

## J-1 Visa Waivers

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## Agenda

- Why do I need to know about J-1 visa waivers and the two-year home residency requirement?
- Consider institutional policy/protocols
- What is the two-year home residency requirement?
- How do you know if your EV is subject to the two-year home residency requirement?
- J-1 waiver types and processes
- Strategies for waiver applications
- J-1 waivers and filing for change or adjustment of status
- When all else fails . . .

2

## Consider institutional policy/protocols

- Appreciate significance of completing the DS-2019 form correctly
- Essential for anyone who processes H-1B visas or permanent residency
- Aids in understanding why students want to be put on other visas, where possible
- Allows you to direct student to appropriate resources
- Helps ROs/AROs to understand role and why they cannot extend or transfer Js once a DOS waiver recommendation is issued

3

## Background on J-1 visa

- Several types of J-1 visa programs:
  - Trainee
  - Intern
  - Short-Term Scholar
  - Research Scholar/Visiting Professor
  - Student
  - Au Pair
  - Teacher
  - Specialist
  - Physician
  - Government Visitor
  - Camp Counselor
  - Special State Department Programs: e.g. Ireland

4

## What is the two-year home residency requirement?

- INA Section 212(e):  
<http://www.uscis.gov/propub/ProPubVAP.jsp?dockey=c9fef57852dc066cfe16a4cb816838a4>
- Home country or country of last residence
    - Country of citizenship or last permanent residence
    - As of time the EV entered in J-1 status
      - After acquired LPR status does not eliminate requirement
    - Look to DS-2019 or IAP-66 and also inquire with EV
  - Two years
    - Need not be continuous
    - Result: creative plans for compliance
  - Only prevents H or L visas or permanent residency
    - TN, O-1 and other nonimmigrant categories may still be options if EV otherwise qualifies

5

## How do you know if your EV is subject to the two-year home residency requirement?

- Who is subject?
  - J-1 and J-2 dependents
- How does one become subject?
  - Skills list
  - Government funding
    - Direct or indirect
    - U.S. or home country
  - Clinical medical training

6

## Reading the skills list

- **Where to find the skills list(s)?**
  - [http://travel.state.gov/visa/temp/types/types\\_4514.html](http://travel.state.gov/visa/temp/types/types_4514.html)
- **What skills list applies?**
  - **GENERAL RULE:** list in effect at time EV enters in J status
  - **EXCEPTION?:** State Department verbal assertion that EVs subject to prior skills lists no longer subject to 212(e) if *field* not on latest skills list; website says skills list in effect at time of initial J entry still governs, but where *country removed from skills list*, EV is retroactively not subject to 212(e)

7

## Government funding

- Don't rely on forms
  - Always ask EV about funding
  - Request copies of funding sources
- Types of funding:
  - U.S.: federal, not state or local
  - Home country
- Nature of funding:
  - Direct: typically annotated on DS-2019; some agencies have a special form that is completed & sent to DOS
  - Indirect: not as easy to pinpoint
    - indirect if the organization receives funding from an agency if that funding is not specifically earmarked to the EV's program?
    - Indirect if EV received a fellowship from home country government if paid directly to EV and home country did not track the funds to the specific J program?

8

## Clinical medical training

- Commonly used for U.S. medical residencies and fellowships
- Don't assume 212(e) applies just because a J-1 is a physician
  - Requires *clinical* medical training to attach
  - Lab researchers exempt

9

## How do you know if your EV is subject to the two-year home residency requirement?

- **Loophole:** Is it ever possible to lawfully obtain H status when subject to 212(e)?
  - Even when 212(e) attaches, what does it prevent?
    - Obtaining H/L "visa"—visa exempt Canadians
    - Does not prevent obtaining an H approval or extension of stay
  - **Caveat:**
    - Canadians: is lawful, temporary fix, but will not get around ultimate problem of inability to immigrate
    - Extensions: ethically questionable if COS impermissibly granted to provide initial H status

10

## How do you know if your EV is subject to the two-year home residency requirement?

- **Do:**
  - Request copies of all J-1 visas
  - Request copies of all Forms IAP-66 & DS-2019
    - Make sure you have all—begin a new program continuously through entire program stay
  - Request documentary evidence (passport pages & summary) of all trips to home country or country of last residence
    - Obtain evidence of permanent resident status
    - Review date LPR status obtained relative to start of exchange visitor program

11

## How do you know if your EV is subject to the two-year home residency requirement?

- **Don't:**
  - Assume EV not subject because EV is currently in H-1B status
  - Rely on the annotation on the J-1 visa
  - Don't rely on your EV's opinion as to whether he/she is subject
  - Fail to make your own, independent assessment of the documents to determine whether 212(e) attaches
  - Forget to consider whether EV complied with the requirement
  - Forget that J-2s may also be subject
    - J-2s subject if J-1 was subject
      - Rationale: took advantage of being in U.S. in J-2 status
      - J-2s released from requirement if J-1 obtains waiver
    - Divorce situation: difficult—still subject; may need to appeal to DOS, but not easy case

12

### How do you know if your EV is subject to the two-year home residency requirement?

- What if you still don't know or for strategy reasons need a definitive answer?
  - Advisory opinions
    - Can request from DOS: [http://travel.state.gov/visa/temp/info/info\\_1288.html](http://travel.state.gov/visa/temp/info/info_1288.html)
    - 6-8 weeks
    - Binding
    - Include:
      - Copies of all IAP-66/DS-2019 forms
      - Copies of all visas
      - Evidence of nationality/LPR status at time EV entered J status
      - Argument about why not subject plus any relevant evidence

13

### J-1 waiver types and processes

- What agency grants waivers?
  - Only USCIS can grant or revoke a waiver (I-612)
  - DOS: only has authority to recommend a waiver, but carries significant weight

14


### J-1 waiver types and processes

- Types:
  - No objection letter
  - IGA (Interested Government Agency)
    - DHHS
    - USDA
    - VA
    - Other Federal agencies
  - Conrad 30 (physicians)
    - Waiver transfers to complete 3 yr. service obligation
  - Hardship
  - Persecution

15

### J-1 waiver types and processes

- General process steps:
  - 1-DOS case number (DS-3035: new online version)
    - [http://travel.state.gov/visa/temp/info/info\\_1296.html](http://travel.state.gov/visa/temp/info/info_1296.html)
    - \$215 fee
  - 2-No objection letter and/or IGA waiver request
    - No objection letter required for skills list and foreign government funding cases (does country require repayment?)
    - No objection never sufficient for physicians or where U.S. government funding involved—add additional IGA support to influence favorable agency views but no guarantee
  - 3-DOS waiver recommendation
    - Automatically sent to USCIS; you do not file I-612 (except in hardship/persecution cases)
    - Approval 99.9% guaranteed
  - 4-USCIS I-612 approval



16

### J-1 waiver types and processes

- Other types of waivers:
  - Hardship waiver
    - Exceptional hardship to USC or LPR spouse or child
    - Hardship can be physical, emotional, career interruption, economic, etc.
    - Hardship must be established in both scenarios:
      - If entire family goes abroad
      - If J-1 returns home and family remains in U.S.
  - Persecution waiver
    - "would be subject to persecution on account of race, religion or political opinion"
    - higher standard than asylum

17

### Strategies for waiver application

- How do you know which type of waiver works for a particular situation?
  - When is a no objection letter enough?
    - Skills list only—YES, but what is country's policy?
    - Government funding—DEPENDS
      - Home country only: sufficient, but
        - What is their policy?
        - Do they require repayment before issuing letter?
      - U.S. government only: not enough
  - When is IGA sponsorship necessary?
    - Clinical physicians (except hardship/persecution)
    - U.S. government funding to tip balance (most cases; but see researcher case with NIH funding)

18

## J-1 waivers and filing for change or adjustment of status

- J-1s ineligible to change status if subject to 212(e) and has not complied/no waiver (INA 214(l)(2))
  - Limited to all NIV statuses except A & G
  - Scope of prohibition extends beyond H/L—applies to O & TN too
- Can file while DS-2019 is valid or within 30 days of expiration per regulatory grace period (8 CFR §214.2(j)(1)(ii))
- Can file for COS/AOS with DOS waiver recommendation—USCIS I-612 approval not required

19

## When all else fails...

- If waiver is not feasible, consider:
  - TN, O-1 and other non-H and non-L NIV as short-term options (does not eliminate 2-year requirement)
  - Remember: COS prohibited if 212(e) attaches
  - Complying with requirement
    - Offshore assignment (must be in home country/last residence)
      - Advise manager to inquire into tax & export license implications, even though no immigration implications
    - Chipping away at requirement over time

20

## When all else fails...

- As ROs/AROs, can you circumvent subjecting a student to 212(e) by putting them on another visa?
  - Regs and NAFSA manual on nondegree F-1s

21

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22