

## Adjudicator's Field Manual

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### Chapter 45 Waiver of Section 212(e) Foreign Residence Requirement.

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## 45.1 Background.

### (a) History of the Exchange Visitor Program.

The exchange visitor program was created in 1948 with the passage of the Information and Educational Exchange Act of 1948 (the Smith-Mundt Act). While one of the major goals of the Smith-Mundt Act was to enable aliens to acquire skills and knowledge which would be valuable in their home countries, it did not initially contain a legal requirement that the exchange visitor return to his or her home country for any specified period of time.

Over the years, Congress became concerned that program participants were subverting the goals of the program by immigrating to the United States (thereby creating a “brain drain” in the very countries the program was designed to help). In 1956, the law was amended to provide that all persons who came to the United States under an exchange visitor program would be subject to a two-year foreign residency requirement before being eligible to either immigrate to the United States or obtain temporary worker (Nonimmigrant) status. This provision (which became section 212(e) of the Act) applied to both J-1 exchange aliens and their J-2 family members. The amendment also allowed waivers of the two-year foreign residency requirement under limited circumstances.

The Immigration and Nationality Act (Act) was further amended in 1961 with the passage of the Mutual Educational and Cultural Exchange Act of 1961. (This 1961 Act was known as the Fulbright-Hayes Act, and to this day exchange visitors are sometimes referred to as “Fulbright scholars.”) The Fulbright-Hayes Act allowed waivers under limited circumstances dealing with exceptional hardship.

In 1970, the Act was further changed so that the two-year residency requirement only applied to those exchange visitors who:

- Participated in programs which were financed in whole or in part by either their own government or the United States government, or
- Were engaged in a field of specialized knowledge or skill which had been designated by the Director of the United States Information Agency (USIA) as being a knowledge or skill which was needed in the alien’s country of nationality or last residence. (From 1978 to 1982 the exchange visitor program was administered by the International Communication Agency (ICA), which incorporated the former USIA. In

1982 the ICA was renamed the USIA, which was subsequently again renamed the “Waiver Review Division”. )

The Exchange Visitor’s Skills List was first published on April 25, 1972, and has been revised a number of times since then. Appendix 15-1 of the Inspector’s Field Manual contains the current version of the Exchange Visitor’s Skills List. Many aliens who had been subject to the two-year requirement when they initially entered the program were relieved of the requirement in 1970, and only those who acquired J status on or after April 25, 1972 needed to be concerned about the Exchange Visitor’s Skills List making them subject to the requirement.

A 1976 amendment to the statute (which took effect in January 1977) made any exchange visitor who seeks any immigrant status or H or L nonimmigrant status after having received graduate medical training subject to the two-year foreign residence requirement.

In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) was enacted. Section 622 of IIRIRA imposed new terms and conditions on section 212(e) waivers granted to foreign medical graduates that are based on a request by an interested U.S. Government agency (federal program). The terms and conditions are the same as those applied to waivers requested by a State Department of Public Health. These terms and conditions are specified in section 214(l) of the Act (formerly section 214(k) of the Act).

**Note:**

If an alien was not subject to the exchange visitor’s skill list at time of his or her initial arrival or change of status, but the list subsequently changes and his or her skill is added to the list, the alien would acquire a section 212(e) obligation if he or she:

- Departs from the United States and makes a new entry based on a new nonimmigrant visa; or
- Falls out of status for any reason and is later reinstated to the exchange classification.

(b) Current Provisions of the Two-year Residency Requirement.

If the alien is subject to the 2-year foreign residency requirement, he or she is barred under section 212(e) of the Act from filing any:

- Application for an immigrant visa or permanent residence;
  
- Application for a nonimmigrant visa under section 101(a)(15)(H) (temporary worker) or section 101(a)(15)(L) (intracompany transferee) of the Act;
  
- Application for adjustment of status under ANY section of law (including adjustment under section 209 as an asylee or refugee)
  
- Application for change of status to either the H or L nonimmigrant category.

**Note:**

Section 248 of the Act bars any exchange visitor who is subject to 212(e) from being granted change of status to any nonimmigrant classification, other than A or G, and bars any exchange visitor who received graduate medical training from receiving any change of status (see Chapter 30 of this field manual for a discussion of change of status applications).

(c) Waiver of the 2-Year Residency Requirement.

Section 212(e) also provides that under certain circumstances USCIS may waive the foreign residence obligation. A waiver of the requirement can be based on any of the five following reasons:

(1) Exceptional Hardship.

A claim that the exchange visitor's compliance with the residence requirement would impose exceptional

hardship on the applicant's United States citizen or lawful permanent resident spouse or child (see Chapter 45.3 of this field manual);

(2) Persecution.

A claim that the exchange visitor's compliance with the residence requirement would subject the applicant to persecution on account of race, religion, or political opinion (see Chapter 45.4 of this field manual);

(3) Interested Government Agency.

In the case of an alien who did NOT come to the United States as (or was NOT granted a change of nonimmigrant status to) an exchange visitor for the purpose of receiving graduate medical training, the sponsorship of an interested United States Government agency (see Chapter 45.5 of this field manual);

(4) No Objection.

In the case of an alien who did NOT come to the United States as (or was NOT granted a change of nonimmigrant status to) an exchange visitor for the purpose of receiving graduate medical training, a statement by the government of the country of the applicant's nationality or last foreign residence that it has no objection to a waiver in the applicant's case (see Chapter 45.6 of this field manual); or

(5) Employment in a Designated Health Care Shortage Area.

In the case of an alien who did come to the United States as (or was granted a change of nonimmigrant status to) an exchange visitor for the purpose of receiving graduate medical training, and who will be employed in such field, the foreign residence requirement may be waived based on a request by an interested federal government agency (federal program) or the State Department of Public Health of any state or the District of Columbia (State program). Aliens granted such waivers must agree to be employed for three years as an H-1b temporary worker at a designated health care facility or organization or a Federal agency involved in medical research or training, in compliance with all the requirements set forth in section 214(l) of the Act. Since 1994, a Graduate Medical trainee can obtain a waiver under section

214(l) of the Act (formerly designated as section 212(k)) of the 2-year requirement by working for 3 years at a health facility or health care organization for 3 years (see Chapter 45.7 of this field manual).

**Note:**

These reasons are not mutually exclusive and it is possible for an alien to base his waiver request on more than one of them, but normally requests are based on only one of the reasons.

## 45.2 General Considerations.

### (a) Filing Requirements.

#### (1) Form.

The format in which an alien who is subject to the foreign residency requirement seeks a waiver of that requirement depends on the basis of the application:

A waiver application based on either an exceptional hardship or persecution claim must be filed on Form I-612 (Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act). The I-612 must be accompanied by the supporting documentation described on the form and the fee prescribed in 8 CFR 103.7(b)(1).

A waiver request based on either the sponsorship of an interested United States Government agency or a “no objection” statement by the government of the country of his or her nationality or last foreign residence involves submission of that statement in conjunction with the alien’s application for change of status, adjustment of status or visa application. There is no separate form or filing fee.

A waiver request based on section 214(l) of the Act can only be submitted in conjunction with a petition on Form I-129 filed by the interested State or Federal agency. There is no separate form to be filed or fee to be paid.

#### (2) USCIS Office Jurisdiction.

A waiver application on Form I-612 or in conjunction with a temporary worker petition (Form I-129 ) pursuant to section 214(l) is properly filed at any of the Service Centers where the applicant is temporarily residing, or, if the applicant is abroad, at the Service Center located nearest the place where the applicant last resided in the United States. A waiver request based on other U.S. government agency sponsorship, State health department request, or a “no objection” letter may only be filed with the Department of State’s Waiver Review Division (formerly the USIA). The application is considered properly filed only at such time as the Bureau receives a favorable recommendation from the Waiver Review Division, normally at the

office where the alien will be seeking adjustment of status. Applications filed without a Waiver Review Division recommendation should be rejected.

(b) Adjudicative Actions to be Taken.

(1) Verify the Applicant's Foreign Residence Obligation.

Before proceeding to adjudicate the application, you should verify that the applicant is indeed subject to the foreign residence requirement (see 8 CFR 212.7(c) and 22 CFR 41.65(b)). Do not assume that the alien is subject to the requirement just because he or she is filing the waiver application or even because another officer so indicated during a prior proceeding on the IAP-66.

If the applicant is found to be subject to the requirement, the basis of your determination should be noted in the "A" file. Where the record indicates that an applicant may have resided in the country of nationality or last foreign residence for at least two years following termination of the exchange visitor program, you should seek information about the length of such residence.

If the applicant is not found to be subject to the requirement, you should reject the application and inform the applicant in writing of the basis of the determination, together with instructions concerning application for permanent resident status or change of nonimmigrant status, if appropriate.

A J-1 applicant may become subject to the two-year home residence requirement on the basis of one or more of the following factors:

- If the applicant is sponsored by ECFMG as a MEDICAL TRAINEE under program #P-3-4510. (Note: This factor does not affect ECFMG sponsored medical researchers.)

- If the applicant has received any type of government funding or support -- from his or her home country, the U.S. Government, or international organization -- as indicated in items 5a through 5e on the Form IAP-66.

· If the applicant is sponsored by a government program -- this is indicated by the designation of G in the program number, e.g., G-1-1111, G-5-0021, and G-2-0001, etc. There are only five levels of G programs. This is a prima facie decision. If the J-1 has not used government facilities or received funding, it can be reviewed on request.

· If the J-1 applicant's area of study is on the skills list of the J-1's home country or last legal residence when beginning a new program or changing program objective -- advancing to a higher level of study in the field of study is not considered a change of program objective. Determination is made on the basis of the most current skills list at the beginning of the J-1's program, e.g., China did not have a skills list prior to July 14, 1984. J-1 Chinese visitors who entered the U.S. before that date are not subject to the skills list requirement unless they had changed their program objective after July 14, 1984. The skills list is contained in Appendix 15-1 of the Inspector's Field Manual.

**Note:**

An alien erroneously determined to be subject to 212(e) by an American consular officer or immigration inspector is not made subject thereto because of the officer's error. Likewise, an alien who was erroneously determined not to be subject to 212(e) is not exempt from the requirement due to the officer's error. In other words, whatever is indicated on the IAP-66 is not necessarily correct and you should verify that alien's obligations for yourself when adjudicating the waiver application.

(2) Conduct Adjudication Checks.

All applications for waiver of the 2-year foreign residency requirement 212(e) must be checked through appropriate data bases in accordance with Chapter 10.3 of this field manual.

**Note:**

In reviewing the application, verify that the applicant's date and place of birth and his or her country of last residence are accurately recorded. This information is vital in both the checks against relating USCIS records, it is also required for the Waiver Review Division's evaluation of the foreign relations aspects of the matter.

(3) Determine Statutory Eligibility for Waiver.

Based on the criteria discussed in the appropriate subsection (45.3 through 45.7) of this chapter, decide whether the alien meets the statutory requirements for the particular waiver being sought, adjudicate the waiver application.

(4) Determine If Favorable Exercise of Discretion Is Warranted.

Weigh all the positive and negative factors to decide whether the alien merits favorable discretion (see Chapter 10.15 of this field manual for a discussion of the use of discretionary authority) and the precedent decisions of this Bureau (summarized at the end of each subchapter for guidance in how much weight to give each factor).

(c) Closing Actions.

(1) Approved 212(e) Waiver Cases.

If an applicant whose waiver has been granted is the beneficiary of an approved immigrant visa petition, he or she should be invited to apply for adjustment of status or for an immigrant visa abroad, as appropriate. If the applicant is still maintaining a bona fide nonimmigrant status and has expressed an intention only to change to another nonimmigrant status, the approval notice should state that the applicant may now file the appropriate form for that purpose. A waiver approved for a foreign medical graduate who is subject to the terms and conditions of section 214(l) of the Act should be provided with the 214(l) addendum to the approval notice.

Remember to record the disposition of the case for statistical purposes on the monthly report. (Form G-22).

(2) Denied 212(e) Waiver Cases.

In denial cases from which an appeal lies, you should normally wait for the expiration of the appeal period

or, if an appeal has been filed, for the decision on the appeal, before taking action to enforce the alien's departure or to initiate removal proceedings.

Remember to record the disposition of the case for statistical purposes on the monthly report. (G-22)

(d) Precedent Decisions.

The following precedent decisions apply to section 212(e) waivers in general:

- *Matter of Park* , 15 I&N Dec. 436 (BIA 1975). Alien who acquired exchange visitor visa and US admission through fraud and who never participated in an exchange visitor program is still subject to the two-year foreign residence requirement of section 212(e).

- **Matter of O** , 19 I&N Dec. 871 (Comm'r 1989) . An exchange visitor is eligible for temporary resident status under section 245A if he or she establishes he or she was not subject to the 2-year foreign residence requirement. Also, a finding that an applicant is subject to the 2-year foreign residence requirement must be supported by the record since not all exchange visitors are subject to the requirement.

- *Matter of Baterina* , 16 I&N Dec. 127 (BIA 1977). Aliens granted exchange visitor visas after the effective date of the Skills List (April 25, 1972), shall be subject to it; and an alien reinstated in exchange visitor status after April 25, 1972, is subject to the Skills List as an alien obtaining an exchange visitor visa for the first time after that date.

### **45.3 Waiver Based on Exceptional Hardship to USC or LPR Spouse or Child.**

(a) Disposition of Improperly Filed Applications.

Unless an I-612 has been submitted to support a waiver application based upon exceptional hardship or persecution claims, it should be rejected with appropriate instructions to the applicant. If an I-612 application does not indicate that the applicant has a United States citizen or lawful permanent resident spouse or child, and does not allege that return to the country of nationality of last foreign residence would subject the applicant to persecution on account of race, religion, or political opinion, you should return the application and give the applicant an opportunity to resubmit it with the appropriate information requested. If the application is returned without the above information indicated, deny for failure to establish the relationship or persecution necessary to be considered for the specific waiver. Requests by exchange visitors or interested parties for a waiver based on a "no objection" statement or on the sponsorship of a U.S. Government agency should be rejected with instructions to submit such requests directly to:

General Counsel of the Waiver Review Division,

Department of State

Visa Office,

2401 E St., N.W., Room 603,

Washington, D.C. 20547

for that agency's recommendation.

(b) Referral to Waiver Review Division.

If the evidence establishes a prima facie case of hardship, you must send the case to the Waiver Review Division for their recommendation. A file must be created to house the application if a Central Index check does not indicate one exists. If the application or documentation is deficient, it should be returned to the applicant with concise instructions concerning what is needed. Unless otherwise instructed or a change of law occurs, the applicant should be given the opportunity to furnish the information requested before final action is taken on the case.

(c) Review of Application.

In reviewing the I-612 application, the adjudicating officer should pay particular attention to the following items:

- Item 4 (“I believe I am subject to the foreign residence requirements because:”) should be reviewed to verify whether the applicant is in fact subject to the foreign residence requirement on the grounds alleged and to ascertain whether additional grounds apply to the applicant's case. For example, an applicant whose exchange visitor program was financed by the government of his or her country may also have participated in graduate medical education or training. All exchange visitor aliens defined in section 101(a)(15)(J) and 212(e) of the Immigration and Nationality Act who entered the United States as J-1 or changed to such status to pursue graduate medical education or training after January 10, 1977 are subject to the two year foreign residence requirement. (See 8 CFR 212.7(c)(3)) Depending on the basis for the waiver application, existence of multiple grounds for the foreign residence obligation should be included in your evaluation (and that of the Waiver Review Division) as to whether the application should be approved.

- Item 5 (“I am applying for waiver of the foreign residence requirement on the ground that:”) If neither block A nor block B has been checked, the application must be returned with proper instructions. If both blocks are checked, the applicant must provide documentation for both claims.

- Item 7 (“List all program numbers and names of all programs sponsors”) The applicant must provide all program numbers and sponsors to determine whether he or she is actually subject to the residence requirement and to assist the Waiver Review Division in its evaluation of the case for recommendation purposes. The Waiver Review Division may regard program sponsorship by a Federal government agency as an important factor in deciding whether to recommend that the waiver be granted. This information may also indicate whether the purpose of the applicant's program participation was to acquire knowledge or training in this country or to impart knowledge of skills acquired abroad.

- Item 8 (“Major field of activity”) and Item 9 (“Occupation”) aid in determining whether the applicant's program is on the Skills List of the country of nationality or last foreign residence. In the event that the I-612 cannot be approved, these items may also suggest federal government agencies from which the alien may seek sponsorship for an alternative waiver application based upon their interest in the alien's program activities.

- Item 10 (“Date and port of last arrival in the United States...”) requires the submission of the

applicant's I-94. The I-94, and other travel documents (IAP-66, etc.), not only reflect the applicant's entry but normally contain the information necessary for the purpose of verifying the applicant's identity and admission as an exchange visitor (if claimed), and tracking of the original Bureau file.

- Item 11 (“If you are now abroad, give date of departure from U.S.”) is twofold in purpose: first, to facilitate verification of the applicant's claimed departure; second, to provide a basis for computation of the time spent abroad in fulfillment of the foreign residence obligation (the applicant will be exempt from the waiver requirement if he or she has resided in the country of nationality or last foreign residence for at least two years following termination of exchange visitor status). Unless the applicant can furnish conclusive evidence of an alleged fulfillment of the requirement, the information should be verified from Bureau records.

- Item 12 (concerning the applicant’s prior marriages) is important in a hardship case dependent on a relationship to a United States citizen or lawful permanent resident spouse, because documentation of the legal termination of the prior marriage(s) will be needed to establish the applicant's eligibility for the waiver. In the case of a previously married female applicant, it may also suggest use of prior names.

- Items 13 through 16 (information on the applicant’s spouse and children) concern the relationship to the United States citizen or lawful permanent resident spouse or child. If the application is based upon allegations of exceptional hardship to the applicant's spouse or child, then information regarding the name, date, and place of birth, and the citizenship or lawful permanent resident status of the relative must be documented. However, lawful permanent resident status or citizenship (acquired through naturalization or derivation) may be verified from Bureau records and noted on the application. The applicant cannot claim hardship to himself because this would disqualify him. The exceptional hardship must relate to the applicant’s spouse or child. The applicant must establish the hardship to the spouse or child while remaining in the U.S. without the applicant and if the applicant's spouse or child went abroad for two years. In other words, exceptional hardship must be demonstrated if the spouse or child stayed in the U.S. or went abroad.

**Note:**

For cases involving hardship to a spouse or child, the applicant must also submit documentary evidence of qualifying relationship(s).

(d) Written Statement of the Applicant.

The applicant's signed statement is an integral part of the I-612 application. In cases based upon exceptional

hardship claims, the statement must specify how the applicant's compliance with the foreign residence would impose exceptional hardship on the United States citizen or lawful permanent resident spouse or child. Where relevant to the allegations of hardship, you may require supporting evidence, such as a physician's diagnosis and prognosis, or affidavits from the spouse's dependent parents.

An application based upon a claim that return to the country of nationality or last foreign residence would subject the applicant to persecution on account of race, religion, or political opinion must include a detailed statement of the basis for the applicant's belief that he or she would be persecuted. Where appropriate, affidavits by persons with direct knowledge of the alleged facts should be requested. If after reviewing the evidence, you still have reason to question the validity of the persecution claim, you may request an advisory opinion from the Waiver Review Division. Additional information about the state of human rights (as well as some economic conditions) in the applicant's country can be obtained from the current edition of the *Country Reports on Human Rights Practices*, published annually by the Department of State.

You may request additional documentation which you think necessary for a proper evaluation of a hardship or persecution claim; but in no case can such evidence be accepted as a substitute for the applicant's own signed statement. If that statement is lacking, the application must be returned to the applicant. If the applicant does not comply with the request by submitting a signed statement, the application must be rejected as deficient.

(e) Consultation with the United States Public Health Service.

When a medical officer of the USPHS has been consulted (telephonically or in writing) in connection with an "exceptional hardship" case, you should record the advice or opinion in memorandum for the file, unless the advice has been received in writing.

The USPHS has advised that it is unable to provide expert advice concerning the availability of facilities for medical treatment abroad. Therefore, in cases where it is alleged that a serious physical or mental condition, such as a malignancy requiring extensive surgery, requires the continuing treatment of the applicant's spouse or child in the United States, you should make a determination without consulting USPHS solely for that issue. However, USPHS may be consulted about other matters, such as whether specified dangerous diseases are endemic in a certain country (see, e.g., *Matter of Ambe*, 13 I&N Dec. 3 (District Director 1968)).

(f) Processing of the I-613.

When you send the case to the Waiver Review Division for their recommendation, you must complete an I-613 and instruct the clerical section to make copies of the I-612 and supporting documentation to be sent with the I-613. Where you are persuaded that the evidence supports a finding of exceptional hardship or persecution, you should summarize the pertinent information on Form I-613 (Request for Waiver Review Division Recommendation). After its endorsement by the Director, forward the first four pages (with out removing the carbons) together with the I- 612 to the Waiver Review Division. The last carbon copy should be retained with supporting documents in the file until the original has been returned by the Waiver Review Division. At that time, the endorsed original I-613 should replace the carbon copy in the file, and the returned "Public Information" copies should be distributed to the public reading room.

The spouse of a principal applicant will be included in the I-613 request for Waiver Review Division recommendation if he or she: (1) has been in J-2 status during a time when the principal applicant was subject to the foreign resident requirement; and (2) has not been in a separate J-1 program subject to the foreign residence requirement. Examination of a copy of the front and back of the spouse's I-94 will aid you in making that determination. If J-2 children are also involved, you will endorse the appropriate block of the I-613 to designate USCIS as the "interested agency" recommending their inclusion in the waiver request.

If the applicant cannot establish a prima facie case of hardship or persecution through the documentary evidence submitted, you should deny the application. This is done on an I-292 since the applicant has appeal rights in this case.

If the Waiver Review Division recommends approval, the application can be approved. Use standard approval letters for I-612. You cannot approve an I-612 without a favorable recommendation from the Waiver Review Division. The applicant gets only a letter. The application stays in the file.

If the Waiver Review Division does not recommend approval, you should deny the application. There is no appeal right from this type of denial because the unfavorable recommendation came from Waiver Review Division, not from this agency.

(g) Other Consultation with the Waiver Review Division.

Apart from the I-613 context, you may also consult with the Waiver Review Division in cases where that

agency has better access to information necessary for your adjudication, or where the Waiver Review Division has made a recommendation which appears to be based upon faulty information (for example, where an applicant has omitted to mention a previous J-1 program funded by the government). For such consultations you should use regular USCIS stationery, rather than the I-613.

(h) Adjudication of the 212(e) Waiver Application.

Under the Act, approval or denial of section 212(e) waiver application filed by an eligible applicant is a matter of Service discretion. In the case of I-612 applications, the law specifically requires not only prima facie eligibility but also a finding that the applicant's admission to the United States is "in the public interest." If the applicant cannot establish a prima facie case of hardship or persecution through the documentary evidence submitted, you should deny the application. You must prepare an I-292 since the applicant has appeal rights in this type of case. All cases generally rely on the recommendation of the Waiver Review Division and the interested federal government agency, as appropriate. If that recommendation appears to rely on faulty information, it is preferable to invite the Waiver Review Division to reconsider its recommendation, rather than deny the application for such reasons. You cannot approve an I-612 without a favorable recommendation from the Waiver Review Division.

(i) Approval Action.

If you decide that this agency should concur in a Waiver Review Division recommendation that the waiver be granted, then a notice of approval must be prepared by selecting the appropriate approval screen in CLAIMS, and issued to the applicant and the applicant's legal representative. Send copies to the Waiver Review Division and to the interested government or government agency (if applicable).

(j) Denial of the Waiver Application.

If the application to be denied is subject to appeal, Form I-292 must be used for the notice of denial. For denial of applications based on hardship claims, it is important to clearly explain why the alleged hardship evidence does not meet the exceptional hardship standard of the statute. In section 212(e) waiver denials not subject to appeal (e.g., a denial based on lack of a favorable recommendation from the Waiver Review Division) the denial order does **not** require the I-292, but simply ordinary stationery.

If appropriate, the denial notice should refer to the options of seeking a waiver based upon a statement of "no objection" from the applicant's country of nationality or last foreign residence (except in the case of a

foreign medical graduate described in section 212(e)(iii)), or the recommendation of an interested agency of the United States Government.

It is permissible to deny an I-612 application without consultation with the Waiver Review Division. However, if the Director of USCIS sustains an appeal from such a denial and remands the case to the local office or Service Center for compliance, you must then obtain a recommendation from the Waiver Review Division before adjudication can be completed. If the Waiver Review Division recommends that the application **not** be approved, then the application **must be denied again** without appeal.

(1) Precedent Decisions Relating to Exceptional Hardship.

The foreign residence requirement may be waived if it is determined that the exchange visitor's departure would cause exceptional hardship to his or her U.S. citizen or lawful permanent resident spouse or child. The exchange visitor's admission must also be found to be in the public interest. The Act does not define the term "exceptional hardship." There is, however, an extensive history of case law pertaining to hardship in the context of immigration law from which general principles can be drawn. First, the claimed exceptional hardship must be considered for the qualifying spouse and for any qualifying children. Second, an exceptional hardship claim must be considered under the circumstances of both relocation abroad and separation on the qualifying spouse or children. Third, while a determination of exceptional hardship is not fixed or inflexible, a number of common factors may be considered in examining a claim of exceptional hardship. No single factor would normally be determinative, but all relevant factors should be considered in the aggregate in order to render a determination of exceptional hardship. Exceptional hardship to the qualifying family members must be that which is beyond the normal hardship expected from a temporary relocation or separation.

· *Matter of Anderson* , 16 I&N Dec. 596 (BIA 1978). Factors which the BIA have found to be appropriate for consideration in the context of applications for suspension of deportation in which an alien must show extreme hardship include, but are not limited to: the subject's age; family ties in the United States and abroad; length of residence in the United States; health condition; political and economic conditions in the home country; financial status; occupation and employment prospects; immigration history; and position in the community.

· *Matter of Ambe* , 13 I&N Dec. 3 (DD 1968). Exceptional hardship was found where the USC child was allergic to the smallpox vaccine, and smallpox was endemic to the home country. Waivers were accordingly granted under section 212(e).

· *Matter of Vicedo* , 13 I&N Dec. 33 (DD 1968). Hardship was found for purposes of a section 212(e)

waiver where evidence showed that the two USC children would be deprived of the love and care of their parents, and the father could not pay transportation to the Philippines or maintain the family there.

- *Matter of Lai* , 13 I&N Dec. 188 (RC 1969). Application was denied where the minor USC child would suffer only the normal hardship of language difficulty, lesser educational opportunities, and hardship resulting from the parent's reduced earnings in Taiwan. Exceptional hardship was, therefore, not found for purposes of section 212(e).

- *Matter of Coffman* , 13 I&N Dec. 206 (Dep. Assoc Comm'r 1969). A liberal attitude was found permissible where the applicant's participation was to impart skills to American teachers, and where she had minimal time remaining in which to complete the two year foreign residence requirement.

- *Matter of Amin* , 13 I&N Dec. 209 (RC 1969). Exceptional hardship was not found where the mother's skin condition did not in the past impair her ability to care for her USC children, and treatment for the condition was available in her home country.

- *Matter of Savetamal* , 13 I&N Dec. 249 (RC 1969) . Hardship was found for purposes of a section 212(e) waiver where the LPR spouse would be forced to give up an established medical career, or maintain two households, causing the USC child to be deprived of the father's affection and guidance.

- *Matter of Ibarra* , 13 I&N Dec. 277 (RC 1968). Hardship was found where the pregnant USC spouse would suffer a disruption of her education and plans for a career, and where residence in the Philippines would be detrimental to her health.

- *Matter of Lejman* , 13 I&N Dec. 379 (RC 1969). Hardship to the USC was child found because a Jewish background would subject the child to social and economic persecution in Poland. A waiver under section 212(e) was accordingly granted.

- *Matter of Gupta* , 13 I&N Dec. 477 (Dep. Assoc. Comm'r 1970). Exceptional hardship was found where a prior visit of the USC child to India resulted in medical disorders due to climatic conditions and the unavailability of foods to which the child was accustomed.

#### 45.4 Waiver Based on a Claim of Persecution.

(a) Disposition of Improperly Filed Applications.

Unless an I-612 has been submitted to support a waiver application based upon a hardship or persecution claim, it should be rejected with appropriate instructions to the applicant. If the I-612 application does not allege that return to the country of nationality or last foreign residence would subject the applicant to persecution on account of race, religion, or political opinion, you should return the application and give the applicant an opportunity to resubmit it with the appropriate information requested. If the application is returned without the above information indicated, deny for failure to establish the relationship or persecution necessary to be considered for the specific waiver.

**Note:**

An alien may have erroneously submitted an I-612 requesting a waiver based on an extreme hardship claim and submitted documentation to establish persecution, or vice versa. In such case, return the application to the alien with a request that he or she either correct the basis for the waiver request indicated in block 5 or submit documentation supporting the basis indicated. Also, an alien may have erroneously submitted an I-612 in conjunction with a waiver request based on a "no objection" statement or on the sponsorship of a U.S. Government agency. Such requests should be rejected with instructions to submit the requests directly to the Waiver Review Division of the United States Department of State, Washington, D.C. 20547, for that agency's recommendation to the USCIS.

While certain aspects of the persecution provision under section 212(e) of the Act parallel the asylum requirements in section 208 of the Act, they differ in many respects. A waiver application under section 212(e) of the Act based on persecution is unrelated to an asylum application under section 208 of the Act. The most notable difference between the 212(e) waiver provisions based on persecution and the requirements under section 208 of the Act for asylum are the reasons for the claimed persecution and whether the applicant has firmly resettled in a third country. Among other things, the asylum provisions of section 208 of the Act require the applicant to establish persecution on account of race, religion, political opinion, nationality, or membership in a particular social group. Section 208 also requires an alien to show that he or she has not firmly resettled in another country. The waiver provisions of section 212(e) of the Act, however, limit claims of persecution to race, religion, or political opinion, and do not require the applicant to establish that he or she has not firmly resettled in a third country. In addition, a waiver application under section 212(e) of the Act requires the applicant to establish that he or she would be subject to persecution upon a return to the home country, whereas an applicant under section 208 of the Act must only establish a well-founded fear of persecution. This is a higher standard than that applied to asylum claims under section 208 of the Act.

## 45.5 Waiver Based on a “No Objection” Letter.

### (a) Filing.

The foreign residence requirement may be waived based on a formal written statement from the exchange visitor’s home country that it consents to a waiver of the two-year foreign residence requirement. This official letter is commonly known as a “no objection” letter. A “no objection” letter must be sent directly from the exchange visitor’s home country to the Department of State’s Waiver Review Division through official diplomatic channels. A “no objection” letter submitted directly by the exchange visitor should be rejected with instructions on the proper channels for submission. A “no objection” letter is generally insufficient to warrant a favorable recommendation from the Secretary of State when U.S. government funding was involved in the exchange program. Section 212(e)(iii) of the Act further prohibits waivers based on “no objection” letters in most cases of J-1 foreign medical graduates (FMG) whose exchange programs are for the purpose of pursuing graduate medical education or training.

#### **Note 1:**

Section 212(e) waiver cases based upon these grounds are considered to be filed with USCIS only on receipt of a Waiver Review Division recommendation. Preliminary requests from interested United States Government agencies or the government of the exchange visitor's country should be rejected and the applicant referred to the Waiver Review Division.

#### **Note 2:**

A “no objection” case is the only situation where the alien is allowed to file an adjustment application concurrently with waiver request.

### (b) Adjudication.

Upon receipt of the “no objection” letter and the Waiver Review Division recommendation, review the case to ensure that documentation is in order and that the waiver is appropriate for the alien’s circumstances (i.e., ensure that the alien did not come to the U.S. as an exchange visitor, or later acquire such status, in order to receive graduate medical training or education). If so, you may grant the waiver.

Since you should only receive a request for a “no objection” waiver in conjunction with another

application (e.g., an application for adjustment of status), you may indicate that the waiver is granted by annotating the approval of the other application (e.g., the Form I-181).

**Note:**

In the case of a medical exchange visitor who has applied for a waiver based on grounds other than hardship or persecution, you must require the date of the applicant's entry into the program in order to verify eligibility for the waiver. In Accordance with 8 CFR 212.7(c)(3), applicants who entered or acquired such status prior to January 10, 1977, and were not then subject to the foreign residence requirement, may still be exempted from the foreign residence requirement.

(c) Precedent Decisions.

· *Matter of Musharraf*, 17 I&N Dec. 462 (BIA 1980). A “no objection” letter does not constitute a “waiver” within the meaning of section 212(e) of the Act. Also, an exchange visitor who is coming to the country to practice in the medical profession and is inadmissible because he or she graduated from a medical school which is not “accredited” under the Act (and does not qualify for an exception) is precluded from adjusting status despite the grant of a 212(e) waiver.

#### **45.6 Waiver Based on a Request by a U.S. Government Agency, Not Involving a Foreign Medical Graduate.**

Under the Federal program, the foreign residence requirement may be waived based on an offer of full-time employment sponsored by an interested U.S. Government agency (IGA). The alien may be employed directly by the IGA or by a public or private employer if the primary work of the alien directly supports the mission of the IGA. The IGA must obtain a favorable recommendation from the Waiver Review Division. The IGA must certify that the waiver would directly benefit its mission, or programs of significant interest to its mission, and certify that the employment benefits the public interest. For example, a branch of the United States military could sponsor a waiver for an alien engineer to be directly employed by that branch of the military or to be employed by a private firm contracted to support a program of that branch of the military.

## **45.7 Waiver for a Foreign Medical Graduate Requested by an Interested Federal or State Agency for Employment with a Designated Health Facility or Health Care Organization, or Federal Agency Involved in Medical Research or Training under Section 214(l) of the Act.**

### (a) Statutory Amendments Contained in IIRIRA.

Section 212(e) of the Act, as amended by Section 622 of IIRIRA, provides that foreign medical graduates granted waivers of the 2-year foreign residence requirement under the Federal program are subject to specific terms and conditions. Former section 214(k) of the Act, which already specified the terms and conditions imposed on waivers of the 2-year foreign residence requirement based on a request by a State Department of Public Health (State Program), was also amended by Section 622 of IIRIRA to include the terms and conditions imposed on foreign medical graduates who are granted waivers under the federal program.

#### **Note:**

Prior amendments had inadvertently left the Immigration and Nationality Act with two sections designated “section 214(k)”. Therefore, in addition to amending sections 212(e) and 214(k) of the Act, IIRIRA also redesignated section 214(k) of the Act as section 214(l) of the Act. This redesignation unintentionally resulted in two different sections 214(l) of the Act, as section 625 of IIRIRA also created a new section 214(l) of the Act to impose terms and conditions on certain F-1 academic students. The latter section 212(l) was subsequently redesignated as subsection “(m)” by section 107(e) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No 106-386, 114 Stat. 1464 (Oct. 28, 2000).

### (b) Terms and Conditions of the Waiver.

The restrictions on the grant of the waiver to foreign medical graduates under section 212(e) of the Act, as detailed in section 214(l) of the Act, are as follows:

- The foreign medical graduate must submit a “no objection” statement from the government of his or her country of nationality or last residence abroad (home country) unless the foreign medical graduate has no contractual obligation to return to his or her home country upon completion of the graduate medical research or training.

- Where the request is by an interested State agency, the grant of the waiver must not cause the number of waivers allotted for that State for that fiscal year to exceed 20. Note: There is no limit on the number of waivers that may be granted to foreign medical graduates under the Federal program.

- The foreign medical graduate must agree to practice medicine at the health care facility named in the waiver application for at least three years, and only in HHS- designated shortage areas. There are two exceptions to this requirement:

- If the United States Department of Veteran's Affairs (VA) requests the waiver, the foreign medical graduate must practice medicine with the VA for at least three years, but does not need to do so in an HHS- designated shortage area.

- If an interested Federal agency requests the waiver so that the agency can employ the foreign medical graduate full-time in medical research or training, the foreign medical graduate may fulfill his or her obligation by working for the agency for at least three years in that capacity, rather than by practicing medicine in an HHS-designated shortage area.

- The foreign medical graduate must demonstrate a bona fide offer of full-time employment at a health care facility or organization, and such employment must have been determined to have been in the public interest.

- The foreign medical graduate must agree to fulfill the three-year obligation as an H- 1B nonimmigrant.

- The foreign medical graduate must agree to start employment within 90 days of receipt of waiver approval.

- A foreign medical graduate who does not fulfill the three-year obligation for the health care facility or organization named in the waiver application becomes subject once again to the two-year foreign residence requirement, unless USCIS finds that extenuating circumstances exist, such as closure of the facility or hardship to the alien that would justify a shorter period of employment. The foreign medical graduate will, however, be required to serve the balance of the three-year period with another qualifying health care facility or organization.

· A foreign medical graduate who obtains a waiver under section 214(l) of the Act may not obtain permanent residence, whether by an immigrant visa or by adjustment of status, until the foreign medical graduate has satisfied the service obligation that the foreign medical graduate agreed to accept.

**Note:**

To prevent claims that a foreign medical graduate was unaware of the obligations that accompany a waiver under section 214(l) of the Act, an addendum is affixed to the I-797 approval notice which specifies the terms and conditions that accompany the waiver. The addendum identifies whether a State Department of Public Health or an Interested U.S. Government Agency made the request for a waiver, while the applicable public law number is listed on the Form I-797 itself.

(c) Effective Date.

The IIRIRA amendments to section 212(e) of the Act became effective on September 30, 1996. The reasoning in *Matter of Soriano*, 21 I&N Dec. 516 (BIA 1996; AG 1997), compels USCIS to adjudicate an application for the waiver according to the law in effect at the time of adjudication. Therefore, foreign medical graduates who were granted a waiver of the two-year foreign residence requirement by the Service or USCIS on or after September 30, 1996, are subject to the terms and conditions of section 214(l) of the Act, regardless of the date the waiver request was initiated by the interested Federal agency or State Department of Public Health. **These foreign medical graduates may not apply for any other change of nonimmigrant status or for status as a lawful permanent resident (including the Diversity Visa (DV) lottery program), unless the terms and conditions of section 214(l) of the Act have been met.**

(d) Ability to Change Status From J-1 to H-1B.

Section 214(l)(2)(A) of the Act, as amended by section 622 of IIRIRA, allows a change of status from J-1 to H-1B for those foreign medical graduates who were granted waivers of the 2-year foreign requirement under both the state and federal programs. The foreign medical graduate, however, must be otherwise eligible to apply for a change of nonimmigrant status under section 248 of the Act. This includes the requirement of timely filing of the change of status application. However, the statutory ineligibility for change of status under section 248 continues to apply to foreign medical graduates who obtain a section 212(e) waiver based on exceptional hardship or persecution (i.e. under section 212(e) itself, rather than section 214(l)).

(e) Foreign Medical Graduates Who Again Become Subject to the Two-Year Foreign Residence Requirement.

As noted above, a foreign medical graduate who obtains a waiver under section 214(l) may not obtain permanent residence until the foreign medical graduate has completed his or her service obligation. A waiver under section 214(l), moreover, is void if the foreign medical graduate does not meet this requirement. Under section 214(l)(3)(A) of the Act, a foreign medical graduate who does not practice medicine for three years for the health care facility or organization named in the waiver application again becomes subject to the two-year foreign residence requirement. The alien may, however, request that the early termination of employment with the named health care facility be excused based on “extenuating circumstances,” which can include hardship or closure of the health care facility. See section 214(l)(1)(c)(ii) of the Act. As part of the request, the alien must submit an employment contract with another health care facility in an HHS-designated shortage area for the balance of the 3 years. If the interested Federal agency was the VA, the alien must submit an employment contract with another VA facility for the balance of the three years. 8 CFR 212.7(c)(9)(iv) states that under no circumstances will a foreign medical graduate be eligible to apply for 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 health care facility located in an HHS-designated shortage area.

Under section 214(l)(3)(B) of the Act, the foreign medical graduate also once again becomes subject to the two-year foreign residence requirement if, at any time during the three-year period following approval of the waiver, his or her employment ceases to benefit the public interest.

(f) Notifications Concerning Changes in Employment.

8 CFR 212.7(c)(9)(vi) provides that foreign medical graduates who have been granted a waiver of the two-year foreign residence requirement under the State program, and who subsequently apply for and receive H-1B status, must notify the USCIS of any material change in the terms and conditions of the H-1B employment during the three-year period following waiver approval. Regulations implementing these waivers for foreign medical graduates under the Federal program are under development. Until such regulations are published, the procedures in 8 CFR 212.7(c)(9)(vi) should be followed for foreign medical graduates who have been granted waivers under the Federal program and are requesting a change in employment due to extenuating circumstances. However, when the interested Federal agency is the VA, the alien is only required to establish that he or she will work for another VA facility for the balance of the three-year period.

In exercising its statutory discretion to excuse the foreign medical graduate's failure to complete the three-

year contract with the health care facility named in the waiver application, the USCIS may consult with the Waiver Review Division, the interested Federal agency or State Department of Public Health that initiated the waiver request, or the health care facility named in the waiver application. Prior to affirming the underlying section 212(e) waiver and approving the new H-1B petition, Bureau officer s should, as a matter of course, contact the Waiver Review Division so that the sponsoring Federal agency or State Health Department may be consulted.

**Appendix 45-1 Addendum to Section 212(e) Waiver Approvals.  
ADDENDUM TO SECTION 212(e) WAIVERS**

**GRANTED PURSUANT TO PUB. L. 103-416 AND PUB. L. 104-208**

Because of your current or prior J-1 status (J-2 for your spouse and children) as a foreign medical graduate, you are subject to the 2-year foreign residence requirement established under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(e). On the basis of a waiver request made under

**Pub. L. 103-416 (by a State Department of Public Health) OR**

**Pub. L. 104-208 (by an interested U.S. Government Agency) ,**

the United States Information Agency has recommended the waiving of the foreign residence requirement in your case.

Upon consideration of the evidence of record, and on the basis of the favorable USIA recommendation, the Service grants you and your J-2 dependent family members who are subject to the 2-year foreign residence requirement a waiver of section 212(e) of the Act. If any member of your immediate family was ever subject to the 2-year foreign residence requirement because of his or her own current or prior nonimmigrant status as an exchange alien (independent of you), that family member will need to apply for a separate waiver in his or her own behalf to remove that obligation.

Your approved waiver is subject to the following terms and conditions specified in section 214(1) of the Act:

1. Within 90 days of the date of this notice you must commence employment with the health care facility named in the request submitted to USIA within 90 days.

A. Unless paragraph B or C applies to your case, you must practice medicine at this health care facility for at least 3 years. During this 3-year period, you may only practice medicine in geographic areas designated by the Secretary of Health and Human Services as having a shortage of health care professionals.

B. If the United States Department of Veterans' Affairs requested the waiver in your case, you must work for the VA for at least 3 years, but you are not limited to HHS-designated shortage areas.

C. If a Federal agency requested the waiver so that the Federal Agency may employ you full-time in

medical research or training, you must work for that agency in medical research or training for at least 3 years.

2. You may complete the required 3-year period of employment only as an H-1B nonimmigrant. You may not change to another nonimmigrant classification, apply for adjustment of status to lawful permanent resident, or apply for an immigrant visa, unless you have fulfilled the 3-year employment contract with the health care facility named above.

3. **IF YOU DO NOT COMPLY WITH THE TERMS AND CONDITIONS IMPOSED ON THIS WAIVER, YOU AND YOUR IMMEDIATE FAMILY MEMBERS WHO WERE INCLUDED IN THE WAIVER APPLICATION WILL AGAIN BECOME SUBJECT TO THE 2-YEAR FOREIGN RESIDENCE REQUIREMENT UNDER SECTION 212(e) OF THE ACT.**