e).

Service regulations at 8 CFR 212.7(c)(9)(iii) interpret the statute so that the alien may not file an adjustment application until the requirements of section 214(l) are fulfilled. This is a reasonable interpretation of section 214(l)(2)(B), since it helps to safeguard against inadvertently granting adjustment to an alien who has not fulfilled the waiver requirements.

In contrast, the September 6, 2000, interim rule (65 FR 53889) addressing NIWs for EB-2 physicians permits these physician beneficiaries to submit an adjustment of status application upon approval of the I-140. See 8 CFR 204.12(e). Again, this is a reasonable interpretation of the statute since section 203(b)(2)(B)(ii)(III) provides that the NIW provision should not be construed to preclude the alien physician's filing of an adjustment application before the alien physician completes the NIW service requirement.

The Service sees section 203(b)(2)(B)(ii)(III) of the Act as authorizing an acceptable modification of the regulations interpreting section 214(l) of the Act, especially since many of the alien physicians availing themselves of the NIW provisions are former J-1 visa holders who have obtained a section 212(e) waiver of the foreign residence requirement under section 214(l) and who have changed status to that of an H-1B nonimmigrant with a three-year commitment. Therefore, the policy of the Service is:

- An alien physician who received a waiver under section 214(l) of the Act, AND who is the beneficiary of an *approved* Form I-140 with an *approved* NIW may apply for adjustment of status once the Service approves the Form I-140 and the NIW. The Service may not, however, *approve* the adjustment application until the alien

physician has *completed* the service requirement under both section 214(l) and section 203(b)(2)(B)(ii) of the Act.

- The H-1B physician must fulfill his or her three-year commitment with the H-1B petitioner as required by section 214(l) of the Act. The only exception to this requirement is the provision for obtaining permission to complete the period of service with a different H-1B employer, as outlined in section 214(l) of the Act and § 212.7(c)(9)(v) of the regulations.
- After fulfilling the H-1B service requirement, the alien physician may continue his or her employment with the H-1B petitioner in order to satisfy the remaining two years of the NIW five-year service requirement, or may seek a different employer provided the place of full-time employment is with a Department of Veterans Affairs facility or in a Department of Health and Human Services designated medically underserved area.

Officers should remember that an alien physician who received a waiver under section 214(l) of the Act, but who is not the beneficiary of an *approved* Form I-140 with an *approved* NIW may not apply for adjustment of status until the alien physician has *completed* the service requirement under section 214(l) of the Act. Note that the Service will include these provisions in the NIW final regulation.

Questions

Officers with questions about this guidance may contact HQ Staff Officers Tracy Renaud, Danielle Lee, Kevin Cummings, or Craig Howie via e-mail, through appropriate channels.