

9 FAM 40.202 NOTES

(CT: VISA-1393; 01-21-2010)
(Office of Origin: CA/VO/L/R)

9 FAM 40.202 N1 ALIENS SUBJECT TO INA 212(E)

(CT: VISA-1238; 07-01-2009)

- a. Certain J-1 exchange visitors are subject to the two-year foreign residence requirement of INA 212(e). These exchange visitors must reside and be physically present in their country of nationality or last legal permanent residence for an aggregate of at least two years following completion of the exchange program and departure from the United States. If the exchange visitor's country of nationality differs from his or her country of legal permanent residence, then he or she is required to return to the country of his or her legal permanent residence at the time the J-1 visa was issued or J status obtained. These exchange visitors are ineligible to apply for or receive an H, K, or L nonimmigrant visa (NIV), nor are they eligible for an immigrant visa (IV) or permanent residence status until they have complied with or received a waiver for the foreign residence requirement.
- b. If a waiver of the INA 212(e) foreign residence is being sought, the applicant should be directed to the Consular Affairs (CA) Web site on Travel: Residence Requirement of INA 212(e) for an application and all necessary information about the process. In most cases, post will only be involved in the waiver process when a **No Objection Statement** is issued by the alien's designated ministry and is sent to the U.S. Chief of Mission within that country. In this case, the **No Objection Statement** should be forwarded directly by the consular section to the Waiver Division (CA/VO/L/W) in accordance with 9 FAM 40.202 N2.1-2.
- c. The following categories of exchange visitors (and their accompanying dependents in J-2 status) are subject to the foreign residency requirement:
 - (1) Aliens participating in an exchange program financed in whole or in part, directly or indirectly, by an agency of the U.S. Government, the alien's home government, or an international organization which received funding from the U.S. Government or the alien's home government;

- (2) Aliens whose exchange program involves an area of study or field of specialized knowledge that has been designated as necessary for further development of their home countries on the Exchange Visitor Skills List in effect at the time of J visa issuance; or
 - (3) Aliens who entered the United States to receive graduate medical education or training.
- d. If post is unsure as to whether INA 212(e) applies to the J applicant, an advisory opinion (AO) may be requested from CA/VO/L/W.

9 FAM 40.202 N1.1 Two-Year Residence Abroad or Waiver Requirement

(CT:VISA-912; 11-15-2007)

An exchange visitor who is subject to the requirements of INA 212(e) is ineligible to apply for the H, K, or L nonimmigrant visa (NIV) categories, an immigrant visa (IV), or permanent residence status until he or she has complied with the foreign residence requirement or a waiver of that requirement has been favorably recommended by the State Department and then approved by Department of Homeland Security (DHS). (See 9 FAM 41.81 N8 for applicability of INA 212(e) to K visa applicants.)

9 FAM 40.202 N1.2 Two-Year Residence Must Be In Country of Nationality or Last Residence

(CT:VISA-912; 11-15-2007)

Residence for two years in a country other than the country of nationality or last legal permanent residence, when J visa or J status was acquired, does not satisfy the requirements of INA 212(e). If the country of nationality differs from the country of legal permanent residence at the time of J visa issuance, then the alien is required to fulfill the two years in the country of legal permanent residence.

9 FAM 40.202 N1.3 Time In Country of Residence or Nationality Need Not Be Continuous

(CT:VISA-912; 11-15-2007)

In determining whether a former exchange visitor has resided and been physically present in the country of nationality or last legal permanent residence for an aggregate of at least two years upon completion of the exchange program and departure from the United States, physical presence need not be continuous and may be cumulative.

9 FAM 40.202 N2 BASES FOR WAIVERS OF TWO-YEAR FOREIGN RESIDENCE REQUIREMENT UNDER INA 212(e)

9 FAM 40.202 N2.1 No Objection Statement From Foreign Government

(CT:VISA-912; 11-15-2007)

It is the responsibility of the alien to seek and receive a **No Objection Statement** from his or her applicable government.

9 FAM 40.202 N2.1-1 Diplomatic Missions in United States May Issue Statement

(CT:VISA-912; 11-15-2007)

The **No Objection Statement** is a diplomatic note from the alien's home government stating that it has no objection to the exchange visitor's not returning home for two years to fulfill the INA 212(e) requirement and to the possibility of the alien's remaining in the United States and becoming a resident. It is issued on behalf of the alien by the alien's home government embassy located in Washington, DC or, if there is not an embassy, then by its diplomatic mission. The **No Objection Statement** must be sent directly to CA/VO/L/W from the embassy or the diplomatic mission:

Waiver Review Division, CA/VO/L/W
U.S. Department of State
2401 E Street, NW (SA-1, L-603)
Washington, DC 20522-0106

9 FAM 40.202 N2.1-2 Alien Requesting Statement Directly From Own Government

(CT:VISA-1127; 12-04-2008)

An alien seeking to obtain a waiver of the two-year foreign residence requirement on the basis of a statement from the alien's government should comply with the following:

- (1) The alien should apply directly to his or her government for such a statement. It is up to the alien's government to determine whether it will issue such statement;
- (2) The **No Objection Statement**, a diplomatic note from the alien's home government stating that it has no objection to the exchange visitor's not returning home for two years to fulfill the INA 212(e)

requirement and to the possibility of the alien's remaining in the United States and becoming a resident, may also be issued by the designated ministry of the alien's country. Such a statement must be sent from the designated ministry to the U.S. chief diplomatic mission in the home country; and

- (3) Upon receipt at the U.S. mission, the U.S. consular section should forward the statement directly to:

Waiver Review Division, CA/VO/L/W
U.S. Department of State
2401 E Street, NW (SA-1, L-603)
Washington, DC 20522-0106

9 FAM 40.202 N2.1-3 Foreign Government's Option To Determine Who May Make Statement

(CT: VISA-912; 11-15-2007)

It is the prerogative of the alien's government to determine which ministry or official is authorized to issue a **No Objection Statement** on its behalf. Once made, however, the statement should be transmitted to CA/VO/L/W as stated in 9 FAM 40.202 N2.1-1 or 9 FAM 40.202 N2.1-2 above.

9 FAM 40.202 N2.1-4 Contents of No Objection Statement

(CT: VISA-912; 11-15-2007)

To enable the Department to process the case expeditiously, a copy of the Form IAP-66 or Form DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status (this form is now part of the Student and Exchange Visitor Information System (SEVIS) program) should be attached to the **No Objection Statement** along with the alien's waiver case number issued by CA/VO/L/W, if available, and should contain the following information:

- (1) Full name of exchange visitor, date and place of birth;
- (2) Date of entry into the United States;
- (3) List of exchange visitor program or programs and program numbers, if known, in which the alien participated;
- (4) The exchange visitor's alien registration number, if known; and
- (5) The name of the foreign government official with whom the case can be discussed, if necessary.

9 FAM 40.202 N2.1-5 No Objection Statement Does Not Guarantee Waiver Approval

(CT:VISA-912; 11-15-2007)

Some exchange visitors have incorrectly assumed that **No Objection Statements** by their governments guarantee that waivers will be granted. It should be emphasized that the submission of such a statement by a foreign government serves only to initiate the consideration of the alien's request for a waiver. Each waiver case is reviewed on a case-by-case basis and a recommendation is made to DHS by reviewing program, policy, and foreign relations considerations. If an alien has received U.S. Government financing to participate in the exchange program, such funding may be an indication of strong program considerations against granting the waiver.

9 FAM 40.202 N2.1-6 No Objection Waiver Unavailable to Medical Graduates

(CT:VISA-1127; 12-04-2008)

The holders of J visas who came to the United States, or those who acquired such status after January 9, 1977, in order to receive graduate medical education or training, are precluded by INA 212(e) from obtaining a waiver based solely on a **No Objection Statement** from their government. They may, however, request waivers on the basis of one of the other situations outlined in INA 212(e). (See 9 FAM 40.202 N2.2, 9 FAM 40.202 N2.3, 9 FAM 40.202 N2.4, and 9 FAM 40.202 N2.5 below.)

9 FAM 40.202 N2.2 Exceptional Hardship to U.S. Citizen or Permanent Resident Spouse or Child

(CT:VISA-1238; 07-01-2009)

- a. In cases in which DHS has made a determination that the enforcement of the two year home residence requirement would impose exceptional hardship upon the exchange visitor's American citizen or U.S. legal permanent resident (LPR) spouse or child, the alien may apply for a waiver based on exceptional hardship.
- b. If you are receiving inquiries regarding the possibility of obtaining waivers under INA 212(e) on exceptional hardship grounds, direct the applicant to the CA/VO/L/W Web site for additional information and advise the applicant:
 - (1) To communicate with the DHS office having jurisdiction over the issue; and
 - (2) Applications for waivers on the basis of exceptional hardship must be made to DHS on Form I-612, Application for Waiver of the Foreign Residence Requirement, (under Section 212(e) of the Immigration and Nationality Act, as Amended) (INA 212(e)).

9 FAM 40.202 N2.3 Alien Subject to Persecution

(CT:VISA-1183; 04-08-2009)

A waiver may be based on a finding by DHS of probable persecution on account of race, religion, or political opinion if the alien returned to his or her country to fulfill the two year home residence requirement. If you are receiving inquiries regarding the possibility of obtaining waivers under INA 212(e) based on findings of persecution, direct the applicant to the CA/VO/L/W Web site for additional information. Applications for waivers on the basis of probable persecution must also be made to DHS on Form I-612, Application for Waiver of the Foreign Service Requirement (under Section 212(e) of the Immigration and Nationality Act, as Amended) (INA 212(e)).

9 FAM 40.202 N2.4 Request From Interested Government Agency

(CT:VISA-912; 11-15-2007)

a. An alien desiring to apply for a waiver on the basis that an Interested Government Agency (IGA) has requested a waiver on his or her behalf should be directed to the CA/VO/L/W Web site for additional information. Such a request by an IGA must state that the alien's services are considered to be essential to a program or activity of official interest to that U.S. Government agency and:

- (1) A U.S. Federal Government agency must make a written request signed by the head of the requesting agency, or the designated signatory, for a waiver of the alien's INA 212(e) requirement;
- (2) Such a request must state that it is in public interest for the waiver to be granted and that it will be detrimental to a project sponsored by or of interest to the requesting agency if the alien is unable to continue his or her involvement with the project; and
- (3) The request must be submitted directly from the requesting agency to:

Waiver Review Division, CA/VO/L/W
U.S. Department of State
2401 E Street, NW (SA-1, L-603)
Washington, DC 20522-0106

b. If the request is recommended by the Department, it will be forwarded to the DHS office having jurisdiction over INA 212(e) waivers. The DHS office will inform the alien of the final decision.

9 FAM 40.202 N2.5 Requests From State

Departments of Public Health for Certain Foreign Medical Graduates

(CT: VISA-1393; 01-21-2010)

- a. Section 220(c) of the Immigration and Nationality Technical Corrections Act of 1994 (INTCA) (Public Law 103-416) (8 U.S.C. 1182 note) established the Conrad State 20 Program (later changed to the Conrad State 30 Program), which provides Federal programs waiving the *two*-year foreign residence requirement for alien physicians, who received J-1 status to pursue graduate medical education or training, in return for at least three years of medical service in an underserved area or for services to patients from underserved areas. If you receive inquiries regarding the possibility of obtaining waivers on this basis, direct the applicant to the CA/VO/L/W Web site for additional information.
- b. This waiver basis allows each state's Department of Public Health, or its equivalent, to submit 30 such applications annually on behalf of J-1 physicians:
 - (1) Who were admitted, or acquired J-1 status before September 30, *2012*, to pursue graduate medical education or training in the United States;
 - (2) Who entered into a bona fide, full-time employment contract for three years to practice medicine at a health care facility located in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals;
 - (3) Who agree to commence employment within 90 days of receipt of the waiver and agree to practice medicine for three years at the facility indicated by the state and named in the waiver application; and
 - (4) For whom the requesting state agency has submitted in writing that it is in public interest that a waiver of the two-year foreign residence requirement be granted and for whom the Department submits a favorable waiver recommendation to DHS.
- c. On *October 28*, 2009, through enactment of Public Law 111-*83*, Congress extended the Conrad State 30 Program until September 30, *2012*. The two-year extension became effective retroactively on May 31, 2006. Under this act each state's Department of Public Health, or its equivalent, may recommend a waiver of the two-year home residency requirement for up to 30 foreign medical graduates who are present in the United States with J-1 nonimmigrant status.

9 FAM 40.202 N2.6 Failure to Fulfill Three-Year

Employment Contract

(CT:VISA-912; 11-15-2007)

- a. If a foreign medical graduate fails to meet the terms and conditions imposed by the waiver under INA 214(I) the alien will again become subject to the two-year foreign residency requirement.
- b. For extenuating circumstances, DHS may exercise discretion to excuse early termination of a specific three-year employment contract, but the full three years of service must still be provided. Extenuating circumstances may include, but are not limited to:
 - (1) Closure of the facility named in the waiver application; or
 - (2) Hardship to the alien.
- c. Under no circumstances may an alien who fails to comply with the waiver conditions be allowed to change status, apply for adjustment of status to lawful permanent resident or apply for an immigrant visa (IV) prior to completing the three-year period of employment.

9 FAM 40.202 N2.7 Required Evidence for Excuse of Early Employment Termination

(CT:VISA-1127; 12-04-2008)

A foreign medical graduate who seeks to have early termination of employment excused due to extenuating circumstances shall submit to the Department of Homeland Security (DHS):

- (1) An employment contract with another health care facility in an HHS-designated shortage area for the balance of the three-year period;
- (2) Evidence that the facility he or she worked for has closed or is about to be closed; or
- (3) Evidence that hardship was caused by unforeseen circumstances beyond his or her control.

NOTE: The decision whether extenuating circumstances justify a change of employer is made by DHS and is not subject to review by the consular officer.

9 FAM 40.202 N3 APPLYING INA 212(e) TO ALIENS ISSUED J-2 VISAS

(CT:VISA-1127; 12-04-2008)

The spouse or child of an exchange visitor subject to the provisions of INA 212(e) who is issued a J-2 visa is also subject to the provisions of that section. But, if such a spouse or child ceases to be a member of the household of the former exchange visitor (that is, the child marries, or becomes self-supporting, or, in the case of a spouse, the marriage is terminated, either by death or divorce), and the former J-2 alien wishes to change to immigrant, lawful permanent resident, or to H, K, or L status prior to the completion of the two-year foreign residence requirement, a full report of the circumstances surrounding the case may be submitted by the J-2 alien requesting that the State Department act on his or her behalf for a waiver recommendation. However, the State Department will act on behalf of such applicants only rarely and for humanitarian circumstances. Such an application by the J-2 should be submitted as an Interested Government Agency (IGA) request to the State Department. If you receive inquiries regarding the possibility of obtaining such a waiver, direct the applicant to the CA/VO/L/W Web site for additional information.

9 FAM 40.202 N4 WAIVER REVIEW RESPONSIBILITY IN THE WAIVER DIVISION (CA/VO/L/W)

(CT:VISA-1393; 01-21-2010)

The office responsible for INA 212(e) waiver recommendations in the Department is CA/VO/L/W. The waiver applicant should access the Visa Office Web site for information on *the waiver application process and to download the J-1 visa waiver recommendation application Form DS-3035, Waiver of the J Visa Two-Year Foreign Residence Requirement, 212(e)*. If the applicant has applied and received a waiver case number, he or she may obtain the current information on the status of his or her application on the CA/VO/L/W Web site.