

## 9 FAM 40.202 NOTES

(CT:VISA-684; 01-31-2005)  
(Office of Origin: CA/VO/L/R)

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

(CT:VISA-684; 01-31-2005)

- a. Certain J-1 exchange visitors are subject to the 2-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 departure from the United States. These exchange visitors are not allowed to change their nonimmigrant status *to any classification (with limited exceptions)* or to be admitted to the United States under the H, L or K nonimmigrant category, or *to* acquire immigrant or permanent residence status until they have complied with the foreign residence requirement.
- b. The following categories of exchange visitors (and their accompanying dependents in J-2 status) are subject to the foreign residency requirement:
  - (1) Aliens whose program was financed in whole or in part by an agency of the U.S. Government or the government of their "home" country;
  - (2) Aliens whose field of specialized knowledge or skill is required in their home country *based on the Exchange Visitor Skills List*; or
  - (3) Aliens who entered the United States to receive graduate medical education or training.

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

(CT:VISA-684; 01-31-2005)

An *exchange visitor* who is subject to the requirements of INA 212(e) and who applies for *lawful permanent residence* or an immigrant visa or for an H, K, or L nonimmigrant visa must fulfill the 2-year foreign residence

requirement or receive a waiver of that requirement before a visa application may be considered. (See 9 FAM 41.81 N7) 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-684; 01-31-2005)*

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).

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

*(CT:VISA-684; 01-31-2005)*

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 following departure from the United States upon completion of the J program, all time spent in such country is cumulative and need not be continuous.*

## **9 FAM 40.202 N2 Bases for Waivers of Two-Year Foreign Residence Requirement Under INS 212(e)**

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

#### **9FAM 40.202 N2.1-1 Diplomatic Missions in United States May issue Statement**

*(CT:VISA-684; 01-31-2005)*

*As is done in most **No Objection Statement** based waiver cases, embassies or diplomatic missions located in Washington, D.C. may have the necessary authority to issue "no objection" statements on behalf of the governments concerned. In such case, the embassy or the mission can send statement directly to:*

CA/VO/L/W, Visa Services  
U.S. Department of State  
2401 E Street, NW (SA-1, L-601)  
Washington, D.C. 20522-0106

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

*(CT:VISA-684; 01-31-2005)*

*An alien seeking to obtain a waiver of the 2-year foreign residence requirement on the basis of a statement from the alien's government should comply with the following:*

- (1) That the alien's government has no objection to such a waiver;*
- (2) Should apply directly to that government for such a statement.*
- (3) If originating in the alien's country, the statement must be transmitted through official channels, that is, from the country's designated foreign office to the U.S. diplomatic mission in the country.*
- (4) The consular officer at the mission should mail the statement with a short covering memorandum directly to:*

CA/VO/L/W, Visa Services  
U.S. Department of State  
2401 E Street, NW (SA-1, L-601)  
Washington, D.C. 20522-0106

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

*(CT:VISA-684; 01-31-2005)*

The determination by a government of the official or agency authorized to make such statements on its behalf is entirely within the prerogative of the government concerned. The statement once made should, however, 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-684; 01-31-2005)*

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, should be attached to the "no objection" statement with the alien's waiver case number issued by CA/VO/L/W upon submission of the waiver application, 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. *(If still in the United States, the present U.S. address of the exchange visitor should be included and if overseas, the overseas address if the exchange visitor should be included.);*
- (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-684; 01-31-2005)*

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 decision is made by balancing the program, policy and foreign relations considerations. In cases which involve U.S. Government financing, such funding is often an indication of strong program policy considerations.*

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

*(TL:VISA-159; 12-20-1996)*

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 own 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-684; 01-31-2005)*

- a. *The Department of Homeland Security (DHS) acts as the requesting agency for waivers of the 2-year foreign residence requirement. In cases in which DHS determines the enforcement of the 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 lawful permanent resident.*
- b. Consular officers receiving inquiries regarding the possibility of obtaining waivers under INA 212(e) on *exceptional* hardship grounds should advise the applicant:
  - (1) *To communicate with the DHS office having jurisdiction over the issue.*
  - (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, (INA 212(e)).*

## 9 FAM 40.202 N2.3 Alien Subject to Persecution

*(CT:VISA-684; 01-31-2005)*

A waiver may be based on a finding by **DHS** that the alien is unable to return to the country of nationality or last *legal permanent* residence because the alien would be subject to persecution on account of race, religion, or political opinion. Applications for waivers on the basis of

probable persecution must also be made to **DHS** on Form I-612( INA 212(e)).

## **9 FAM 40.202 N2.4 Request From Interested U.S. Government Agency**

*(CT:VISA-684; 01-31-2005)*

a. An alien desiring to apply for a waiver on the basis that the alien's services are considered to be essential to a program or activity of official interest to a U.S. Government agency should be advised *that*:

- (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:*

CA/VO/L/W, Visa Services  
U.S. Department of State  
2401 E Street, NW (SA-1, *L-601*)  
Washington, D.C. 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-684; 01-31-2005)*

a. The Immigration and Nationality Technical Corrections Act of 1994 (**Public Law 103-416**) provides for a waiver of the two-year foreign residence requirement for certain foreign medical graduates. The Act also permits these foreign medical graduates to change their

nonimmigrant status from a J-1 exchange visitor to an H-1B specialty occupation worker, *if DHS approves the waiver application.*

- b. Section of the INA 212(e)(iii) permits *individual* State Departments of Public Health, or their equivalent, to submit INA 212(e) waiver requests for foreign medical graduates:
- (1) Who were admitted, or acquired J-1 status before *June 1, 2005*, 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.*

Note: The approval of such waiver must not exceed the number of waivers permitted *for each state per fiscal year under the Act.*

## **9 FAM 40.202 N2.6 Failure to Fulfill Three-Year Employment Contract**

*(CT:VISA-684; 01-31-2005)*

- 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 2-year foreign residency requirement.
- b. *For* extenuating circumstances, **DHS** may exercise discretion to excuse early termination of the 3-year employment contract. 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 prior to completing the three-year period of employment in a health care facility located in a Health and Human Services (HHS)-designated shortage area *or in a Veteran administration facility.*

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

*(CT:VISA-684; 01-31-2005)*

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; and
- (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-684; 01-31-2005)*

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 status to that of an immigrant, lawful permanent resident or to an H, K, or L prior to the completion of the 2 year foreign residence requirement,* a

full report of the circumstances surrounding the case *may be submitted by the J-2 alien to:*

CA/VO/L/W, Visa Services  
U.S. Department of State  
2401 E Street, NW (SA-1, *L-601*)  
Washington, D.C. 20522-0106

## **9 FAM 40.202 N4 WAIVER REVIEW RESPONSIBILITY IN CA/VO/L/W**

*(CT:VISA-684; 01-31-2005)*

*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 waiver application process and to download the waiver recommendation application Form DS-3035, J-1 Visa Waiver Review Application. If the applicant has applied and received a waiver case number, he or she may obtain the current application status at CA/waivers.*