inside IMMIGRATION
APRIL 2013
VOL. 4 ISSUE 1

The J-1 Program Demystified: Answers to Your Top J Visa Questions

by the AILA Students and Scholars Committee

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The J-1 Visa or Exchange Visitor Program began with the Mutual Educational and Cultural Exchange Act of 1961. The goal was to promote the understanding of other cultures by the people of the United States as well as an understanding of the American culture by people of other countries through educational and cultural exchanges. It is essentially a foreign policy tool of the U.S. Department of State. Every year, there are more than 170,000 J-1 exchange visitors in the United States participating in a variety of programs such as au pair, camp counselor, student, trainee, research scholar, and physician. Thus, the J-1 program has been a popular, albeit increasingly complex, nonimmigrant visa status.

Since 1961, many changes to the J-1 program have been implemented including added restrictions on categories of participants such as foreign medical graduates. In response to security concerns regarding the tracking of foreign students in the United States, a web-based database called the Student and Exchange Visitor Information System (SEVIS) was instituted in 2003 and is administered by U.S. Immigration and Customs Enforcement.

This article contains information for immigration attorneys regarding various aspects of the J-1 visa program including the forms and systems used in the program; the government and institutional agencies involved; the two-year home residence requirement; waivers of the foreign residence requirement; and restrictions specific to certain categories, such as research scholars and foreign medical graduates.

What is the DS-2019 and what does it tell me?

Form DS-2019, "Certificate of Eligibility for Exchange Visitor (J-1) Status" is the document used to indicate participation in an Exchange Visitor Program (EVP). The Responsible Officer (RO) or Alternate Responsible Officer (ARO) of the program sponsor issues the DS-2019 through SEVIS and sends it to the prospective exchange visitor. The DS-2019 allows the prospective exchange visitor to apply for a visa at a U.S. consulate abroad or, if already in the United States in another nonimmigrant status, apply for a change of status to J-1.[1]

1 Note that the Department of State has been penalizing J Program sponsors when a pattern of change of status occurs. Change of status is considered by the Bureau of Education and Cultural Affairs to be a misuse of the intent of the J program.

The DS-2019 is a two-page form that identifies the participant and the program sponsor, describes the activities to be completed by the participant, provides the start and end dates of the program, identifies the program category, and provides an estimate of the total financial support required for the participant. It also contains a preliminary endorsement by the consular or immigration official as to whether the exchange visitor is subject to the two-year home residence requirement, and if so, on what basis. The program category, which is listed in section 4 of the DS-2019, may be referenced in order to determine whether the exchange program falls within the Department of State's (DOS) Skills List, described more fully below. The preliminary endorsement on the DS-2019 is not dispositive as to whether the exchange visitor is subject to the home residence requirement, even though in practice it is often accepted by U.S. immigration officials. Practitioners should make their own determination based on the statutory criteria discussed below or, if necessary, seek an advisory opinion from the DOS Waiver Review Division (WRD).

Attorneys who represent current or former J-1/J-2 nonimmigrants should review the DS-2019 to determine if they were properly admitted to the United States and maintained status, and whether they may or may not be eligible to change or adjust status, or apply for an immigrant visa abroad. Decisions regarding program extensions and transfers are generally reserved for the J-1 RO or ARO.

What is the two-year home residence requirement, and what does it mean to be subject to it?

The J-1 visa is intended to provide for cultural exchange and enhance mutual understanding between the United States and other nations. To further that purpose, INA §212(e) provides that a J-1 or J-2 exchange visitor is not eligible to apply for an immigrant visa, for permanent residence, or for a nonimmigrant visa in the "H" or "L" categories, until he or she "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":

- Whose program was financed in whole or in part, directly or indirectly, by a U.S. government agency or by the government of his nationality or last residence; or
- Who at the time of admission or acquisition of J status was a permanent legal resident of a country2 designated as clearly requiring the skills or knowledge of persons engaged in the field of specialized knowledge or skill in which the exchange visitor was engaged; or
- Who came to the United States in or acquired J-1 status to receive graduate medical education or training.

However, persons subject to §212(e) are not precluded from other nonimmigrant categories, including B-1/B-2 visitor, E-1/E-2 treaty trader/treaty investor, F-1 student, O extraordinary ability, P outstanding or culturally unique worker, or R-1 religious worker.

In addition, 8 CFR §248.2(a)(3) precludes certain 212(e)–subject persons from changing their nonimmigrant status from J to another classification while in the United States. However, U.S. Citizenship and Immigration Services (USCIS) has generally taken a "plain language" approach to this regulation and considers this bar to apply only to those seeking a change of status from J. Aliens subject to §212(e) who currently hold another status have not generally been considered ineligible for a change of status.

2 The DOS "Skills List" is negotiated with each country and is a determination made by the sending country's government.

How do I know if my client is subject to the two-year home residence requirement?

Under INA §212(e), all foreign medical graduates who receive graduate medical education or training in J-1 status are subject to the two-year home residence requirement. One is also subject if the J-1 program was funded in full or in part, directly or indirectly, by the United States or the exchange visitor's home country government. Finally, one is also subject if the exchange program is in an area that falls under the DOS "Skills List" for the country of nationality or last residence.

Both the DS-2019 and the J visa in the exchange visitor's passport are often annotated with the consular officer's determination as to whether §212(e) applies. But these annotations should not be relied on as definitive determinations on the applicability of §212(e). Where there is doubt, the attorney should refer to the DOS Skills List or seek an advisory opinion by submitting copies of all DS-2019 forms (or the precursor IAP-66) to the U.S. Department of State, Waiver Review Division (WRD).

What can (and can't) my client do if he or she is subject to the two-year home residence requirement?

Persons subject to §212(e) are ineligible for immigrant visas, or H or L nonimmigrant visas unless or until they have either been physically present in their home country or country of last residence for a minimum of two years after termination of the exchange visitor program, or the home residence requirement has been waived.

Under 8 CFR §248.3, persons subject to §212(e) are unable to change status in the United States from J to another nonimmigrant status. To obtain a nonimmigrant status other than H or L, the J visa holder must depart the United States, apply for a new nonimmigrant visa (*e.g.*, F-1 student) and be admitted to the United States in the new status. The nonimmigrant remains subject to §212(e) even though he or she has returned in a status other than J.

When a person subject to §212(e) returns to the United States in a different nonimmigrant status, he or she is no longer ineligible to change status in the United States. Thus, it is possible to change status from F-1 to any other nonimmigrant status, including H or L. Nevertheless, a person who is subject to §212(e) cannot later travel abroad and apply for an H or L visa, so they are still significantly limited.

How can my client satisfy or waive the two-year home residence requirement?

Satisfying the Two-Year Home Residence Requirement

J-1 visitors satisfy the two-year home residence requirement by returning to their home country (not any third country) for at least two years. A "home country" is either the exchange visitor's country of nationality or country of last residence (*i.e.*, the equivalent of lawful permanent resident status in the country). While the two years are calculated in the aggregate and need not be continuous, J-1 visitors must show both residence and physical presence in their home country for two years. Thus, any trips outside the home country, even if short, will be deducted from the two years. In addition, the two-year clock begins running after the J-1 has completed the J-1 program, so trips to the home country during the J-1 program will not be counted toward the two-year requirement.

Waiving the Two-Year Home Residence Requirement

There are four types of waivers that allow a J-1 to avoid the home residence requirement: (1) no-objection waivers; (2) hardship waivers; (3) persecution waivers; and (4) interested government agency (IGA) waivers. Regardless of type, a waiver application is initiated by completing and submitting an

electronic Form DS-3035. The applicant will receive a case number, and is instructed to print the DS-3035 and mail a copy to the DOS WRD along with a filing fee and copies of all DS-2019 forms.

No-Objection Waivers

No-objection waivers may be granted if the J-1's home country does not object to the J-1 not fulfilling the two-year requirement. The J-1 must request a no-objection statement from their home country's embassy in Washington, D.C. If the embassy agrees, it will send the statement to the WRD, which will contact any U.S. agencies that provided funding to the visitor to see if they object to the waiver. For example, the WRD will contact the Fulbright Commission if the J-1 visitor received a Fulbright scholarship. The WRD will then either deny the waiver or recommend to USCIS that it be granted. USCIS makes the final decision on whether to grant a waiver, but usually follows DOS's recommendation. It is important to note that each country has different rules about when it will or will not issue a no-objection letter. For example, some countries will almost never issue a no-objection letter, while others will issue a letter only if the J-1 repays any government funding that he or she received. In addition, DOS will rarely recommend a no-objection waiver when the J-1 has received U.S. government funding. These waivers are unavailable to physicians who received graduate medical training as J-1s.

Hardship and Persecution Waivers

A hardship waiver may be granted if the J-1 can show that their U.S. citizen or lawful permanent resident (LPR) spouse or child would suffer exceptional hardship if a waiver is not granted. The hardship must be more substantial than the normal results of separation and must exist both if the family member were to stay in the United States or accompany the J-1 abroad. Factors that can contribute to a finding of hardship include physical or mental health conditions of the family members, particularly if adequate treatment would not be available in the J-1's home country; conditions of war, civil strife, or natural disaster in the home country; interruption of the spouse's established career and any resulting economic consequences; and conditions of severe racial, religious, or gender discrimination in the home country that would limit the family members' educational opportunities.

Persecution waivers are available to J-1s who would be subject to persecution based on their race, religion, or political opinion in their home country. The definition of persecution is similar to the definition used in the asylum context, except persecution on account of nationality and particular social group is not included. Both waivers are applied for by submitting Form I-612 to USCIS, along with the appropriate filing fee (in addition to the DOS case initiation fee) and all supporting documentation. If USCIS finds the J-1 meets the criteria for a waiver, it will forward the file to DOS for a recommendation. DOS may recommend denying the waiver even if USCIS has determined the J-1 meets the requirements. This typically happens in hardship waivers where the hardship is only to the spouse, the spouse knew of the foreign residence requirement before the marriage, and the J-1 received significant U.S. government funding.

Interested Government Agency (IGA) Waivers

IGA waivers may be granted when a U.S. government agency states and establishes that the J-1's departure would be harmful to an agency program. For physicians, state health departments can serve as interested government agencies. The J-1 obtains the waiver by applying to the agency, and if the agency agrees, it submits a request for the waiver to DOS. DOS then makes a recommendation to USCIS, which decides whether to grant the waiver.

Conrad 30 waivers are probably the best known type of IGA waivers. Under this program, each state's department of health can request up to 30 waivers a year for physicians who agree to work full-time for three years in a medically underserved area (MUA). Other agencies that regularly support requests for IGA waivers include the Department of Health and Human Services, the Department of Veterans Affairs, the National Science Foundation, the U.S. Department of Defense, and the U.S. Department of Energy. However, IGA waivers are not limited to these few agencies. J-1s seeking an IGA waiver should be prepared to be persistent and do significant research to identify an appropriate government agency and to learn about the agency's procedures and requirements for obtaining a waiver.

How long can a person remain in J status?

The length of time a person may remain in J status depends on the category in which he or she was admitted. The maximum period of stay for each category is listed in the DOS regulations at 22 CFR §§62.20–62.32, and range from less than six months (short-term scholars, camp counselors, summer work travel) to five years or longer (research scholars). Other common categories include interns (12 months), trainees (12 months), specialists (12 months), and au pairs (12 months).

Some categories permit individuals to engage in a second or subsequent visit within the same category. For example, interns may engage in qualifying internships of up to 12 months as long as they meet the definition of an intern under 22 CFR §62.2. Thus, they may visit, and then re-visit, in virtually back-to-back internships, throughout their school career and for up to 12 months following graduation. In this way, foreign interns may complete thesis work and other long-term, school-related activities in the United States that essentially consume more than 12 months, even if broken down into 12-month increments. Other categories (such as research scholars or trainees) are subject to "repeat participation rules" that bar reentry to the United States in the same category until the individual has been outside the United States for a period of time. *See* 22 CFR §62.20(i)(2), 22 CFR §62.22(n)(2). Repeat participation rules generally do not take into account where in the world the person might be—they need not be in their "home" country, for example—nor what the individual is doing during this time.

When planning any visit, including sequential visits in J status, it is important to consider the combined effect that a repeat participation rule and home residence rule might have. The repeat participation rule will bar readmission to the United States in the same category of J status, while the home residence requirement will bar readmission to the United States in H, L, K, or permanent residence status. Depending on the circumstances, the combination of these two rules might effectively bar the J-1 from entering the United States for a significant time.

Who can I contact about program designation?

Organizations interested in becoming J program sponsors should contact the DOS Bureau of Educational and Cultural Affairs in Washington, D.C.[3] Fax and e-mail are the only two direct means for prospective sponsors to contact DOS, with the more effective method generally being an e-mail to jvisas@state.gov.

3 Note that moratoriums are currently in place for new sponsor applications in some categories, such as summer work travel.

Once the organization becomes a sponsor, direct contact information for the assigned DOS officer will be provided to the sponsor, and in general, such officers respond reasonably promptly to all communications.

Where can I look for information on program designation?

The DOS Exchange Visitor website has a section dedicated to becoming a sponsor, which includes information on the process for applying for designation, and an overview of the administrative obligations of sponsors. There is also a list of common questions for prospective sponsors.

Prospective organizations should, of course, also review the DOS regulations at 22 CFR §62, as well as the USCIS regulations at 8 CFR §214.2(j). However, for a basic understanding of the responsibilities involved, the DOS website is the better place to begin.

What if I have questions about the Student and Exchange Visitor Program (SEVIS), including constraints on Responsible Officers/Alternate Responsible Officers (ROs/AROs)?

SEVIS is the online system that manages exchange visitors and students in the United States. The limitations and procedures incorporated within SEVIS essentially impose a layer of "unofficial" rules on the approval, management and closure of exchange visitor programs beyond the regulations. It is important, therefore, for sponsors and prospective sponsors to understand both the regulations as well as the SEVIS procedures when considering designation or a specific strategy for a specific exchange visitor.

The DOS regulations are available online. Section 62.11 of 22 CFR outlines the duties of ROs and AROs. In general, all of the obligations within the regulations and the procedural limitations of SEVIS are placed on the ROs and AROs, and in a very real sense the many administrative obligations scattered throughout the regulations and in SEVIS that are placed on the sponsor must all be executed and managed by the ROs and AROs.[4]

Can status problems be resolved?

The regulations describe three kinds of infractions that exchange visitors might commit. The first, "minor or technical" infractions, may be resolved by the RO/ARO. 22 CFR §62.45(b)(1). The second, "substantive violations," are considered more serious and may be resolved only through a reinstatement application to DOS. *See* 22 CFR §62.45(b)(4). The third, unnamed in the regulations, is a category primarily composed of yet more serious infractions that "preclude reinstatement." *See* 22 CFR §62.45(f).

Can "minor or technical" infractions be resolved by the RO/ARO?

Three examples of "minor or technical" infractions are provided in the regulations:

1. failure to accomplish a necessary program extension;
2. failure to conclude a transfer in a timely manner; and
3. failure of the exchange visitor to receive prior approval of the RO/ARO to accept an honorarium or other payment for "a normally approvable and appropriate activity" such as a lecture or consultation. *See* 22 CFR §62.45(c).

4 Also note that the Department of State may communicate other "unofficial rules" to sponsors. It cannot be understated that the J programs are foreign policy tools of the Department of State and are designated to fulfill the goals and priorities of the Bureau of Education and Cultural Affairs.

The regulations note that "it is impossible to list every example of a technical or minor infraction" and offer a set of criteria that the RO/ARO should examine in determining whether a violation may be considered "minor or technical." These include whether the exchange visitor has engaged in unauthorized employment, failed to comply with the insurance requirements, or "failed to maintain valid program status for more than 120 calendar days after the end date on the current Form DS-2019." *See* 22 CFR §62.45(d).

If any criterion is met, the infraction is not considered "technical or minor," and the RO/ARO is not authorized to correct the record and "return the exchange visitor to valid program status." *See* 22 CFR §62.45(d)(8). Despite the examples of "minor or technical" infractions listed in the regulations and the apparent authority invested in the RO/ARO to correct these and other infractions, SEVIS allows ROs/AROs to correct only two: failure to accomplish an extension in a timely manner and failure to receive advance approval to accept an honorarium or payment.[5]

What is the process for correcting the record?

If an infraction is "minor or technical"—one of those specified at 22 CFR §62.45(c) or so determined by the RO/ARO pursuant to 22 CFR §62.45(d)—the RO/ARO "corrects the record status quo ante by issuing a Form DS-2019 or by writing an authorization letter to reflect the continuity in the program or the permission to engage in the activity that a timely issued document would have reflected." *See* 22 CFR §62.45(c)(4). However, as noted above, despite the apparent authority invested in the RO/ARO, SEVIS currently allows the RO/ARO to correct the record only if an extension has not been timely accomplished or if the exchange visitor failed to receive advance approval to accept an honorarium or payment. In order to correct either of these two infractions, the RO/ARO updates the exchange visitor's SEVIS record, and issues a new DS-2019 bearing the "correct a minor or technical infraction" notation. For failure to receive advance approval to accept an honorarium or payment, the RO/ARO would usually also issue a letter authorizing the activity.

What are "substantive violations" that require a reinstatement application to DOS?

The regulations specify two infractions that are "substantive violations" and require submission of a reinstatement application to DOS: (1) failure to maintain valid program status for more than 120 days after the end date on the current Form DS-2019; and (2) failure of a student to maintain a full course of study without prior approval. 22 CFR §62.45(e).

In order to qualify for reinstatement, the exchange visitor must establish three facts:

1. that he or she is pursuing or has at all times intended to pursue the original objective of his or her program;
2. that failure to maintain status was due to circumstances beyond his or her control or due to "delay, oversight, inadvertence, or excusable neglect" on the part of the exchange visitor or RO/ARO; and
3. that unusual hardship would result to the exchange visitor if reinstatement is not granted. *See* 22 §CFR 62.45(h)(1)(iv).

The agency considers an unusual hardship to be a hardship that would not normally be expected to result from a failure to obtain reinstatement. For example, if an exchange visitor fails to maintain valid program status and, if denied reinstatement, must pay for a return airline ticket to his or her home

5 Not only does SEVIS preclude the RO/ARO from determining whether violations not mentioned in the regulations would meet the criteria for correction, SEVIS Release 5.0 (http://www.ice.gov/doclib/sevis/pdf/SEVIS_Release_5_0_Anticipated_Changes-RTI.pdf) removed "failure to conclude a transfer of program prior to end date of the current DS-2019" from the Correct Minor or Technical Infraction functionality in SEVIS.

country, the level of hardship would not be considered unusual. By contrast, if an exchange visitor doctoral candidate is in the final semester of a seven-year degree program and fails to maintain valid program status, the agency would consider it an unusual hardship to be denied the opportunity to complete the final semester and obtain the doctoral degree."[6]

What is the reinstatement application process?

If a reinstatement application is required, the RO/ARO must submit it to DOS through SEVIS pursuant to the process delineated at 22 CFR §62.77. After entering the request in SEVIS, the RO/ARO prints a copy of the reinstatement request, which is a draft copy of the Form DS-2019. The RO/ARO submits the request, along with the appropriate filing fee and all supporting documents, to DOS by mail or courier within 30 calendar days. Under 22 CFR §62.45(j), reinstatement applications should be adjudicated within 45 days of submission. If the application is approved by DOS, the RO/ARO is notified by e-mail and may access the exchange visitor's SEVIS record to issue a new Form DS-2019. If the application is denied, the RO/ARO is notified by letter or fax.

Are there actions and infractions that preclude reinstatement?

The regulations specify six infractions that "preclude reinstatement" and "will result in a denial" if reinstatement is requested:

1. knowingly or willfully failing to obtain or maintain the required health insurance;
2. engaging in unauthorized employment;
3. suspension or termination from the most recent exchange visitor program;
4. failure to maintain valid program status for more than 270 calendar days;
5. receiving a recommendation on an application for waiver of the two-year home residence requirement; and
6. failure to pay the required SEVIS fee. *See* 22 CFR §62.45(f).

Are there special conditions on participation in the research scholar and professor categories?

Tenure-Track Positions

Under 22 CFR §62.20(d)(1), an exchange visitor professor or research scholar may not be "a candidate for tenure track position." but a J-1 professor or research scholar may, however, temporarily occupy a position that might normally be a tenured or tenure-track position. For example, an exchange visitor professor may temporarily serve as a visiting professor in a position held by a tenured professor who is on sabbatical. It would not be appropriate, though, for a sponsor to place an exchange visitor professor in an assistant professor position which leads to tenure.

The Five-Year Continuous Period of Eligibility

"A professor or research scholar may be authorized to participate in the Exchange Visitor Program for the length of time necessary to complete his or her program, provided such time does not exceed five years." *See* 22 CFR §62.20(i)(1).[7] An unusual aspect of this limit is that it is not an aggregate period but is rather "continuous and begins with the initial program begin date documented in SEVIS or the date such status was acquired ... as documented in SEVIS and ends five years from such date." *See* 22 CFR §62.20(i)(1).

6 64 Fed. Reg. 44123, 44125 (Aug. 13, 1999).

7 Only Federally Funded National Research and Development Centers (FFNRDCs) and U.S. Federal Laboratories designated as G-7 sponsors by DOS may request extensions beyond five years. 22 CFR §62.20(i)(3). No programs had yet been designated as G-7 when this article was in preparation.

It is a "use or lose" period of eligibility.[8] Once the exchange visitor's SEVIS record is validated by the RO/ARO, the five-year eligibility period begins running from the program start date, and the five-year window during which the exchange visitor may participate in one or more programs consecutively has opened. When the exchange visitor's SEVIS record becomes inactive, the eligibility window closes, regardless of how long the exchange visitor actually participated. Bars on repeat participation make this closing of the window especially momentous.

The need to keep professors' and research scholars' SEVIS records active even if they spend only intermittent periods in the United States has led to many program administration issues for ROs/AROs and institutions. For example, if an institution anticipates that an exchange visitor professor will teach three academic-year terms and spend summer breaks working at her home institution abroad, the RO/ARO must issue one DS-2019 to cover the entire three-year period and keep the professor's SEVIS record active even while she is abroad.[9] If the RO/ARO were to issue a DS-2019 just for the initial nine-month academic term, once the professor's program ended (and her SEVIS record became inactive), she would no longer be eligible for the additional four years and three months for which she would have been eligible had her SEVIS record remained active. Related questions arise concerning the duties of exchange visitors and their sponsors while the exchange visitors are outside of the U.S. but still have an active SEVIS record, such as whether the insurance requirements apply. It is essential for attorneys to recognize that the "continuous" period of eligibility afforded to professors and research scholars functions quite differently than the aggregate periods often afforded to other nonimmigrants such as H-1Bs.

Are there bars on participation in the research scholar and professor categories?

There are two restrictions that may apply to prospective exchange visitors in the professor and research scholar categories. The "12-month bar" prevents (with some qualifications explained below) someone who has completed an exchange visitor program in any category during the prior 12 months from beginning a new exchange visitor program as a professor or research scholar. The "24-month bar" on repeat participation prevents someone who has completed a program in the professor or research scholar categories during the prior 24 months from beginning a new exchange visitor program as a professor or research scholar. In other words, the 12 month bar arises after any exchange visitor program, and the 24-month bar arises only after participation as a professor or research scholar. It is crucial to note that each bar is a separate condition (one does not supersede or displace the other) so a careful analysis of whether either bar applies is necessary.

The 12-Month Bar

A foreign national is not eligible to begin a new exchange program as a professor or research scholar if he or she was physically present in any J status (including J-2 status) for "all or part of" the "twelve month period immediately preceding the date of program commencement set forth on his or her Form DS-2019." *See* 22 CFR §62.20(d)(2).

8 In the supplementary information to the rule published in the *Federal Register*, DOS stated that "the five-year period is not ... an aggregate of five years. DOS considered this approach [counting in the aggregate] and found it unworkable. Instead, this will be a calendar year, five-year period afforded to a participant on a 'use or lose' basis, which commences with the program begin date identified in SEVIS. For example, a research scholar who comes to an institution for two years and returns to his or her home institution for nine months will be eligible, as a program matter, to return to the same U.S. institution—or transfer to another—for an additional two years and three months. If the participant does not return to the United States until three months later, he or she has two years remaining on his or her program." 70 Fed. Reg. 28815 (May 19, 2005).

9 SEVIS 5.8, released on April 18, 2008, introduced an "Out of Country" functionality that allows ROs/AROs to indicate that an exchange visitor professor or research scholar continues participating in his or her exchange program although she or he is for a particular period of time outside the United States. This allows the SEVIS record to remain active while the Exchange Visitor is abroad.

There are three exceptions to the 12-month bar. First, it does not apply to those who will begin a program by transferring to a new program sponsor. *See* 22 CFR §62.20(d)(2)(i). Second, participation in the short-term scholar category is not counted as physical presence that triggers the bar. *See* 22 CFR 62.20(d)(2)(iii). Third, the person whose prior physical presence in J status was of less than six months duration is exempt from the 12-month bar. *See* 22 CFR §62.20(d)(2)(ii).

The 12-month bar would, for example, prevent an exchange visitor student from completing a year of study and then undertaking a fellowship as a research scholar. Had the program of study been shorter, a semester for example, the 12-month bar would not apply and participation as a research scholar would not be barred.

The 24-Month Bar on Repeat Participation

In addition to the 12-month bar, the regulations provide for a 24-month bar on "repeat participation" in the exchange visitor professor and researcher categories. 22 CFR §62.20(i)(2). The bar applies even if the professor or research scholar completes his or her program before the full five-year eligibility period is over. As noted above, the five-year eligibility period closes when the exchange visitor's program ends and the SEVIS record becomes inactive, regardless of how much time the individual actually spent as an exchange visitor professor or researcher.[10] As noted above, the potential application of this bar often requires careful use or administration of the five-year eligibility period. It is the 24-month bar that would prevent a sponsor who issued a DS-2019 to cover only the first academic year from simply issuing a new DS-2019 and bringing the visiting professor back to begin the second year of teaching. After completing the initial program, the visiting professor would not be eligible to begin another professor or research scholar program for 24 months.

Despite the clear language in 22 CFR §62.20(i)(2) applying the 24-month bar only to "[e]xchange participants who have entered the United States under the Exchange Visitor Program as a professor or research scholar or who have acquired such status while in the United States ...," DOS has taken the position that the bar also applies to J-2 dependents of exchange visitor professors and research scholars.[11]

Can exchange visitors change from one participant category to another?

Yes, under certain circumstances, but any such change is at the discretion of DOS, and DOS is said to exercise this discretion quite sparingly. *See* 22 CFR §62.41. The regulations provide that "any change in category must be clearly consistent with and closely related to the participant's original exchange objective, and necessary due to unusual or exceptional circumstances" *See* 22 CFR §62.41(a). The RO/ARO requests a change of participant category with DOS and submits supporting documents. Upon approval, DOS directs the sponsor to issue a new Form DS-2019 indicating the new category. If the application is denied, the exchange visitor may remain in the original category until the expiration of Form DS-2019 (plus the standard 30-day grace period). If the DS-2019 has already expired by the time a denial notice is issued, a 30-day period to leave the country is granted, during which time the visitor is considered to be maintaining lawful status, but can no longer engage in the exchange activity. *See* 22 CFR §62.41(e).

It is important to note that alternating between activities appropriate for the professor category and activities appropriate for the research scholar category does not require a change of category. "Because these activities are so intertwined, such a change of activity will not be considered a change of category necessitating a formal approval by the Responsible Officer or approval by the Department of State and does not require the issuance of a new Form DS-2019 to reflect a change in category." *See* 22 CFR §62.20(h).

10 DOS has confirmed this specifically in the context of the 24-four month bar, stating in a 2007 letter to NAFSA that "countdown of the 12– and 24-month bars begins the day after the status of the Exchange Visitor's SEVIS record becomes 'inactive' or 'terminated.'"

11 In a 2007 letter to NAFSA, the director of the DOS Office of Exchange Coordination and Designation stated that "a J-2 spouse or dependent is afforded such status on a derivative basis from the principal J-1 exchange visitor program participant, [and] given this derivative status, J-2 dependents will be subject to both the 12-month and 24- month bars."

Given the potential difficulties in establishing that a change of category is "necessary due to unusual or exceptional circumstances" and that the original objective will continue, many who might benefit from a change in category decide to travel abroad and re-enter the United States to begin a program in a new category. When this strategy is pursued, a careful analysis of the applicability of the 12-month and 24-four month bars is required.

Does a J-1 visa applicant have to worry about export control issues?

When filing a petition for H, L or O-1A status, an employer must answer questions on Form I-129 about whether the foreign national will work on any technology that requires an export license. There is no similar question when filing a change of status to J-1, and as a practical matter, the majority of J-1 applicants applies at a consular post. While the DS-160 does not include any export control questions, the consular officer has the discretion to make further inquiries as to whether an employer or foreign national is liable for an illegal technology transfer or failed to obtain the appropriate export control license. In addition, if the J-1 applicant is engaged in what DOS deems to be a "sensitive technology" with potential dual uses, a consular officer may initiate a Visas Mantis security advisory opinion (SAO). If a Mantis SAO is initiated, the consular post may not issue the J-1 visa until it has received an affirmative response from all participating government agencies, except for the FBI. If a Mantis security check has been pending for over 90 days, counsel may call the Visa Office public inquiries number at (202) 663-1225 or e-mail an inquiry to legalnet@state.gov.

A Mantis clearance is valid for the duration of the approved activity up to a maximum of two years. If the nature of the J-1 scholar's activities changes, the clearance ceases to be valid and a new SAO is required.

What is the "Alien Physician" category for J-1 Exchange Visitors?

This category is for foreign-national physicians pursuing graduate medical education and training at accredited U.S. schools of medicine, or other U.S. institutions through a clinical exchange program. The Educational Commission for Foreign Medical Graduates (ECFMG) (www.ecfmg.org) is the only program sponsor authorized for this category. Foreign medical graduates under this category must successfully complete examinations administered by ECFMG that measure their command of English and the medical sciences as well as Step I and II (CK and CS) of the United States Medical Licensing Examination (USMLE). All J-1 foreign medical graduates are subject to the two-year home-residence requirement. Any foreign national physician must conform fully with the state licensing requirements and regulations for medical and health care.

What is the maximum duration of the alien physician category for J-1 Exchange Visitors?

The maximum duration of the physician category is seven years, unless an extension of the program is authorized by DOS. An extension beyond seven years is considered extraordinary. Generally, the foreign national's home country must submit documentation and evidence specifically requesting that the physician continue graduate medical education in the sought after discipline because it is in the home country's national interest. In addition, the physician must make additional attestations regarding his or her intention to return home at the conclusion of the training. This requirement could make it difficult to subsequently obtain a J-1 waiver, if desired.

Can the dependent spouse of a J-1 physician participate in a graduate medical education program pursuant to an EAD?

Yes, a J-1 physician's dependent J-2 spouse may participate in a graduate medical education program pursuant to an EAD.

Can a J-1 physician waive the home residency requirement pursuant to a no objection certificate from their home country?

A J-1 physician is statutorily barred from utilizing the no-objection option to waive the two-year home residency requirement.

Must a J-1 physician only practice in a federally designated medical professional shortage area (MPSA) if he or she has been granted a waiver pursuant to sponsorship by a state health agency?

Generally, each state health agency is permitted to sponsor up to 10 waivers per fiscal year (commonly known as "Flex 10" slots) for placement of health professionals to practice at facilities in areas that are not federally designated MPSAs, but treat patients who reside within such MPSAs.

What are the limitations placed on J-1 physicians who have been granted a waiver of the home residency requirement based on sponsorship by an IGA or state health agency to perform clinical medical services?

Pursuant to INA §214(l), a J-1 physician who has been granted a waiver of the home residency requirement based on sponsorship by an IGA or state health agency to perform clinical medical services must promise to perform such services full time, 40 hours per week, for three years in H-1B classification in a federally designated MPSA commencing within 90 days of approval of the J-1 waiver by USCIS. Generally, until such time as this three-year obligation is completed, the physician will not be eligible to adjust status. Furthermore, an individual seeking change of employment during the three-year obligation must show extenuating circumstances justifying the termination of the employment contract and obligation with the J-1 sponsoring employer, such as closure of the facility or hardship to the individual.

Besides IGA or state health agency requests, is a J-1 physician eligible for any other waiver options for the home residency requirement?

A J-1 physician may utilize any other waiver option, such as hardship to a qualifying U.S. citizen or LPR relative, fear of persecution, or IGA to waive the home residency requirement. Approval of a waiver (under such categories that do not require clinical medical services of the physician) does not require the physician to complete three years of service in H-1B classification in a federally designated MPSA prior to becoming eligible to adjust status.

What are the J-1 programs advertised by nonprofits and other organizations such as the American Immigration Council?

According to the American Immigration Council website, these programs are typically trainee or intern programs that permit exchange visitors to spend up to 18 months in the professional setting of an American host company, learning and utilizing new skills related to their degree or career. Summer

work travel and camp counselor programs also are generally sponsored by umbrella organizations.

To apply, an American host organization and the exchange visitor must submit biographical materials and a training plan, in addition to filing fees and health insurance coverage costs (typically amounting to about $2,200) to the sponsoring organization. Upon approval, the sponsoring organization will issue a DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status to the exchange visitor in advance of his or her application for a J-1 visa at the U.S. consulate or embassy with jurisdiction over his or her place of residence.

Who can be a host organization?

A host organization conducts training or internship programs on behalf of DOS-designated program sponsors (such as the American Immigration Council). They must sign a written agreement with the program sponsor.

Host organizations that have not successfully participated in the J visa sponsor's training or internship programs must be visited by a representative of the visa sponsor prior to approval of a DS-2019. Companies with 25 or more employees or at least $3 million in annual revenue are exempt from this mandatory visit.

The host organization must have workers' compensation insurance. Where possible, the intern or trainee must be covered by the insurance. The host organization must be able to provide an Employer Identification Number (EIN).

Who can be an intern?

Interns must be either currently enrolled in and pursuing post-secondary academic studies abroad, or have graduated from an overseas post-secondary academic institution no more than 12 months prior to the start date of his or her exchange visitor program.

Who can be a trainee?

Trainees are individuals who have either a degree or professional certificate from a post-secondary academic institution abroad and at least one year of related work experience acquired outside the United States, or have five years of related work experience acquired outside the United States. A trainee program must be in the applicant's specific occupational field.

inside **IMMIGRATION**

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INSIDE IMMIGRATION, published several times annually, is an official publication of the American Immigration Lawyers Association, Suite 300, 1331 G Street, NW, Washington, DC 20005