

## **9 FAM 40.202 Notes**

*(TL:VISA-342; 01-08-2001)*

### **9 FAM 40.202 N1 Aliens Subject to INA 212(e)**

*(TL:VISA-155; 10-18-1996)*

a. Certain J-1 exchange visitors are subject to the 2-year home country residence and physical presence requirement of INA 212(e). These exchange visitors must reside and be physically present in their country of nationality or last place of residence abroad 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 or be admitted to the United States under the H or L nonimmigrant category, or acquire permanent residence status until they have complied with the foreign residency 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; 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**

*(TL:VISA-1; 08-30-1987)*

A former exchange visitor who is subject to the requirements of INA 212(e) and who applies for 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**

*(TL:VISA-1; 08-30-1987)*

Residence for 2 years in a country other than the country of nationality or last legal residence 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**

*(TL:VISA-1; 08-30-1987)*

In determining whether a former exchange visitor has resided and been physically present in the country of nationality or last residence for an aggregate of at least 2 years following departure from the United States, all time spent in such country is cumulative and need not be continuous. However, if the exchange visitor returns to the United States on another J-1 visa in the interim and participates in a new program subject to the requirements of INA 212(e) before satisfying the 2-year residency requirement, the alien would be required to fulfill another full 2 years' residence in the alien's country of nationality or last legal residence after completion of the second program.

## **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**

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

*(TL:VISA-243; 03-13-2001)*

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 that it has no objection to a waiver in the alien's case should apply directly to that government for such a statement. If originating in the alien's country, the statement must be transmitted through official channels, that is, from the country's foreign office to the U.S. diplomatic mission in the country. The consular officer at the mission should mail the statement with a short covering memorandum directly to:

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

**9 FAM 40.202 N2.1-2 Diplomatic Missions in United States May Issue Statement**

*(TL:VISA-243; 03-13-2001)*

Diplomatic missions may have the necessary authority to issue "no objection" statements on behalf of the governments concerned. In such case, the mission can send the statement directly to:

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

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

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

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 USIA 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**

*(TL:VISA-243; 03-13-2001)*

To enable the Department to process the case expeditiously, the "no objection" statement should contain the following information:

- (1) Full name of exchange visitor and date and place of birth;
- (2) Date of entry into the United States. If still in the United States, the present address of the exchange visitor should be included. If not in the U.S., the last address prior to departure from the United States should be given;
- (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**

*(TL:VISA-1; 08-30-1987)*

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. In cases which involve U.S. Government financing, for example, the adverse effects which such recommendations would have on the exchange program must be carefully considered before a favorable recommendation could be made to INS for final determination.

**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**

*(TL:VISA-1; 08-30-1987)*

INS acts as the requesting agency for waivers of the 2-year foreign residence requirement in cases in which INS determines that 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. Consular officers receiving inquiries regarding the possibility of obtaining waivers under INA 212(e) on hardship grounds should advise the applicant to communicate with the INS office having jurisdiction over the exchange visitor's last place of residence in the United States. Applications for waivers on the basis of exceptional hardship must be made to INS on Form I-612, Application for Waiver of the Foreign Residence Requirement, under INA 212(e).

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

(TL:VISA-342; 01-08-2002)

A waiver may be based on a finding by INS that the alien is unable to return to the country of nationality or last 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 INS on Form I-612, *Application for Waiver of the Foreign Residence of Section 212(e) of the Immigration and Nationality Act, as Amended* which may be obtained from INS district offices in the United States.

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

(TL:VISA-243; 03-13-2001)

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 to request the agency, or to suggest that the institution desiring the alien's services request the agency, to submit a statement regarding the need for the alien's services directly to:

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

b. If the request is approved by the Department, it will be forwarded to the INS office having jurisdiction over the last place of residence in the United States of the former exchange visitor. The INS 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**

(TL:VISA-243; 03-13-2001)

a. The Immigration and Nationality Technical Corrections Act of 1994 (Pub. L. 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.

b. Section 212(e)(iii) permits State Departments of Public Health, or their equivalent, to submit waiver requests for foreign medical graduates:

(1) Who were admitted or acquired J-1 status before June 1, 1996 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 named in the waiver application; and

(4) Who the Department of Public Health, or its equivalent, has requested the Director of the Department to recommend the waiver; and the Director of the Department submits a favorable recommendation to INS.

The approval of such waiver must not exceed the number of waivers permitted under the Act.

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

*(TL:VISA-155; 10-18-1996)*

a. If a foreign medical graduate fails to meet the terms and conditions imposed by the waiver under INA 214(k), the alien will again become subject to the 2-year foreign residency requirement.

b. In extenuating circumstances, INS 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 an HHS-designated shortage area.

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

*(TL:VISA-155; 10-18-1996)*

A foreign medical graduate who seeks to have early termination of employment excused due to extenuating circumstances shall submit:

(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.

## **9 FAM 40.202 N3 Applying INA 212(e) to Aliens Issued J-2 Visas**

*(TL:VISA-243; 03-13-2001)*

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, following departure from the United States, 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 return to the United States as an immigrant or as an H, K, or L nonimmigrant prior to the completion of the foreign residence requirement, a full report of the circumstances surrounding the case should be submitted by Memorandum, Subject: Educational Exchange - Former J-2 Alien directly to:

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

## **9 FAM 40.202 N4 Waiver Review Responsibility in USIA**

*(TL:VISA-243; 03-13-2001)*

The office responsible for INA 212(e) waivers may be contacted by writing or calling:

CAVO/L/W, Visa Services  
U.S. Department of State  
2401 E Street, NW (SA-1)  
Washington, D.C. 20522-0106  
(202) 663-1291