
Immigration Physician Law Update

By Roberta Freedman / Jul 18, 2012

Welcome to the Clark Hill Immigration Update - Physician Edition designed specifically for physicians, health care professionals and their employers.

We are excited to announce our upcoming annual *Life after Training - Options for J-1 and H-1B Physicians* seminar series on July 28, 2012 in Chicago, IL, and on Aug. 25, 2012 in Brooklyn, N.Y. Details follow below.

In this edition of the bulletin, we will discuss:

- Recent developments in USCIS' adjudication of H-1B change of status petitions for nonimmigrants currently or formerly in J-2 classification whose principal J-1 spouse or parent is about to commence or is completing their three-year service obligation in H-1B classification after receiving a waiver of their home residency requirement.
- The Appalachian Regional Commission J-1 waiver program, in the first of a three-part article summarizing waiver programs who can sponsor as many J-1 waivers for clinical physicians as they deem necessary for the health interests of their constituents.
- A brief practice pointer to time the start date for H-1B petitions such that an extension is not needed in order to fulfill the full three-year commitment in the federally designated health professional shortage or underserved area.

We invite and welcome questions or comments so that we can continue this bulletin to best serve you and your personal needs. Please email us with your questions and comments at rreedman@clarkhill.com and kmehta@clarkhill.com.

USCIS IS NOT APPROVING CHANGE OF STATUS TO H-1B FOR CURRENT OR FORMER J-2 NONIMMIGRANTS WHOSE PRINCIPAL J-1 RELATIVE HAS RECEIVED A WAIVER OF THEIR HOME RESIDENCY REQUIREMENT BUT HAS NOT COMPLETED THEIR THREE-YEAR COMMITMENT.

It is common for spouses of J-1 nonimmigrants pursuing graduate medical residencies and fellowships to be employed in the United States in J-2 classification with a valid Employment Authorization Document. When the J-1 nonimmigrant receives a waiver of their home residency requirement pursuant to sponsorship under the Conrad 30 or another interested government agency program to provide medical care to a designated health professional shortage or underserved area in H-1B classification, the J-2 spouse must either cease working and change to H-4 dependent status or change status to H-1B to continue working if they are qualified and eligible to do so.

Traditionally, USCIS has approved H-1B petitions requesting a change of status filed on behalf of current and former J-2 nonimmigrants even when the principal J-1 family member has not yet completed the three-year service obligation in the designated health professional shortage or medically underserved area.

Recently, the USCIS has adopted a restrictive interpretation of the law governing changes of status to preclude current and former J-2 nonimmigrant from changing to any status other than H-4 until the former J-1 spouse has completed their three-year commitment. This has resulted in many current and former J-2 nonimmigrants being denied a change of status in the U.S. to H-1B classification.

Despite denying the change of status request in the H-1B petition, the USCIS will approve the H-1B petition to permit the beneficiary to depart the U.S. and apply for an H-1B visa at a U.S. Consulate or Embassy abroad. Therefore, current and former J-2 nonimmigrants seeking to continue working are required to depart the U.S. to apply for H-1B visas at U.S. Consulates or Embassies if they intend to continue or commence working in the U.S. while their principal J-1 family member is completing the medical service obligation in H-1B classification.

OTHER WAIVER PROGRAMS FOR CLINICAL PHYSICIANS.

In addition to the 50 State Conrad 30 programs, the Appalachian Regional Commission, Delta Regional Authority and the federal Department of Health and Human Service all administer J-1 waiver programs for physicians willing to practice medicine for three years in designated health professional shortage or underserved areas in H-1B classification. These programs are permitted to sponsor as many clinical physicians in a fiscal year as they deem necessary to benefit their constituents. Often times, State Departments of Health mandate an unsuccessful application through one of these programs prior to accepting an application in their State Conrad 30 program.

In this edition, we will discuss the Appalachian Regional Commission program. Stay tuned to future editions of the Clark Hill Immigration Update - Physician Edition for summaries of the Delta Regional Authority and federal Department of Health and Human Services clinical physician J-1 waiver programs.

Appalachian Regional Commission

The Appalachian Regional Commission's J-1 waiver program is designed to alleviate physician shortages in designated health professional shortage areas within the Appalachian region of the United States. The Appalachian region ranges from southern New York to northern Mississippi including the states of Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee and Virginia.

Eligibility for the Appalachian Regional Commission's program is limited to primary care physicians only; subspecialists are not eligible. Moreover, the place of work can only be in a federally designated health professional shortage area (HPSA). Worksites in federally designated underserved areas (MUAs) or underserved populations (MUPs) are not eligible. Additional requirements are that:

- the physician not have been out of status greater than 180 days at the time the waiver application is submitted;
- the physician be licensed to practice medicine in the state or have a pending license application;
- the employer for whom the physician will work has made reasonable, good faith recruitment efforts without success within the six months immediately preceding the request for waiver;
- the employer for whom the physician will work has posted a notice which reflects that it provides services to individuals regardless of their ability to pay, including Medicare and Medicaid patients, and maintains a sliding fee scale for persons at or below the 200 percent poverty line; and
- the employment contract requires the physician to work at least 40 hours per week exclusive of on-call or travel time in the designated health professional shortage area, contains no non-compete clause or other restrictive covenant that prevents or discourages practice in the health professional shortage area with a different employer, and mandates the physician to pay \$250,000 in liquidated damages to the employer if the physician breaches or fails to fulfill the conditions of the contract.

PRACTICE POINTER - MAKE YOUR H-1B PETITION AND EMPLOYMENT START DATE THE SAME.

INA 214(l) requires physicians who have received an interested government agency waiver of their home residency requirement to provide clinical services to work for three years in H-1B classification.

The law permits an employer to request an initial period of H-1B classification for an employee of up to three years, which can be extended for another three years.

Oftentimes, due to practical matters such as relocation or travel, a physician may seek a start date a few weeks after the completion of their training on June 30. If the official start date is after the commencement of the validity of the H-1B petition, the physician will need to seek an extension with the same employer in the future, to ensure that a full three years of employment are documented with the same employer needed to fulfill the J-1 waiver requirement.

Although it is permissible to officially start employment after a H-1B petition is valid when the delay is specifically requested for personal reasons such as relocation or travel, it is more prudent to commence the validity of the H-1B petition to coincide with the exact start date of employment. This will avoid a potentially awkward situation that could arise if an individual seeks to commence new employment after the three year term is complete, but must seek an extension with the waiver employer in order to complete the full three years in H-1B status.

SEEKING A WAIVER SLOT IN TEXAS? GET STARTED NOW!

As in every year, the State of Texas will commence accepting applications for J-1 waiver applications under their Conrad 30 program for Fiscal Year 2013 (which commences on Oct. 1, 2012) on **Sept. 1, 2012**. The State of Texas accepts applications on a first come first served basis - i.e. the first 30 applications it receives are granted sponsorship, and the remainder are rejected. Consequently, as Texas is a popular destination for physicians after training, Texas traditionally fills all of its 30 slots on the first day it accepts applications.

If a physician is seeking a waiver slot in Texas, it would be wise and prudent to commence preparing the application now, to ensure that it is received by the State of Texas as early as possible on Sept. 1.

Upcoming Events

On July 28, 2012, we will be coming to Chicago to present our annual *Life after Training - Options for J-1 and H-1B Physicians* seminar series at The University Club of Chicago, 76 East Monroe Street, 6th Floor, Millennium Room, Chicago, IL 60603 between 1:00 PM and 5:00 PM.

Coming back to the East Coast, we will present our annual *Life after Training - Options for J-1 and H-1B Physicians* seminar series on Aug. 25, 2012, at the New York Marriot at the Brooklyn Bridge, 333 Adams Street, Brooklyn, NY 11201 between 1:00 PM and 5:00 PM.

Walk ins are welcome and as always the events are free of charge. Please RSVP to Erin Welsh at ewelsh@clarkhill.com to register.

Contact Us

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