

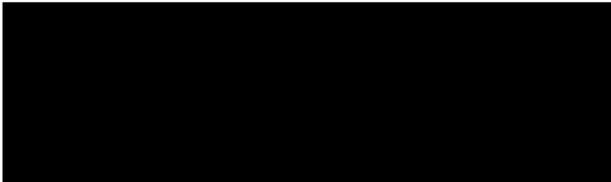
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U.S. Citizenship  
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Services

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MAR 15 2007

FILE: SRC 05 173 50083 Office: TEXAS SERVICE CENTER Date:

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:



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.

*for Michael T. Kelly*  
Robert P. Wiemann, Chief  
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 medical practice that seeks to employ the beneficiary as a physician. The petitioner, therefore, endeavors to extend the beneficiary's classification as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 home residency requirement based on a request by a State Department of Public Health, or its equivalent, 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. . . .
- (D) The Department of Public Health, or its equivalent, in the State where the health facility is located has requested the Director, USIA, to recommend the waiver, and the Director, USIA,<sup>1</sup> submits a favorable waiver recommendation to the Service. . . .

The regulation at 8 C.F.R. § 212.7(c)(9)(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 home residency requirement under section 212(e) of the Act. Under

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<sup>1</sup> The United States Information Agency (USIA) ceased operations on October 1, 1999, pursuant to the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2861 et seq. (1998). The DOS Waiver Review Division now handles requests for waiver of the home residency requirement.

section 214(1)(C) 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 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 at a healthcare facility located in an HHS-designated shortage area.

The director denied the petition on the basis of his determination that the petitioner had not submitted evidence to establish that extenuating circumstances had prevented the beneficiary from completing his obligated three-year period of employment with a previous petitioner.

The beneficiary's J-1 visa waiver application was recommended by the Texas Department of Public Health (TDPH).<sup>2</sup> The DOS granted the TDPH's request, and recommended that CIS grant the waiver on October 17, 2003. CIS approved the H-1B petition on October 26, 2003, and the beneficiary began working shortly thereafter.

The instant petition was received at the service center on May 27, 2005. In the initial submission and response to the director's request for additional evidence, counsel, the petitioner, and the beneficiary contend that extenuating circumstances beyond the control of the beneficiary have made it impossible for the beneficiary to continue his employment at the initially-approved location of employment.

Specifically, the beneficiary contends that the original employer required him to work too many hours and violated the terms and conditions of the employment agreement. The beneficiary contends that although he agreed to work "more than 40 hours per week" when he signed the employment agreement, he did not realize that it would mean 84-105 hours per week. According to the beneficiary:

[The petitioner] made me solely responsible for 75-80% of all patient rounds in all five hospitals without any support from another physician, amounting to about 40-50 very sick inpatients a day. Such a patient load for a single physician is very inadvisable from the standpoint of medical care, especially for very ill patients who require much attention. . . .

[The petitioner's] requirement that I regularly work an excessive number of hours and handle a dangerously large number of patients, including critically ill patients, meant that I spent insufficient time with each patient. . . .

The AMA<sup>3</sup> Code of Ethics (principles I and III) requires that we give our utmost care and attention to our patients and put the welfare of our patients first and above our own interests, including our own financial interests . . . this type of practice of medicine

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<sup>2</sup> The record does not contain a copy of the TDPH's recommendation. However, the DOS recommendation establishes that it was the TDPH that recommended the waiver to DOS.

<sup>3</sup> Although not stated, the AAO will assume that the beneficiary is referring to the American Medical Association.

jeopardized my ability to give full, proper[,] and complete medical care to my patients. . . .

The beneficiary also contends that his original employer breached the employment agreement that the two parties had signed. He claims that he was never paid on time, that payroll deductions from his paychecks were not taken, that the number of hours worked were in excess of what was contemplated, and that the percentage of patient-load that the beneficiary would split with his supervisor were altered in a manner not contemplated by the employment agreement.

In her October 25, 2005 denial, the director found that the petitioner had submitted insufficient evidence to document the claims made in the petition.

On appeal, the petitioner submits additional evidence to establish that extenuating circumstances, beyond the control of the beneficiary, made it impossible for him to fulfill the terms and conditions of his J-1 visa waiver obligations as originally approved.

For example, the petitioner submits an affidavit from Craig S. Smith, an attorney with whom the beneficiary consulted, prior to the filing of this petition, for legal advice regarding his employment situation. The record establishes that the beneficiary has paid Mr. Smith at least \$12,289 for his services. Mr. Smith states the following:

[The beneficiary's original employer] breached the Employment Contract by imposing working conditions upon [the beneficiary] that violated Section 5 of the Employment Contract. . . .

[The beneficiary's original employer] committed fraud when it entered into the Employment Contract with [the beneficiary] and fraudulently induced [the beneficiary] to enter into the Employment Contract. . . .

[The beneficiary] under Texas law can declare the Employment Contract void based on the fraud committed by [the beneficiary's original employer]. . . .

[The beneficiary's original employer] had constructively discharged [the beneficiary] under Texas law by making working conditions so intolerable that [the beneficiary] felt compelled to resign. . . .

[I]f [the beneficiary] continued to obey the working conditions imposed upon him by [the beneficiary's original employer], then [the beneficiary] would violate the law by violating the federal Medicare program's Condition of Participation, which [the beneficiary] was required by law to observe since he was and continues to be a participating provider under the Medicare program.

The issue before the AAO on appeal is whether the petitioner had met its burden of proof, pursuant to section 214(1)(C) of the Act, in establishing that extenuating circumstances exist to excuse the beneficiary from completing his 3-year period of medical service in an HHS-designated shortage area as originally approved.

The AAO finds that such a demonstration has been made. The AAO finds that the weight of the evidence establishes that the working conditions under which the beneficiary was required to practice medicine under his previous employer constitute the extenuating circumstances necessary to establish eligibility under section 214(1)(C) of the Act. The petitioner has submitted a great deal of evidence, including letters from attorneys and colleagues, attesting to the beneficiary's working conditions, which establish extenuating circumstances over which the beneficiary had no control. Moreover, the petitioner has submitted evidence to demonstrate that the beneficiary made a good faith effort to ameliorate the situation, without success. Accordingly, the AAO finds that the petitioner has met its burden of proof and will sustain the appeal.

As such, the petitioner, a medical services provider serving Hidalgo County, Texas, a designated Health Professional Shortage Area at the time this petition was filed, may employ the beneficiary in the capacity petitioned.

This decision concerns only the issues regarding immigration law that surround this case. The AAO is without authority to make any determination on the issues in this case involving Texas contract law.

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.