

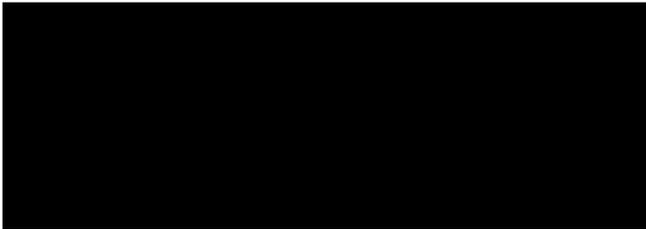
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U.S. Citizenship
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Services

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FILE: EAC 06 074 52840 Office: VERMONT SERVICE CENTER Date: NOV 15 2007

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained. The petition will be approved.

The petitioner is a medical office that seeks to employ the beneficiary as a nuclear medicine physician. The director denied the petition finding that the record did not establish that extenuating circumstances prevented the beneficiary from completing his obligated three-year period of employment with a previous petitioner. The director also indicated the petitioner did not submit a “no objection” letter from the Department of State and that the evidence of record does not establish that the beneficiary may perform services in a specialty occupation.

On appeal, counsel submits a brief stating that the Form I-129 petition should be approved.

Pursuant to 8 C.F.R. § 212.7(c)(9), aliens admitted to the United States under section 101(a)(15)(J) of the Immigration and Nationality Act (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, may be granted 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. Foreign medical graduates are eligible to apply for a waiver of the 2-year residency requirement based on a request by a State Department of Public Health if they meet the following conditions:

- (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 healthcare 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. . . .

8 C.F.R. § 212.7(c)(8)(iv) provides that foreign medical graduates who fail to meet the terms and conditions imposed under section 214(1) of the Act will once again become subject to the 2-year requirement under section 212(e) of the Act. Under section 214(1)(B) of the Act, and the regulation at 8 C.F.R. § 212.7(c)(8)(iv), however, the Service (now Citizenship and Immigration Services – CIS) may, in the exercise of discretion, 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. Such circumstances may include, but are not limited to, closure of the health care facility or hardship to the alien. A determination of whether to excuse such early termination of employment shall be based on the specific facts of each case, with the foreign medical graduate bearing the burden of establishing eligibility for a favorable exercise of discretion. Under no circumstance, however, will a foreign medical graduate be able to apply for a 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 healthcare facility located in an HHS-designated shortage area.

Under 8 C.F.R. § 212.7(c)(8)(v) 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. The graduate shall, in all cases, submit an employment contract with another healthcare facility located in an HHS-designated shortage area for the balance of the required 3-year period of employment. A graduate claiming extenuating circumstances based on hardship shall submit evidence that the hardship was caused by unforeseen circumstances beyond his or her control.

In this instance, the director determined that the record did not establish that extenuating circumstances prevented the beneficiary from completing his obligated three-year period of employment with a previous employer because the petitioner did not submit a “no objection” letter from the Department of State indicating that the Attorney General determined that extenuating circumstances exist. The director, therefore, denied the Form I-129 petition.

On appeal, counsel states and the record establishes, that the petitioner submitted a copy of the beneficiary’s Form I-612 Approval Notice granting a waiver of the two-year foreign residence requirement of section 212(e) of the Act and counsel argues that federal regulations provide that CIS has authority to review petitions for a change of employer due to extenuating circumstances. The AAO disagrees with the director’s finding that a “no objection” letter from the Department of State is required indicating that the Attorney General determined that extenuating circumstances exist. Pursuant to section 214(1)(B) of the Act, and the regulation at 8 C.F.R. § 212.7(c)(8)(iv), CIS has the discretion to excuse early termination of the foreign medical graduates 3-year period of employment with the health care facility named in the waiver application due to extenuating circumstances.

In order to excuse early termination of employment under C.F.R. § 212.7(c)(8)(v), the beneficiary must submit evidence that extenuating circumstances exist. The record of proceeding includes an affidavit from the beneficiary dated January 10, 2006, in which he states that he was contracted to work for Northern Rhode Island Medical Group, Inc. (NRIMG) in Pawtucket, Rhode Island; however, NRIMG does not have a nuclear cardiology lab in Pawtucket, nor has it offered nuclear cardiology services at the Pawtucket location. Instead, NRIMG placed the beneficiary in Riverside, Rhode Island, according to the beneficiary’s affidavit; the beneficiary performed “primarily marketing services for NRIMG, such as contacting internal medicine physicians to sell the nuclear cardiology service and calling various nuclear medicine vendors for their best offers.” In addition, the petitioner has provided an employment contract between the petitioner and the beneficiary stipulating that the beneficiary will work in Woonsocket, Rhode Island, an HHS-designated shortage area, for the balance of the required 3-year period of employment. The requirements of 8 C.F.R. § 212.7(c)(8)(iv) and (v) have been satisfied in this case.

The record reflects that the position is a specialty occupation, and that the beneficiary is qualified to perform the services of a specialty occupation. Thus, the petition may be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden and the appeal shall accordingly be sustained.

ORDER: The appeal is sustained. The petition is approved.