



U.S. Citizenship  
and Immigration  
Services

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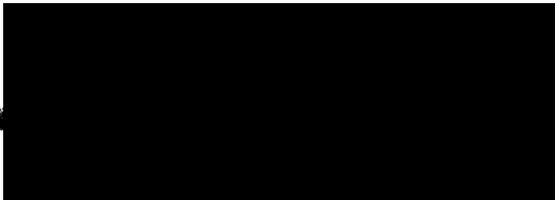
FILE: LIN 03 217 51338 Office: NEBRASKA SERVICE CENTER Date: SEP 15 2005

IN RE: Petitioner:  
Beneficiary:



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:



Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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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, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director 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 non-profit hospital that seeks to employ the beneficiary as a 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.

On appeal, counsel submits a brief and additional information 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 nonimmigrant 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)(d)(iv) provides that foreign medical graduates who fail to meet the terms and conditions imposed on the waiver under section 214(1) of the Act and this paragraph 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, however, the Service (now Citizenship and Immigration Services – CIS) may, in the exercise of discretion, 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. 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)(d)(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 petitioner's employment was terminated for reasons that did not merit the exercise of discretion by CIS excusing early termination. The director, therefore, denied the Form I-129 petition.

On appeal, counsel states, in part, and the record establishes, that the initial employer, Warrensburg Medical Clinic, violated the terms of the ETA 9035 Labor Condition Application (LCA), and breached its contract with the beneficiary, by decreasing the beneficiary's annual salary from \$125,930, to approximately \$100,600, or approximately 80 per cent of the contractual wage agreed upon. This reduction in salary is reflected in the record by copies of the beneficiary's paychecks while in the employ of the Warrensburg Medical Clinic. The record further establishes that the former employer required the beneficiary to perform services at a location other than that designated by the U.S. Department of Agriculture's June 19, 2002 grant of the beneficiary's waiver of the two-year foreign residence requirement. There is also evidence of record in the form of a new employment contract signed by [REDACTED] on behalf of the Warrensburgh Medical Clinic, on May 8, 2003, attempting to renegotiate the terms of the beneficiary's employment and further cut his salary to \$6,000 per month, or approximately 54 per cent of the prevailing wage rate for the position as indicated on the original LCA certified on July 1, 2002. The beneficiary refused to sign that contract. Counsel asserts that this unilateral reduction in salary alone constitutes extreme hardship to the beneficiary, was beyond his control, and constitutes extenuating circumstances that prevented the beneficiary from completing his obligated 3-year period of employment.

The record further reflects that CIS approved the beneficiary's application to waive the foreign residence requirement on July 3, 2002. CIS subsequently approved the Form I-129 petition and the beneficiary was admitted into the United States on August 20, 2002 in valid H-1B status. The beneficiary's employment was authorized from July 15, 2002 until July 1, 2005, and he began his employment with the Warrensburg Medical Clinic on September 1, 2002, leaving that employment on May 13, 2003 after he was terminated for refusal to alter the terms of his initial employment contract.

On July 9, 2003, the present petitioner, Texas County Memorial Hospital, filed a Form I-129 petition on behalf of the beneficiary. The petitioner seeks the beneficiary's employment from July 9, 2003 until June 15, 2006, and an employment contract has been filed of record indicating that the beneficiary would be employed for at least the remainder of his 3-year term of employment authorized by the aforementioned waiver requirements in a medically underserved area.

The record establishes that the petitioner, Warrensburgh Medical Clinic's, unilateral reduction in salary of the beneficiary to a rate 20 per cent below that authorized on the LCA, and subsequent termination from employment establishes that extenuating circumstances prevented the beneficiary from completing his three year term of employment with that petitioner. As such, Texas County Memorial Hospital, a medical facility operating in a medically underserved area in the State of Missouri, is entitled to employ the beneficiary in the capacity petitioned.

The AAO further notes that the former employer's relocation of the beneficiary to a non-approved site would have placed the beneficiary in non-compliance with the terms and conditions of his U.S. Department of Agriculture waiver of the foreign residency requirement.

LIN 03 217 51338

Page 4

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.