

Citizenship and Immigration Services Ombudsman

EMPLOYMENT ELIGIBILITY FOR DERIVATIVES OF CONRAD STATE 30 PROGRAM PHYSICIANS

March 24, 2014

The Conrad State 30 program helps address the shortage of qualified doctors in remote, rural and economically depressed areas. Under this program, foreign medical graduates receive a waiver of a two-year home-country residency requirement in exchange for three years of service in a medically underserved area. Over the years, the program's participants have provided high-quality medical advice and treatment to countless individuals in dire need. These recommendations seek to ensure that spouses of these foreign doctors are able to obtain work authorization, removing an impediment to the program fully meeting its goals.

The J-2 dependents of J-1 international medical graduates are subject to the principal's two-year home-country residence requirement. Upon issuance of the waiver, an overly restrictive interpretation of the relevant statutes and regulations by USCIS limits these J-2 dependents to changing only to H-4 status, with no employment authorization. Nor are they permitted to change to any other employment-authorized status – even if they are independently eligible to do so.

Denying employment authorization to dependent spouses has the potential to discourage talented international medical graduates from applying to the Conrad State 30 program. Many spouses have established careers of their own and have the education or skills to benefit the U.S. economy.

The following review evaluates this problem and provides recommendations to address it. We hope USCIS will implement much needed changes and ensure that overly restrictive application of immigration law is not dissuading well-trained physicians from taking positions in those communities most in need of medical services.

Sincerely,



Maria M. Odom
Citizenship and Immigration Services Ombudsman



**Homeland
Security**

RECOMMENDATIONS

The Ombudsman recommends that USCIS:

- 1) Publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for a Conrad State 30 program waiver to change to other employment-authorized nonimmigrant classifications; and
- 2) Issue new policy guidance clearly explaining that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 program waiver, may change to any nonimmigrant status for which they are otherwise qualified and eligible.

REASONS FOR THE RECOMMENDATIONS

- Stakeholders have reported that if their dependents (particularly their spouse) are unable to work, many J-1 medical doctors may reassess whether they wish to participate in the Conrad State 30 program.
- Without participation of foreign physicians in the Conrad State 30 Program, available medical care may be further limited in already underserved areas.

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The Citizenship and Immigration Services Ombudsman, established by the Homeland Security Act of 2002, provides independent analysis of problems encountered by individuals and employers interacting with U.S. Citizenship and Immigration Services, and proposes changes to mitigate those problems.

EXECUTIVE SUMMARY

U.S. Citizenship and Immigration Services (USCIS) narrowly interprets the statutes and regulations governing the Conrad State 30 program – which provides for a waiver of the two-year home-country residence requirement applicable to J-1 international medical graduates and their J-2 dependents – as prohibiting the J-2 dependents of participating J-1 medical doctors from changing to any nonimmigrant status except H-4. Accordingly, even where the J-2 dependent qualifies for such status in his/her own right, USCIS will not allow a change of status to another, employment-authorized nonimmigrant category. This legal interpretation and the ensuing USCIS business practices appear to be at odds with the legislative intent underlying the Conrad State 30 program; and they may have a chilling effect on Conrad State 30 applications, as well as placing an undue financial burden on international medical graduates and their families. Accordingly, the Citizenship and Immigration Services Ombudsman (Ombudsman) recommends that USCIS:

- 1) Publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for a Conrad State 30 program waiver to change to other employment-authorized nonimmigrant classifications; and**
- 2) Issue new policy guidance clearly explaining that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 program waiver, may change to any nonimmigrant status for which they are otherwise qualified and eligible.**

METHODOLOGY

In conducting this review, the Ombudsman met with stakeholders and USCIS Headquarters officials representing the Office of Chief Counsel, the Office of Policy and Strategy, and the Service Center Operations Directorate. These meetings involved detailed discussion of the regulations, policies, and procedures affecting Conrad State 30 participants and their dependents. The Ombudsman also reviewed case examples and USCIS Administrative Appeals Office decisions relating to J-2 requests for change of status. In response to a request for data from the Ombudsman, USCIS indicated that the agency does not track the number of J-2 dependents of J-1 foreign physicians approved for a Conrad State 30 waiver who apply to change status.

BACKGROUND

Legal and Regulatory Framework. Participation in the Conrad State 30 program – and the attendant waiver process – are governed by a number of statutory and regulatory provisions, which are dispersed throughout the Immigration and Nationality Act (INA) and the Code of Federal Regulations (CFR), and often contain provisions referring to other types of J-1 waivers. The INA and CFR sections most directly relevant to the issues discussed herein are summarized below:

- INA §212(e)(iii) makes J-1 international medical graduates ineligible to change or adjust status until they have been physically present in their country of citizenship or country of last residence for a minimum of two years after completion of their graduate medical education and training.
- INA §214(l) specifies the circumstances under which a Conrad State 30 waiver may be granted.
- INA §248(a)(2) imposes a general bar on changes of status by J-1 physicians, except for a change to H-1B pursuant to the terms of INA §214(l).
- INA §248(a)(3) provides that an alien subject to §212(e) may not change status unless he or she has first obtained a waiver.
- 8 CFR §212.7(c)(9) states, in relevant part, “If the Service approves a waiver request...the foreign medical graduate (and accompanying dependents) may apply for change of nonimmigrant status, from J-1 to H-1B and, in the case of dependents of such a foreign medical graduate, from J-2 to H-4.”

The foregoing is not intended as a comprehensive discussion of all the provisions of the INA and CFR that may be applicable to status changes requested by J-1 physicians and their dependents.

International Medical Graduates and Their Dependents. Each year international medical graduates enter the United States to obtain graduate medical education and training at accredited schools of medicine and teaching hospitals.¹ The “American Medical Association – Section on International Medical Graduates” estimates that physicians trained abroad comprise more than 30 percent of the workforce in U.S. primary care specialties, and close to 40 percent of the physician workforce in the inner-city segments of large metropolitan areas.² Referring to international medical graduates in the United States, Jordan Cohen, MD, former president of the Association of American Medical Colleges stated:

Indeed, examples abound of [international medical graduates] who have improved health care delivery, provided care to underserved populations, made ground-breaking discoveries in biomedical research, introduced new surgical techniques, pioneered innovative teaching methods, and more.³

International medical graduates often are admitted to the United States as J-1 Exchange Visitors.⁴ Pursuant to the INA, all J-1 medical doctors are obligated to return to their home country for a period of two years following the completion of graduate medical education and training, before they may apply to adjust or change status in the United States.⁵

¹ INA § 101(a)(15)(J). See USCIS Webpage, “Exchange Visitors,”

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=b69c83453d4a3210VgnVCM10000b92ca60aRCRD&vgnnextchannel=b69c83453d4a3210VgnVCM100000b92ca60aRCRD> (accessed Jan. 12, 2014), and U.S. Department of State Webpage, “J-1 Visa Exchange Visitor Program,” <http://j1visa.state.gov/> (accessed Jan. 12, 2014).

² American Medical Association, International Medical Graduates in American Medicine: Contemporary Challenges and Opportunities 5 (2013), p. 54.

³ American Medical Association, International Medical Graduates in American Medicine: Contemporary Challenges and Opportunities 5 (2013).

⁴ According to the Department of Homeland Security “Annual Flow Report: Nonimmigrant Admissions to the United States: 2012,” there were 421, 425 J-1 admissions to the United States in 2012. Office of Immigration Statistics, Annual Flow Report: Nonimmigrant Admissions to the United States: 2012 (August 2013), http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2012.pdf (accessed Feb. 24, 2014) (“Admissions” represent events and do not constitute a count of unique individuals who entered the United States in J-1 status. Only a small percentage of total J-1 status holders are International Medical Graduates.).

⁵ INA §§ 212(e), 214(l), and 248. A single exception exists, enabling J-1s subject to the home-country physical presence requirement to request a change to O-1 nonimmigrant status for Individuals with Extraordinary Ability or Achievement; neither the acquisition of an O-1 visa or admission to the United States in O-1 status eliminates the two-year home-country residence requirement. See INS

The spouses and unmarried children of J-1 physicians are typically admitted to the United States in J-2 nonimmigrant status.⁶ J-2 visa holders are eligible to apply for work authorization while residing in the United States.⁷ Accompanying J-2s are also required to return to their home-country for a period of two years once the J-1 physician has completed his/her graduate medical education and training.

The Conrad 30 State Program. For J-1 physicians willing to provide medical services in certain federally designated, underserved areas, Congress established a waiver of the two-year home-country physical presence requirement, referred to as the Conrad State 30 program.⁸ Under this program, each state may receive up to 30 international medical graduates each year. Since it was established in 1994, through the Conrad State 30 program, thousands of foreign physicians, who received graduate medical education and clinical training in the United States, have provided medical services to rural, inner city, and other medically underserved communities.⁹ The program has been utilized by every state in the country and has been reauthorized by Congress several times.¹⁰

Under the terms of the Conrad State 30 program, international medical graduates receive a waiver of the two-year home-residency requirement, in exchange for three years of service as a physician employed by a designated health care facility that provides clinical medical care in a federally designated area that has either a shortage of physicians or populations that are medically underserved.¹¹ In order to obtain the waiver, the J-1 physician must be hired by the designated facility and sponsored by the Department of Health of the state where the physician will be employed. Upon approval of a waiver application, J-1 physicians are permitted to change to H-1B nonimmigrant status and work for the designated health care facility.

Requests for Change of Status for the J-2 Dependents of Conrad State 30 Waiver Recipients. Prior to 2011, USCIS regularly approved requests for change of status for J-2s to employment-authorized nonimmigrant classifications, such as H-1B Specialty Occupation Worker, after the principal J-1 obtained a Conrad State 30 waiver. According to USCIS, subsequent to a revision of Form I-129, *Petition for a Nonimmigrant Worker* in September 2013,¹² the agency began collecting information pertaining to J-2s in order to determine whether the principal was subject to the two-year home-residency requirement. It then began denying change of status

Letter (Oct. 19, 2001), reproduced at 79 Int. Rel. 53-54 (January 07, 2002) and INS Letter (Aug. 30 1994) reproduced at 71 Int. Rel. 1376-77 (Oct. 7, 1994).

⁶ According to the Department of Homeland Security “Annual Flow Report: Nonimmigrant Admissions to the United States: 2012,” there were 53,807 J-2 admissions to the United States in 2012. Office of Immigration Statistics, Annual Flow Report: Nonimmigrant Admissions to the United States: 2012 (August 2013) (“Admissions” represent events and do not constitute a count of unique individuals who entered the United States in J-2 status. Only a small percentage of total J-2 status holders are the dependents of International Medical Graduates.).

http://www.dhs.gov/sites/default/files/publications/ois_ni_fr_2012.pdf (accessed Feb. 24, 2014).

⁷ 8 C.F.R. § 214.2(j)(1)(V). J-2s may obtain employment authorization, as long as their income is not used to support the principal J-1 visa holders.

⁸ INA § 214(l). On September 28, 2012, through enactment of Pub. L. No. 112-176, the Conrad State 30 Program was extended until September 30, 2015.

⁹ See “Find Shortage Areas: MUA/P by State and County” <http://muafind.hrsa.gov/> (accessed Dec. 23, 2013) (Medically Underserved Areas/Populations are areas or populations designated by HRSA as having: too few primary care providers, high infant mortality, high poverty and/or high elderly population. Health Professional Shortage Areas (HPSAs) are designated by HRSA as having shortages of primary medical care, dental or mental health providers and may be geographic (a county or service area), demographic (low income population) or institutional (comprehensive health center, federally qualified health center or other public facility)).

¹⁰ American College of Surgeons: Division of Advocacy and Health Policy, “ACS Supports the Conrad State 30 and Physicians Access Act,” <http://www.facs.org/ahp/workforce/> (accessed Jan. 06, 2014). See *supra* note 7.

¹¹ INA §214(l)(C)(iii).

¹² U.S. Citizenship and Immigration Services, Agency Information Collection Activities: Petition for a Nonimmigrant Worker, Form I-129; Revision of a Currently Approved Collection, 78 Fed. Reg. 129, 40490 (July 5, 2013).

applications filed by these dependents in order to change to classifications other than H-4. USCIS maintains that its policy has not changed in this area. Rather, the agency claims that denial of these applications for change of status is due to the collection of new information by USCIS via the revised Form I-129 (i.e., USCIS is now able to easily identify dependents who are subject to the two-year home-residency requirement).¹³

USCIS avers that the terms of 8 CFR §212.7(c)(9) permit J-2 dependents of waived J-1 physicians to change *only* to H-4 nonimmigrant status – even in circumstances where a J-2 dependent is independently qualified and eligible for another nonimmigrant status. As noted above, J-2 visa holders are eligible to request work authorization. However, when a J-2 changes to H-4 nonimmigrant status, derivatives are no longer eligible to request work authorization. Current USCIS statutory interpretation deprives J-2 dependents of work authorization, even if they have careers of their own or otherwise may be able to contribute to the U.S. economy.

As J-1 medical doctors transition out of the Exchange Visitor Program, the ability of their dependents to work in the United States is an important consideration. Salaries paid to physicians working in publicly funded healthcare facilities are often considerably lower than those paid to doctors working in private facilities or private medical practice.¹⁴ The potential earning ability of J-1 physicians' spouses is often a key financial concern when deciding whether to permanently relocate to the United States in order to build a medical career; and college aged children may need to work in order to help finance higher education. In addition, many spouses with significant education and training find mandatory relegation to H-4 status to be a major impediment to their own professional development. Accordingly, if their dependents (particularly their spouse) are unable to work, many J-1 medical doctors may reassess whether they wish to participate in the Conrad State 30 program. This can create the unintended consequence of further limiting available medical care in already underserved areas.

RECOMMENDATIONS AND ANALYSIS

The Ombudsman recommends that USCIS:

- 1) Publish new regulations that permit independently eligible J-2 dependents of J-1 physicians approved for a Conrad State 30 program waiver to change to other employment-authorized nonimmigrant classifications; and**
- 2) Issue new policy guidance clearly explaining that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 program waiver, may change to any nonimmigrant status for which they are otherwise qualified and eligible.**

When USCIS approves a waiver of the two-year residence requirement for a J-1 visa holder, the corresponding Form I-797, *Notice of Approval* clearly states that the waiver also applies to J-2 dependents:

The United States Information Agency, based upon a recommendation from an interested Government agency, has recommended that the applicant and any member of his or her

¹³ Information provided by USCIS (Sept. 17, 2013).

¹⁴ See “Medscape Physician Compensation Report 2012” <http://www.medscape.com/features/slideshow/compensation/2012/public> (accessed Dec. 23, 2013).

*immediate family be granted a waiver of the two-year foreign residence requirement of Section 212(e) of the Immigration and Nationality Act, as amended.*¹⁵

Similarly, the Department of State provides the following guidance regarding the applicability of an approved waiver to a J-2 visa holder:

*If your J-1 spouse or parent receives a favorable recommendation from the Department of State's Waiver Review Division, it will be forwarded to [USCIS]. If USCIS grants the waiver to your J-1 spouse or parent, then you will also benefit from that waiver.*¹⁶

If the foreign medical graduate fails to comply with the waiver requirements, the individual's H-1B status is revoked, and the physician again becomes subject to the two-year home-country physical presence requirement.¹⁷ In addition, all derivative beneficiaries of the waiver must once again become subject to the 2-year foreign residence requirement under INA §212(e).¹⁸

In the past, where a waiver under INA §212(e)(iii) had been approved for the principal, USCIS approved H-1B change of status applications for J-2 dependents. USCIS also granted changes of status to H-1B status to waiver recipient J-2 dependents where the J-2 first changed to H-4, then immediately sought H-1B status. In either case, waived J-2 dependents were allowed by USCIS to change status prior to the fulfillment of either the two-year home-country physical presence requirement or the Conrad State 30 waiver requirements.

Recently, however, USCIS has routinely denied change of status requests filed by the J-2 dependents of J-1 physicians. These denials are based on USCIS's position that J-2s are prohibited from changing to any status other than H-4 until the J-1 physician has completed the three-year medical service requirement under INA §214(l).¹⁹

¹⁵ U.S. Citizenship and Immigration Services, Form I-797, *Notice of Action. Information taken from exemplar form provided by USCIS.*

¹⁶ "Frequently Asked Questions – Waiver of the Exchange Visitor Two-Year Home-Country Physical Presence Requirement," <http://travel.state.gov/content/visas/english/study-exchange/student/residency-waiver/ds-3035-faqs.html> (accessed Feb. 24, 2014).

¹⁷ INA §214(l)(2)(B) states: No person who has obtained a change of status under subparagraph (A) and who has failed to fulfill the terms of the contract with the health facility or health care organization named in the waiver application shall be eligible to apply for an immigrant visa, for permanent residence, or for any other change of nonimmigrant status, until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least 2 years following departure from the United States.

¹⁸ INA §212(e) states, in relevant part: No person admitted under section 101(a)(15)(J) [8 USC §1101(a)(15)(J)] or acquiring such status after admission (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence, (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) [8 USC §1101(a)(15)(J)] was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) [8 USC §1101(a)(15)(H) or (L)] until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent)....

¹⁹ INA §214(l)(2)(A) states: "Notwithstanding section 248(a)(2) of this title, the Attorney General may change the status of an alien who [has been granted a waiver of the home residency requirement through the Conrad State 30 or comparable Federal agency program] to that of an alien described in section 1101(a)(15)(H)(i)(b) of this title...."

Typical denial notices cite both INA §214(l)(2) and 8 CFR §212.7(c)(9). Although these provisions do *permit* a change of status from J-2 to H-4 for dependents of J-1 physicians who have obtained an appropriate waiver, neither provision contains clear language preventing a J-2 from changing to another nonimmigrant status. A regulatory framework that expressly *permits* a change of status to H-4 does not mean that it inherently *precludes* change to any other nonimmigrant status. A restrictive reading of the statutory framework creates a system in which the two-year home-country residency requirement applies to a J-2 dependent but the full benefit of the Conrad State 30 program does not.

Nevertheless, USCIS asserts that the provisions of INA §214(l) apply equally to any J-2 dependent – permitting dependents to change only to H-4 status, so that if the physician’s H-1B status were revoked for failure to serve out the three year commitment, any derivative status held by dependents would also be revoked. However, it is notable that while the relevant statutes and regulations make clear that J-1s may only fulfill the terms and conditions of the waiver in H-1B status, they do not appear to limit the nonimmigrant status available to J-2 dependents while the J-1 physician performs medical service.

INA §§248(a)(1) to (4) specify exceptions to the generally applicable rule that an individual who maintains valid status in the United States may change to another status within the United States, provided that he or she is both qualified and eligible for the requested status. INA §248(a)(2) imposes a general bar on changes of status by J-1 physicians, except for a change to H-1B pursuant to INA §214(l), and INA §248(a)(3) provides that a foreign national subject to §212(e) may not change status unless he or she has first obtained a waiver. These statutory provisions do not reference J-2 dependents. Similarly, the regulations at 8 CFR 212.7(c)(9) state:

If the Service approves a waiver request...the foreign medical graduate (and accompanying dependents) may apply for change of nonimmigrant status, from J-1 to H-1B, and in the case of dependents of such a foreign medical graduate, from J-2 to H-4.

This regulatory provision is contextual and states only that where a Conrad State 30 waiver has been approved, the J-2 dependent is permitted to request H-4 status. However, nothing in the regulation indicates that the J-2 dependent is prohibited from requesting any other status. The use of the verb “may,” without a modifier, generally indicates “probability or contingency,” *i.e.*, that one is free to choose among multiple permissible courses of action.²⁰ Accordingly, 8 CFR §212.7(c)(9) – which explicitly states that a waived J-2 dependent “may” change status from J-2 to H-4 – should not be interpreted as mandating that a qualifying J-2 “may only” change to H-4 status, thereby precluding change to any other nonimmigrant visa category.²¹ Moreover, based on reports from stakeholders, J-2 dependents of waived J-1 physicians appear to be able to transition to a status other than H-4 by traveling to a U.S. Consulate abroad, applying for a visa, and seeking re-admission to the United States in the desired nonimmigrant status.

Legislative intent regarding the Conrad State 30 program and dependents is also an important consideration. On December 14, 2012, then U.S. Senator Kent Conrad, author of the Conrad State 30 program, sent a letter to then USCIS Director Alejandro Mayorkas requesting that, “USCIS return to its longstanding policy and practice of allowing the dependents of Conrad State 30 program physicians to change classification to statuses other than H-4.” He observed that during its 20 year history the Conrad State 30 program brought more than 10,000 doctors to medically underserved areas; and counseled that, “The future success of the program is threatened by

²⁰ Black’s Law Dictionary 979 (6th ed. 1990); “The word may usually is employed to imply permissive or discretionary, and not mandatory, action or conduct.” 57 C.J.S., *May* p. 456.

²¹ “As used in statutes, contracts, or the like, [shall] is generally imperative or mandatory.” Black’s Law Dictionary 1375 (6th ed. 1990).

policy that makes it more difficult for Conrad 30 doctors to fully integrate their families into these communities.”

Commenting on Congress’ purpose in enacting this program, Senator Conrad stated:

As the author and principal sponsor of the Conrad 30 legislation, I can tell you that Congress did not intend to impede the ability of J-2 spouses to work in H-1B status during the three year J-1 waiver commitment term of their spouses. The entire purpose of the program is to help place physicians into rural, medically underserved areas...One of the ways to attract families is by permitting spouses continued employment without significant interruption.

USCIS’s current policy and practice regarding changes of status by J-2 derivatives appears to operate in a fashion contrary to the purposes of the Conrad State 30 program; and promotes administrative convenience, rather than the beneficial economic and social interests supported by permitting waiver recipient J-2 dependents to obtain work-authorized nonimmigrant statuses.

CONCLUSION

International medical graduates in the United States make important contributions in clinical care in underserved areas, as well as research and teaching. Under the INA, J-1 medical doctors are obligated to return to their home country for a period of two years following the completion of the residency or fellowship program before they may apply to adjust or change status. The Conrad State 30 program provides a waiver of the two-year home-residency requirement for J-1 physicians willing to provide medical services in certain federally designated, underserved areas.

Currently, USCIS permits J-2 dependents to change to only H-4 status, and not to another employment-authorized, nonimmigrant status even where the dependent independently qualifies for such status. This policy appears to be inconsistent with legislative intent and may have a chilling effect on Conrad State 30 applications. Regulations or policy guidance is needed to make clear that J-2 visa holders, who are derivative beneficiaries of a Conrad State 30 waiver, are permitted to change to any nonimmigrant status if they are independently qualified.