

9 FAM 41.63

TWO-YEAR HOME-COUNTRY PHYSICAL PRESENCE REQUIREMENT

(CT:VISA-1624; 02-07-2011)
(Office of Origin: CA/VO/L/R)

9 FAM 41.63 RELATED STATUTORY PROVISIONS

(CT:VISA-984; 07-28-2008)

See INA 212(e) (8 U.S.C. 1182(a)) and INA 214(I) (8 U.S.C. 1184(I)).

INA 212(e)

e. Educational visitor status; foreign residence requirement; waiver

No person admitted under section 101(a)(15)(J) of this title 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) of this title 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) of this title 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 at 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 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 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 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) of this title: And provided further, That, except in the case of an alien described in clause (iii), the Attorney General 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.

INA 214(l)

I. Restrictions on waiver

- (1) In the case of a request by an interested State agency, or by an interested Federal agency, for a waiver of the 2-year foreign residence requirement under section 212(e) of this title on behalf of an alien described in clause (iii) of such section, the Attorney General shall not grant such waiver unless—
 - (A) in the case of an alien who is otherwise contractually obligated to return to a foreign country, the government of such country furnishes the Director of the United States Information Agency with a statement in writing that it has no objection to such waiver;

- (B) in the case of a request by an interested State agency, the grant of such waiver would not cause the number of waivers allotted for that State for that fiscal year to exceed 30;
- (C) in the case of a request by an interested Federal agency or by an interested State agency—
 - (i) the alien demonstrates a bona fide offer of full-time employment at a health facility or health care organization, which employment has been determined by the Attorney General to be in the public interest; and
 - (ii) the alien agrees to begin employment with the health facility or health care organization within 90 days of receiving such waiver, and agrees to continue to work for a total of not less than 3 years (unless the Attorney General determines that extenuating circumstances exist, such as closure of the facility or hardship to the alien, which would justify a lesser period of employment at such health facility or health care organization, in which case the alien must demonstrate another bona fide offer of employment at a health facility or health care organization for the remainder of such 3-year period); and
- (D) in the case of a request by an interested Federal agency (other than a request by an interested Federal agency to employ the alien full-time in medical research or training) or by an interested State agency, the alien agrees to practice primary care or specialty medicine in accordance with paragraph (2) for a total of not less than 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, except that—
 - (i) in the case of a request by the Department of Veterans Affairs, the alien shall not be required to practice medicine in a geographic area designated by the Secretary;
 - (ii) in the case of a request by an interested State agency, the head of such State agency determines that the alien is to practice medicine under such agreement in a facility that serves patients who reside in one or more geographic areas so designated by the Secretary of Health and Human Services (without regard to whether such facility is located within such a designated geographic area), and the grant of such waiver would not cause the number of the waivers granted on behalf of aliens for such State for a fiscal year

- (within the limitation in subparagraph (B)) in accordance with the conditions of this clause to exceed 5; and
- (iii) in the case of a request by an interested Federal agency or by an interested State agency for a waiver for an alien who agrees to practice specialty medicine in a facility located in a geographic area so designated by the Secretary of Health and Human Services, the request shall demonstrate, based on criteria established by such agency, that there is a shortage of health care professionals able to provide services in the appropriate medical specialty to the patients who will be served by the alien.
- (2)(A) Notwithstanding section 248(a)(2) of this title, the Attorney General may change the status of an alien who qualifies under this subsection and section 212(e) of this title to that of an alien described in section 101(a)(15)(H)(i)(b) of this title. The numerical limitations contained in subsection (g)(1)(A) of this section shall not apply to any alien whose status is changed under the preceding sentence, if the alien obtained a waiver of the 2-year foreign residence requirement upon a request by an interested Federal agency or an interested State agency.
- (B) No person who has obtained a change of status under subparagraph (A) and who has failed to fulfill the terms of the contract with the health facility or health care organization named in the waiver application shall be eligible to apply for an immigrant visa, for permanent residence, or for any other change of nonimmigrant status, 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 at least 2 years following departure from the United States.
- (3) Notwithstanding any other provision of this subsection, the 2-year foreign residence requirement under section 214(e) of this title shall apply with respect to an alien described in clause (iii) of such section, who has not otherwise been accorded status under section 101(a)(27)(H) of this title, if—
- (A) at any time the alien ceases to comply with any agreement entered into under subparagraph (C) or (D) of paragraph (1); or
 - (B) the alien's employment ceases to benefit the public interest at any time during the 3-year period described in paragraph (1)(C).

9 FAM 41.63 RELATED REGULATORY PROVISIONS

(CT:VISA-1624; 02-07-2011)

See 22 CFR 41.63.

Section 41.63 Two-year home-country physical presence requirement.

(a) *Statutory basis for rule.* Section 212(e) of the Immigration and Nationality Act, as amended, provides in substance as follows:

- (1) 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 United States Government or by the government of the country of his nationality or of his last legal permanent residence;
 - (ii) Who at the time of admission or acquisition of status under 101(a)(15)(J) was a national or legal permanent resident of a country which the Secretary of State, 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 [See *9 FAM 41.62 Exhibit VI*] 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 is established that such person has resided and been physically present in the country of his nationality or his last legal permanent residence for an aggregate of at least two years following departure from the United States.
- (2) Upon the favorable recommendation of the Secretary of State, pursuant to the request of an interested United States Government agency (or in the case of an alien who is a graduate of a foreign medical school pursuing a program in graduate medical education or training, pursuant to the request of a State Department of Public Health, or its equivalent), or of the Secretary of Homeland Security

- after the latter 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 legal permanent resident alien), or that the alien cannot return to the country of his nationality or last legal permanent residence because he would be subject to persecution on account of race, religion, or political opinion, the Secretary of Homeland Security 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 Secretary of Homeland Security 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, the waiver shall be subject to the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1184).
- (3) Except in the case of an alien who is a graduate of a foreign medical school pursuing a program in graduate medical education or training, the Secretary of Homeland Security, upon the favorable recommendation of the Secretary of State, may also waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last legal permanent residence has furnished the Secretary of State a statement in writing that it has no objection to such waiver in the case of such alien. Notwithstanding the foregoing, an alien who is a graduate of a foreign medical school pursuing a program in graduate medical education or training may obtain a waiver of such two-year foreign residence requirements if said alien meets the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1184) and paragraphs (a) (2) and (e) of this section.
- (b) Request for waiver on the basis of exceptional hardship or probable persecution on account of race, religion, or political opinion. (1) An exchange visitor who seeks a waiver of the two-year home-country residence and physical presence requirement on the grounds that such requirement would impose exceptional hardship upon the exchange visitor's spouse or child (if such spouse or child is a citizen of the United States or a legal permanent resident alien), or on the grounds that such requirement would subject the exchange visitor to persecution on account of race, religion, or political opinion, shall submit the application for waiver (DHS Form I-612) to the jurisdictional office of the Department of Homeland Security.
- (2)
- (i) If the Secretary of Homeland Security (Secretary of DHS) determines that compliance with the two-year home-country

residence and physical presence requirement would impose exceptional hardship upon the spouse or child of the exchange visitor, or would subject the exchange visitor to persecution on account of race, religion, or political opinion, the Secretary of DHS shall transmit a copy of his determination together with a summary of the details of the expected hardship or persecution, to the Waiver Review Division, in the Department of State's Bureau of Consular Affairs.

- (ii) With respect to those cases in which the Secretary of DHS has determined that compliance with the two-year home-country residence and physical presence requirement would impose exceptional hardship upon the spouse or child of the exchange visitor, the Waiver Review Division shall review the program, policy, and foreign relations aspects of the case, make a recommendation, and forward it to the appropriate office at DHS. If it deems it appropriate, the Waiver Review Division may request the views of each of the exchange visitors' sponsors concerning the waiver application. Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.
- (iii) With respect to those cases in which the Secretary of DHS has determined that compliance with the two-year home-country residence and physical presence requirement would subject the exchange visitor to persecution on account of race, religion, or political opinion, the Waiver Review Division shall review the program, policy, and foreign relations aspects of the case, including consultation if deemed appropriate with the Bureau of Human Rights and Humanitarian Affairs of the United States Department of State, make a recommendation, and forward such recommendation to the Secretary of DHS. Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State and such recommendation shall be forwarded to DHS.

(c) Requests for waiver made by an interested United States Government Department of State.

- (1) A United States Government agency may request a waiver of the two-year home-country residence and physical presence requirement on behalf of an exchange visitor if such exchange visitor is actively and substantially involved in a program or activity

sponsored by or of interest to such agency.

- (2) A United States Government agency requesting a waiver shall submit its request in writing and fully explain why the grant of such waiver request would be in the public interest and the detrimental effect that would result to the program or activity of interest to the requesting agency if the exchange visitor is unable to continue his or her involvement with the program or activity.
- (3) A request by a United States Government agency shall be signed by the head of the agency, or his or her designee, and shall include copies of all IAP 66 or DS-2019 forms issued to the exchange visitor, his or her current address, and his or her country of nationality or last legal permanent residence.
- (4) A request by a United States Government agency, excepting the Department of Veterans Affairs, on behalf of an exchange visitor who is a foreign medical graduate who entered the United States to pursue graduate medical education or training, and who is willing to provide primary care or specialty medicine in a designated primary care Health Professional shortage Area, or a Medically Underserved Area, or psychiatric care in a Mental Health Professional Shortage Area, shall, in addition to the requirement set forth in paragraphs (c)(2) and (3) of this section, include:
 - (i) A copy of the employment contract between the foreign medical graduate and the health care facility at which he or she will be employed. Such contract shall specify a term of employment of not less than three years and that the foreign medical graduate is to be employed by the facility for the purpose of providing not less than 40 hours per week of primary medical care, *i.e.*, general or family practice, general internal medicine, pediatrics, or obstetrics and gynecology, in a designated primary care Health Professional Shortage Area or designated Medically Underserved Area ("MUA") or psychiatric care in a designated Mental Health Professional Shortage Area. Further, such employment contract shall not include a non-compete clause enforceable against the foreign medical graduate.
 - (ii) A statement, signed and dated by the head of the health care facility at which the foreign medical graduate will be employed, that the facility is located in an area designated by the Secretary of Health and Human Services as a Medically Underserved Area or Primary Medical Care Health

Professional Shortage Area or Mental Health Professional Shortage Area and provides medical care to both Medicaid or Medicare eligible patients and indigent uninsured patients. The statement shall also list the primary care Health Professional Shortage Area, Mental Health Professional Shortage Area, or Medically Underserved Area/Population identifier number of the designation (assigned by the Secretary of Health and Human Services), and shall include the FIPS county code and census tract or block numbering area number (assigned by the Bureau of the Census) or the 9-digit zipcode of the area where the facility is located.

- (iii) A statement, signed and dated by the foreign medical graduate exchange visitor that shall read as follows:

I, _____ (name of exchange visitor) hereby declare and certify, under penalty of the provisions of 18 U.S.C. 1001, that I do not now have pending nor am I submitting during the pendency of this request, another request to any United States Government department or agency or any State Department of Public Health, or equivalent, other than _____ (insert name of United States Government Agency requesting waiver) to act on my behalf in any matter relating to a waiver of my two-year home-country physical presence requirement.

- (iv) Evidence that unsuccessful efforts have been made to recruit an American physician for the position to be filled.

- (5) Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State and such recommendation shall be forwarded to the Secretary of DHS.

- (d) Requests for waiver made on the basis of a statement from the exchange visitor's home-country that it has no objection to the waiver.

- (1) Applications for waiver of the two-year home-country residence and physical presence requirement may be supported by a statement of no objection by the exchange visitor's country of nationality or last legal permanent residence. The statement of no objection shall be directed to the Secretary of State through diplomatic channels; *i.e.*, from the country's Foreign Office to the Department of State through the U.S. Mission in the foreign country concerned, or through the foreign country's head of mission or duly appointed designee in the United States to the Secretary of State in the form of a diplomatic note. This note shall include applicant's full name, date and place of birth, and present address. If deemed appropriate, the Department of State may request the views of

each of the exchange visitor's sponsors concerning the waiver application.

- (2) The Waiver Review Division shall review the program, policy, and foreign relations aspects of the case and forward its recommendation to the Secretary of DHS. Except as set forth in *section* 41.63(g)(4), *infra*, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.
 - (3) An exchange visitor who is a graduate of a foreign medical school and who is pursuing a program in graduate medical education or training in the United States is prohibited under section 212(e) of the Immigration and Nationality Act from applying for a waiver solely on the basis of no objection from his or her country of nationality or last legal permanent residence. However, an alien who is a graduate of a foreign medical school pursuing a program in graduate medical education or training may obtain a waiver of such two-year foreign residence requirements if said alien meets the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1184) and paragraphs (a)(2) and (e) of this section.
- (e) Requests for waiver from a State Department of Public Health, or its equivalent, on the basis of Public Law 103-416.
- (1) Pursuant to Public Law 103-416, in the case of an alien who is a graduate of a medical school pursuing a program in graduate medical education or training, a request for a waiver of the two-year home-country residence and physical presence requirement may be made by a State department of Public Health, or its equivalent. Such waiver shall be subject to the requirements of section 214(l) of the Immigration and Nationality Act (8 U.S.C. 1194(l)) and this *section* 41.63.
 - (2) With respect to such waiver under Public Law 104-416, if such alien is contractually obligated to return to his or her home country upon completion of the graduate medical education or training, the Secretary of State is to be furnished with a statement in writing that the country to which such alien is required to return has no objection to such waiver. The no objection statement shall be furnished to the Secretary of State in the manner and form set forth in paragraph (d) of this section and, additionally, shall bear a notation that it is being furnished pursuant to Public Law 103-416.
 - (3) The State Department of Public Health, or equivalent agency, shall include in the waiver application the following:

- (i) A completed DS-3035. Copies of these forms may be obtained from the Visa Office or online at *the CA Web site*.
- (ii) A letter from the Director of the designated State Department of Public Health, or its equivalent, which identifies the foreign medical graduate by name, country of nationality or country of last legal permanent residence, and date of birth, and states that it is in the public interest that a waiver of the two-year home residence requirement be granted;
- (iii) An employment contract between the foreign medical graduate and the health care facility named in the waiver application, to include the name and address of the health care facility, and the specific geographical area or areas in which the foreign medical graduate will practice medicine. The employment contract shall include a statement by the foreign medical graduate that he or she agrees to meet the requirements set forth in section 214(l) of the Immigration and Nationality Act. The term of the employment contract shall be at least three years and the geographical areas of employment shall only be in areas, within the respective state, designated by the Secretary of Health and Human Services as having a shortage of health care professionals, unless the waiver request is for an alien who will practice medicine in a facility that serves patients who reside in one or more geographic areas so designated by the Secretary of Health and Human Services without regard to whether such facility is located within such a designated geographic area. For the latter situation, which will be referred to as "non-designated requests", the contract should also state that the term of the employment contract shall be at least three years and employment shall only be in a facility that serves patients who reside in one or more geographic areas so designed by the Secretary of Health and Human Services as having a shortage of health care professionals.
- (iv) Evidence establishing that the geographic area or areas in the state in which the foreign medical graduate will practice medicine or where patients who will be served by the foreign medical graduates reside, are areas which have been designated by the Secretary of Health and Human Services as having a shortage of health care professionals. For purposes of this paragraph, the geographic area or areas must be designated by the Department of Health and Human Services as a Health Professional Shortage Area ("HPSA") or as a

Medically Underserved Area/Medically Underserved Population ("MUA/MUP").

- (v) Copies of all forms IAP 66 or DS-2019 issued to the foreign medical graduate seeking the waiver;
 - (vi) A copy of the foreign medical graduate's *curriculum vitae* ;
 - (vii) If the foreign medical graduate is otherwise contractually required to return to his or her home country at the conclusion of the graduate medical education or training, a copy of the statement of no objection from the foreign medical graduate's country of nationality or last residence; and,
 - (viii) Because of the numerical limitations on the approval of waivers under Public Law 103-416, *i.e.* , no more than the maximum number of waivers for each State each fiscal year as mandated by law, each application from a State Department of Public Health, or its equivalent, shall be numbered sequentially, beginning on October 1 of each year. The "non-designated" requests will also be numbered sequentially with appropriate identifier.
- (4) The Waiver Review Division shall review the program, policy, and foreign relations aspects of the case and forward its recommendation to the Secretary of DHS. Except as set forth in paragraph (g)(4) of this section, the recommendation of the Waiver Review Division shall constitute the recommendation of the Department of State.
- (f) *Changed circumstances.* An applicant for a waiver on the grounds of exceptional hardship or probable persecution on account of race, religion, or political opinion, has a continuing obligation to inform the Department of Homeland Security of changed circumstances material to his or her pending application.
- (g) The Waiver Review Board.
- (1) The Waiver Review Board ("Board") shall consist of the following persons or their designees:
 - (i) The Principal Deputy Assistant Secretary of the Bureau of Consular Affairs;
 - (ii) The Director of Office of Public Affairs for the Bureau of Consular Affairs;

- (iii) The Legislative Management Officer for Consular Affairs, Bureau of Legislative Affairs;
 - (iv) The Director of the Office of Exchange Coordination and Designation in the Bureau of Educational and Cultural Affairs; and
 - (v) The Director of the Office of Policy and Evaluation in the Bureau of Educational and Cultural Affairs.
- (2) A person who has had substantial prior involvement in a particular case referred to the Board may not be appointed to, or serve on, the Board for that particular case unless the Bureau of Consular Affairs determines that the individual's inclusion on the Board is otherwise necessary or practicably unavoidable.
 - (3) The Principal Deputy Assistant Secretary of Consular Affairs, or his or her designee, shall serve as Board Chairman. No designee under this paragraph (g)(3) shall serve for more than 2 years.
 - (4) Cases will be referred to the Board at the discretion of the Chief, Waiver Review Division, of the Visa Office. The Chief, Waiver Review Division, or his or her designee may, at the Chairman's discretion, appear and present facts related to the case but shall not participate in Board deliberations.
 - (5) The Chairman of the Board shall be responsible for convening the Board and distributing all necessary information to its members. Upon being convened, the Board shall review the case file and weigh the request against the program, policy, and foreign relations aspects of the case.
 - (6) The Bureau of Consular Affairs shall appoint, on a case-by-case basis, from among the attorneys in the State Department's Office of Legal Advisor one attorney to serve as legal advisor to the Board.
 - (7) At the conclusion of its review of the case, the Board shall make a written recommendation either to grant or to deny the waiver application. The written recommendation of a majority of the Board shall constitute the recommendation of the Board. Such recommendation shall be promptly transmitted by the Chairman to the Chief, Waiver Review Division.
 - (8) At the conclusion of its review of the case, the Board shall make a written recommendation either to grant or to deny the waiver application. The written recommendation of a majority of the Board shall constitute the recommendation of the Board. Such

recommendation shall be promptly transmitted by the Chairman to the Chief, Waiver Review Division.

[58 FR 15196, Mar. 19, 1993; 58 FR 18305, Apr. 8, 1993; 58 FR 48448, Sept. 16, 1993; 60 FR 16787, 16788, April 3, 1995; 60 FR 53125, Oct. 12, 1995; 62 FR 19222, Apr. 21, 1997; 62 FR 28803, May 28, 1997. Redesignated and amended at 64 FR 54539, 54540, Oct. 7, 1999; 67 FR 77160, Dec. 17, 2002; 72 FR 10061, Mar. 7, 2007]

See also 22 CFR 62.2 Definitions in Part

Financed directly means financed in whole or in part by the United States Government or the exchange visitor's government with funds contributed directly to the exchange visitor in connection with his or her participation in an exchange visitor program.

Financed indirectly means:

(1) Financed by an international organization with funds contributed by either the United States or the exchange visitor's government for use in financing international educational and cultural exchanges, or

(2) Financed by an organization or institution with funds made available by either the United States or the exchange visitor's government for the purpose of furthering international educational and cultural exchange.