

22.6 National Interest Waivers for Physicians Serving in Medically Underserved Areas or at Department of Veterans Affairs Facilities.

(a) General. (1) Background. On September 6, 2000, the Service published regulations (See 65 FR 53889) implementing the above noted 1999 amendment to the Act at section 203(b)(2). (The amendatory language was included in the Nursing Relief for Disadvantaged Areas Act of 1999, enacted on November 12, 1999.) This amendment codifies provisions mandating the granting of a national interest waiver to a second-preference medical doctor who commits to practice medicine for an aggregate of 5 years in a medically underserved area of the United States or at Department of Veterans Affairs (VA) facilities. Officers are urged to consult the supplementary information portion of the interim rule for additional background information and guidance. Officers should also remember that physicians applying for this provision are not relieved from any of the other requirements for EB-2 classification, other than that of the labor certification. In particular, physicians needing a waiver of the J-1 residency requirement must still obtain such waivers.

(b) Guidelines for Adjudication. (1) Who is eligible? Service regulations at 8 CFR 204.12(a) establish the basic eligibility requirements for the alien physician, namely:

- that a petition has been filed under section 203(b)(2) of the Act, accompanied by the national interest waiver request;
- that the physician agrees to work in an underserved area or at a VA facility for an aggregate of 5 years (not counting any time in J-1 status), or, if the petition was filed prior to 11/1/98 and was pending as of 11/12/99, an aggregate of 3 years (not counting any time in J-1 status);
- that the physician has 6 years to complete the 5 years of aggregate service, (or 4 years to complete the 3 years of aggregate service) and;
- that another Federal agency or a State Department of Public Health has determined that the physician's work in the underserved area or VA facility is in the public interest.

Officers note that in designating areas of the country underserved, the Secretary of Health and Human Services (HHS) only addresses the shortage of family or general medicine physicians (those doctors practicing **pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry**). Currently, HHS has not designated any areas in the United States as underserved for medical specialists. Therefore, only doctors practicing in the above noted fields may take advantage of these new provisions. Note: Doctors serving at VA facilities are not bound by the HHS categories noted above. The VA may petition for doctors that specialize in various fields of medicine.

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(2) **Required Supplemental Evidence.** In addition to the evidence necessary to support the I-140 petition, physicians seeking a national interest waiver based on service in an underserved area or at a VA facility must submit supplemental documentation with the petition. A complete list and detailed explanation of this supplemental evidence is found at 8 CFR 204.12(c).

(3) **Effective Dates for Filing.** All physician petitions with accompanying national interest waiver requests based on service in a underserved area filed on or after November 12, 1999, shall be adjudicated in accordance with the regulatory provisions found at 8 CFR 204.12(d)(1). Petitions pending at a service center on November 12, 1999, shall also be adjudicated pursuant to the revised regulatory provisions. See 8 CFR 204.12(d)(2).

Officers must remember that the statutory amendment makes special provisions for petitions filing prior to the November 12, 1999, enactment date. In particular, regulations at 8 CFR 204.12(d)(3), (4), (5) provide specific instructions for officers regarding petitions that were:

- denied on or after November 12, 1999;
- filed prior to November 1, 1998 and pending as of November 12, 1999, and;
- filed and approved before November 12, 1999.

For petitions denied prior to November 12, 1999, the regulations at 8 CFR 204.12(d)(6) specify that petitioners may file a new petition accompanied by the newly codified national interest waiver evidence. Officers shall not accept any motions to reopen or reconsider previously denied cases on behalf of physicians requesting national interest waivers based on service in an underserved area.

(4) **Requests to Practice in a Different Underserved Area.** Service regulations allow a physician to practice medicine in a different underserved area, or a different VA facility. See 8 CFR 204.12(f) for a complete explanation of the procedure physicians must follow in order to request to practice medicine in a different underserved area.

The burden is on the petitioner to submit the needed evidence that will enable the officer to easily determine the amount of time that the physician was between employment in the different underserved areas or VA facilities. This is important since the physician must still complete the service requirement within 6 years, regardless of the amount of time he or she is between employment. Further discussion of this topic is noted below.

(5) **Protocol for Adjustment of Status.** The statutory amendment allows for a physician with an approved I-140 to immediately file an adjustment of status application. The Attorney General may not grant final approval of the adjustment application until the physician has served his or her 5 or 3 years of aggregate service in an underserved area or VA facility. See

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the Act at § 203(b)(2)(B)(ii)(II). This presents a unique situation for this group of aliens, in that they will not be maintaining a valid nonimmigrant status while serving the 5 or 3 years of aggregate medical service. These doctors will be in a period of stay authorized by the Attorney General with a pending adjustment application. Therefore, they are eligible for an Employment Authorization Document (EAD). (See 8 CFR 274a.12(c)(9)) Doctors should submit the application for an EAD (I-765) simultaneously with the adjustment application to insure timely processing. Officers should review the Supplementary Information section of the interim regulation for a complete discussion of this issue.

Service regulations have been amended at 8 CFR 245 with a new section 18. This section is presented in a question and answer format and should be reviewed prior to the adjudication of any physician's adjustment application. The question and answer format allows for an easy to understand explanation of the unique provisions applicable only to these particular physicians. Officers need to be aware of three unique processing differences for these physicians.

- **Delayed fingerprints.** Physicians will be scheduled for fingerprinting at an Application Support Center after the submission of evidence documenting the completion of the 5 or 3 years of aggregate service.
- **Delayed medical report.** Physicians will submit the required adjustment medical report with the evidence submitted at the conclusion of the period of aggregate medical service.
- **An initial submission of required evidence at the two-year anniversary of the alien physician's I-140 petition approval, documenting that the physician has been working at least one year of the two-year period.** See 8 CFR 245.18(g).

Upon receipt of the I-485, the Service Centers shall issue a supplemental document to the physician, outlining the tentative timetable for completing the adjustment process. In particular, this notice shall contain information reflecting the following:

- **The beginning date of the doctor's employment, based upon the doctor's status at the time of filing. (This will be the date on which the doctor will begin counting his or her 5 or 3-year requirement.)**
- **For physicians with a 5-year service requirement, the notice will specify an initial date of 2 years plus 120 days from the date the physician begins his or her qualifying employment for submission of evidence of at least one year of service.**
- **The last possible date (six years plus 120 days from the date the doctor begins his or her qualifying employment) that the doctor will be eligible to submit his or her evidence documenting the completion of 5 years of medical service in an underserved area or VA facility. (Physicians with a 3-year service requirement are not required to submit evidence until the end of the 3-year period.)**

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- Specific information directed at doctors who have moved from one underserved area to another and have experienced a break in medical service.
- A clear explanation that the burden is on the physician to submit evidence that will clearly and easily document the period of time the doctor was between employment, or explain any breaks in medical service.
- The evidence the doctor will need to submit that documents the required years of medical service; and
- Any additional documentation needed to meet eligibility for adjustment.

(6) Evidence for Finalizing the Adjustment of Status. Service regulations at 8 CFR 245.18(g)-(h) note the specific evidence that doctors must submit to document the performance of medical service in an underserved area or VA facility at the 2-year service anniversary mark and at the conclusion of the medical service. In addition, the doctor must submit the medical examination report as required in 8 CFR 245.5. The doctor must submit this final documentation within 120 days of completing the 5 or 3-years of medical service. The adjustment application cannot be approved without this set of required evidence.

The Service Center shall decide if the physician should be interviewed before finalizing the adjustment application. Officers shall follow the procedures found in 8 CFR 245.6 regarding waivers of the adjustment interview, and apply them accordingly to these cases.

Of prime concern to many of the doctors taking advantage of the national interest waiver for underserved areas provision is when the Service begins counting the physician's actual 5 or 3-year medical practice. The following outlines how the Service interprets the counting provisions.

- For an in-status nonimmigrant doctor, who has authorization to work, the service starts on the date of the notice approving the I-140. Example: An H-1B physician, whose current employer (in an underserved area) is also petitioning for the physician's service on an I-140. This physician will be able to continue his or her employment without any interruption. This physician may also file for an EAD simultaneously with the I-485. If the physician's H-1B status expires prior to the physician's completion of the service requirement, the physician will need to submit Form I-765 for an EAD.
- For a nonimmigrant doctor without work authorization, the service starts on the date of issuance of the EAD. Example: An H-1B physician, whose H-1B status expires while the I-140 is pending. Upon receipt of the approval notice, this physician will need to immediately file an adjustment application, accompanied by an EAD application. This physician may not legally work until the EAD is issued. Also, a J-1 nonimmigrant physician attempting to petition for this provision (without any service as an H-1B) will have his or her qualifying service begins on the date the Service issues the EAD.

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Officers must remember that any employment that the applicant engages in without authorization will not be counted toward their qualifying employment.

- For a nonimmigrant H-1B physician who was formerly a J-1 and obtained under section 214(l) of the Act a waiver of the foreign residence requirement, the service date starts on the date the physician changes from J-1 to H-1B status. See 8 CFR 245.18(e)(2).

(7) Non-compliance and Denials. Physicians not complying with the requirement to submit evidence of completed medical service within 120 days of completing the service requirement (both at the 2-year and 5-year marks for physicians with the 5-year requirement) will be served with a written notice of the intent to deny the adjustment application. If the physician fails to respond to the notice, the denial will be finalized and the 1-140 shall be revoked. Officers should follow the standard operating procedures concerning the denial/revocation for these particular petitions.

(8) Advanced Parole. Physicians with pending adjustment applications may apply for advanced parole if they desire to travel during the respective 3 or 5-year service requirement period, and if they no longer have a valid nonimmigrant visa. Regulations at 8 CFR 245.18 (k) note the procedures that alien physicians must follow in order to obtain a Travel Document.

(9) Service Center Protocol for Storing Files. Since the adjustment applications for these physicians will need to remain open and pending for over 3 or 5-years, the Service Centers will need to undertake special procedures for storing these A-files. In particular, each Center must dedicate a special area to house these files. The appropriate product line within each center will be responsible for insuring that all required notices to the applicant are processed in a timely fashion.

Officers with questions about this guidance or the provisions of the statutory amendment may contact HQ Staff

Chapter 23 Adjustment of status to lawful permanent resident.

- 23.1 Prior law and historical background.
- 23.2 General adjustment of status issues
- 23.3 Presumption of lawful admission and creation of record under 8 CFR 101
- 23.4 Adjustment of status under section 245 of the INA
- 23.5 Refugee and Asylee adjustment under section 209 of the INA.
- 23.6 Registration of lawful permanent residence under section 249 INA
- 23.7 Section 289 cases.

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