

# Rules and Regulations

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## DEPARTMENT OF JUSTICE

### Immigration and Naturalization Service

#### 8 CFR Parts 204 and 245

[INS No. 2048-00]

RIN 1115-AF75

#### National Interest Waivers for Second Preference Employment-Based Immigrant Physicians Serving in Medically Underserved Areas or at Department of Veterans Affairs Facilities

**AGENCY:** Immigration and Naturalization Service, Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** This interim rule amends the Immigration and Naturalization Service (Service) regulations by establishing the procedure under which a physician who is willing to practice full-time in an area designated by the Secretary of Health and Human Services as having a shortage of health care professionals or in a facility operated by the Department of Veterans Affairs may obtain a waiver of the job offer requirement that applies to alien beneficiaries of second preference employment-based immigrant visa petitions. This rule explains the requirements the alien physician must meet in order to obtain approval of an immigrant visa petition and, once the physician has completed the requirements, to obtain adjustment to lawful permanent residence status. This regulatory change is necessary to help reduce the shortage of physicians in designated underserved areas of the United States.

**EFFECTIVE DATE:** This interim rule is effective October 6, 2000.

*Comment date:* Written comments must be submitted on or before November 6, 2000.

**ADDRESSES:** Written comments must be submitted, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC, 20536. To ensure proper handling, please reference the INS number 2048-00 on your correspondence. Comments are available for public inspection at this location by calling (202) 514-3048 to arrange for an appointment.

#### FOR FURTHER INFORMATION CONTACT:

Craig Howie, Headquarters Adjudications Officer, Business and Trade Services, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 3040, Washington, DC 20536, telephone (202) 353-8177.

#### SUPPLEMENTARY INFORMATION:

##### Background

##### *What Are National Interest Waivers?*

Section 203 of the Immigration and Nationality Act (the Act) provides for the allocation of preference visas for both family and employment-based immigrants. The second preference employment-based category (EB-2) allows for the immigration of aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. See section 203(b)(2) of the Act. The Act at section 203(b)(2)(B) also allows the Attorney General to waive the job offer requirement placed on EB-2 immigrants when the Attorney General determines that services the alien intends to provide will be in the national interest. Such waivers are commonly called national interest waivers. These waivers relieve the petitioner from fulfilling the labor certification requirement, as administered by the Department of Labor.

##### Legislative Authority

##### *How Has Congress Amended Section 203 of the Act?*

On November 12, 1999, the President approved enactment of the Nursing Relief for Disadvantaged Areas Act of 1999, Public Law 106-95 (Nursing Relief Act). Section 5 of the Nursing Relief Act amends section 203(b)(2) of the Act by adding a new subparagraph (B)(ii). The amendment establishes special rules for requests for a national interest waiver that are filed by or on

behalf of physicians who are willing to work in an area or areas of the United States designated by the Secretary of Health and Human Services (HHS) as having a shortage of health care professionals or at facilities operated by the Department of Veterans Affairs (VA). The amendment is applicable only to practicing licensed physicians (namely doctors of medicine and doctors of osteopathy), not other health care professionals such as nurses, physical therapists, or doctor's assistants.

Note that the Consolidated Appropriations Act, 2000, Public Law 106-113, 113 Stat. 1501, enacted on November 29, 1999, also included an essentially identical amendment to section 203(b)(2)(B) of the Act. (See Section 1000(a)(1) of Division B of Pub. L. 106-113, 113 Stat. at 1535, which enacts the Department of Justice Appropriations Act, 2000.) To make the benefit of new section 203(b)(2)(B)(ii) as widely available as possible, and to avoid confusion for any physician on whose behalf a petition was filed between November 12 and November 29, 1999, the interim rule fixes November 12, 1999, as the proper effective date.

Under the Act as amended, the Attorney General is directed to grant a national interest waiver of the job offer requirement to any alien physician who agrees to work full-time in a clinical practice for the period fixed by statute. For most cases, the required period of service is 5 years; 3 years' service is sufficient in those cases involving immigrant visa petitions filed before November 1, 1998. The alien physician must provide the service either in an area or areas designated by the HHS as having a shortage of health care professionals (namely in HHS designated Medically Underserved Areas, Primary Medical Health Professional Shortage Areas, or Mental Health Professional Shortage Areas), or at a VA facility or facilities. In either case, the alien physician must also obtain a determination from HHS, VA, another federal agency that has knowledge of the physician's qualifications, or a State department of public health that the physician's work in such an area, areas, or facility is in the public interest.

### *Why Is the Service Issuing This Regulation?*

This interim rule is necessary to codify the provisions of Public Law 106-95 and to put into place procedures for both the public and Service officers to follow.

### *Are the New Statutory Provisions Available to Any Physician?*

Section 203(b)(2)(B)(ii) of the Act states that any physician may petition for a national interest waiver. While the statutory language says "any physician," the Service notes that HHS currently limits physicians in designated shortage areas to the practice of family or general medicine, pediatrics, general internal medicine, obstetrics/gynecology, and psychiatry. Unless HHS establishes shortage areas for other fields of medicine, only these fields of medicine are covered by this rule.

The Service anticipates that the majority of physicians petitioning under the new provisions will be those that are already admitted to the United States in a valid nonimmigrant status. The Service expects that many J-1 nonimmigrant medical doctors in training, as well as physicians practicing medicine in H-1B nonimmigrant status, will apply for this waiver since many J-1 and H-1B physicians practice or are in training to practice family or general medicine. It is unlikely that many physicians living abroad will have completed the necessary licensing and certification procedures in order to qualify for this particular EB-2 immigrant visa. Any physician living abroad who has met the requirements necessary to practice in the United States, however, may seek a national interest waiver of the job offer requirement, if the physician can meet the requirements of section 203(b)(2)(B)(ii).

### *How Much Time Will the Service Give an Alien Physician To Complete His or Her Aggregate Service?*

The interim rule establishes that physicians petitioning for EB-2 immigrant status with a request for a national interest waiver must fulfill the aggregate 5 years of full-time service within a 6-year period following approval of the petition and waiver (within 4 years of approval of the petition and waiver for cases filed before November 1, 1998). The Service is of the opinion that granting physicians one additional year to accumulate the needed aggregate time is more than reasonable.

The Service realizes that situations will arise that cause some physicians to

have interruptions in the respective medical practice, such as job loss through no fault of their own and the ensuing search for new employment in an underserved area, pregnancy, or providing care to ill parents, children, or other family members. Nevertheless, the Service does not consider it appropriate to allow physicians to remain in the United States indefinitely without satisfying the service requirement. The Service will, therefore, deny the application for adjustment of status and revoke approval of the visa petition and national interest waiver in any case in which the alien physician fails to submit, within the time fixed by the interim rule, the required documentary evidence establishing the physician's compliance with the service requirement.

### *Does Time Spent by the Alien Physician in J-1 Status Count Toward the Mandatory Service Time Period?*

No. The Act plainly states that any time spent by the alien physician in J-1 nonimmigrant status does not count toward either the 5 or 3-year medical service requirement.

### *What Evidence Will Physicians Need To Submit?*

This interim rule establishes what documentary evidence is necessary for physicians desiring to take advantage of the statutory amendment. However, most of this documentation is similar to what a physician would be required to submit if he or she were not applying for the national interest waiver. In a national interest waiver case, however, the evidence must establish that the physician will work in an HHS designated shortage area or a VA facility and that the petition is supported by the needed attestations from either HHS, VA, another Federal agency that has knowledge of the physician's qualifications, or a State public health department.

### *Can Any Federal Agency Issue a Needed Attestation?*

This interim rule provides that, in order to provide an attestation, the Federal agency must possess knowledge of the alien physician's skills and have experience in making similar type attestations. In addition to HHS and the VA, this might include, for example, attestations from the medical director of a United States military hospital, The Peace Corps, or the Department of State.

### *Are Similar Limits Placed on State Departments of Health?*

Yes, the interim rule establishes that the needed attestation must come from

a State department of public health (or the equivalent), including United States territories and the District of Columbia. While the Act, as amended, states that "a department of public health in any State" may provide the needed attestation, the Service has concerns over how a completely decentralized system of providing attestations can effectively address the problem of physician shortages. In particular, the Service sees problems with an attestation procedure operating without a central authority in each State having oversight of the process and oversight of where the physicians are actually practicing. Therefore, the interim rule places the authority with each State department of public health to make the necessary attestations. Nothing in this interim rule prevents local departments of public health from urging the central State health department to issue attestations concerning the merits of a particular alien physician and that physician's desire to practice medicine in an HHS-designated underserved area. This policy of placing the authority to render a needed attestation with the State public health department is consistent with Service regulations that address waivers of the 2-year return home requirement for J-1 nonimmigrant physicians. See 8 CFR 212.7(c)(9)(i)(D).

The Service is also restricting such attestations to physicians intending to practice clinical medicine within the agency's territorial jurisdiction. For example, the Service will not accept an attestation from the State of Maryland Public Health Department regarding a physician proposing to practice medicine exclusively in Pennsylvania.

### *Is There Any Special Provision for Long-Pending Petitions?*

As noted, most alien physicians must work in the area designated by the Secretary of HHS as having a shortage of health care professionals (or at the VA facility) for at least 5 years before the alien physician may obtain permanent residence status. A special rule applies if the alien physician is the beneficiary of an immigrant visa petition filed before November 1, 1998. In that case, all the other requirements apply but the alien physician may obtain permanent residence after only 3 years of qualifying service. The Service has established an administrative method to implement the noted effective dates by providing guidance at 8 CFR 204.12(d) for each group of possible petitioners and beneficiaries.

*Is This Waiver Available to an Alien Physician Who Is the Beneficiary of an Immigrant Visa Petition That the Service Denied Prior to the Amendment's Enactment Date of November 12, 1999?*

If a Service decision that denied an immigrant visa petition became administratively final before November 12, 1999, the alien physician may obtain the benefit contained in the interim rule only through the filing of a new immigrant visa petition with the required evidence. The Service will not entertain motions to reopen or reconsider denied cases because the provisions of section 203(b)(2)(B)(ii) of the Act were not in effect when those particular cases were denied. Under established precedent, in order for an alien to receive a priority date, his or her petition must be fully approvable under the law that is in effect at the time of filing. *See Matter of Atembe*, 19 I&N Dec. 427 (BIA 1986). The denial of a motion to reopen or reconsider, however, will be without prejudice to the filing of a new immigrant visa petition.

This restriction applies only if the denial became final before November 12, 1999. That is, if the petitioner had filed a timely appeal of the Administrative Appeals Office (AAO) which was still pending as of that date, or, if the AAO affirmed the denial but the petitioner had already sought judicial review by November 12, 1999, it will not be necessary to file a new petition. In making provision for cases filed before November 1, 1998, however, section 203(b)(2)(B)(ii)(IV) of the Act makes it clear that Congress intended to apply this new provision to all petitions that were actually pending on November 12, 1999. If a case was pending before the AAO or a Federal court on November 12, 1999, the Service will support remand of the case to the proper Service Center for a new decision in light of the new amendment. If the case is still pending before a Service Center, the visa petitioner may supplement the record with evidence that satisfies the requirements of section 203(b)(2)(B)(ii) of the Act.

*At What Point in the Process May an Alien Physician Apply for Adjustment of Status?*

Section 203(b)(2)(B)(ii)(III) of the Act allows any physician in receipt of an approved immigrant petition with an accompanying national interest waiver request based on full-time service in a shortage area to immediately apply for adjustment of status to that of lawful permanent resident. With a non-

frivolous adjustment of status application pending, the alien physician is eligible to apply for an Employment Authorization Document (EAD) pursuant to 8 CFR 274a.12(c)(9). (Physicians with approved immigrant petitions and national interest waivers based on service in a shortage area should file the application for adjustment of status and the application for an EAD simultaneously.) This relieves the physician of having to maintain any type of valid nonimmigrant status prior to the final adjudication of the adjustment of status application. That is to say, the alien physician, under section 245(c)(7) of the Act, must have been in a lawful nonimmigrant status when the alien physician files the adjustment application, but need not remain in lawful nonimmigrant status during the entire period of medical service.

*At What Point Does the Service Begin Counting the Physician's 5 or 3-year Medical Practice Requirement?*

In general, the alien's 5-year or 3-year period of medical service begins when the alien starts working for the petitioner in a medically underserved area. If the physician, other than those with J-1 nonimmigrant visas, already has authorization to accept employment at the facility, the 6-year or 4-year period during which the physician must provide the service begins on the date that the Service approves the Form I-140 petition and national interest waiver. If the physician must obtain employment authorization before the physician can begin working, the 6-year or 4-year period begins on the date the Service issues an EAD. Since section 203(b)(2)(B)(ii)(II) of the Act specifically prohibits any time served in J-1 nonimmigrant status as counting towards the 5-year service requirement, J-1 physicians with approved Form I-140 petitions will have their medical service under this rule begin on the date the physician starts his or her employment with the petitioner, and after the Service issues an EAD.

The interim rule does include a special provision for former J-1 nonimmigrant physicians who have obtained foreign residence requirement waivers. Section 214(l) of the Act, as previously amended by section 220 of Public Law 103-416, provides a special waiver of the foreign residence requirement for alien physicians who are willing to work at VA facilities or in HHS-designated underserved areas. Under section 214(l), 3 years' service as an H-1B nonimmigrant is sufficient. The interim rule makes clear that for aliens who already have a waiver under

section 214(l) of the Act, the Service will calculate the 5-year or 3-year period of services of the national interest waiver under section 203(b)(2)(B)(ii) of the Act beginning on the date the alien changed from J-1 to H-1B status. That is, an alien who is subject to the foreign residence requirement will not be required to first serve for 3 years to obtain that waiver and then to serve an additional 5 years to obtain adjustment of status based on the national interest waiver.

*Will the Service Hold Open an Adjustment of Status Application for the Aggregate 5 or 3-year Period?*

Section 203(b)(2)(B)(ii)(II) of the Act prohibits the Attorney General from making a final determination on any adjustment of status application submitted by a physician practicing medicine full-time in a medically underserved area until the physician has had the opportunity to prove that he or she has worked full-time as a physician for an aggregate of 5 or 3 years, depending on filing date. Physicians should note that this period of service does not count any time the physician has spent in a J-1 nonimmigrant status.

The interim rule establishes two points where the alien physician must submit evidence noting his or her practice of medicine in an underserved area. First, physicians with the 5-year service requirement must make an initial submission of evidence no later than 120 days after the second anniversary of the approval of the immigrant petition, Form I-140. The physician must document at least 12 months of qualifying employment during the first 2-year period. If a physician has not worked at least one year of this 2-year period, it will be mathematically impossible for the physician to reach his or her five-year mark within six years. At the end of the physician's four-year balance, evidence must be submitted that documents the employment of the final years of the 5-year aggregate service requirement. Alien physicians with the 3-year service requirement will only be required to submit evidence once, at the conclusion of the 3-years aggregate service.

As evidence, the Service will request individual tax return documents, and documentation from the employer attesting that the physician has in fact performed the required full-time clinical medical service. If a physician obtained the waiver based on his or her plan to establish his or her own practice, the physician must submit documentation proving he or she did so, including proof of the incorporation of the

medical practice (if incorporated), business licenses, and business tax returns.

*Are the Adjustment of Status Filing Requirements Different for These Alien Physicians?*

Yes. Since the Attorney General is prohibited from making the final adjudication on a physician's adjustment of status application, until the physician has submitted evidence documenting the medical service in a shortage area or areas, the interim rule establishes two modifications to the adjustment filing procedure. First, physicians will not be scheduled for fingerprinting at an Application Support Center until the physician submits evidence documenting the completion of the required years of service. Second, physicians will not submit the required medical examination report at the time of filing for adjustment. The medical report will instead be submitted with the documentary evidence noting the physician's fulfillment of the 5 or 3-year medical service requirement.

*Can an Alien Physician Relocate to Another Underserved Area During the 5 or 3-year Service Period?*

Yes, physicians will not be prohibited from relocating to other underserved areas. However, the interim rule establishes that any physician desiring to relocate must submit a new petition that documents the reasons for the proposed relocation. The interim rule, at 8 CFR 204.12(f), establishes the necessary procedures for the alien physician and the new petitioner to follow.

The Service will take into account the amount of time the physician is engaged in full-time practices in calculating the aggregate medical service time in the underserved areas. For example, if the physician completed 3 years of service before approval of a second petition, then only 2 more years of service would be needed to qualify for adjustment of status. However, petitioners and beneficiaries should note that the authorization to begin a medical practice in a new area does not constitute the beginning of a new 6-year period. Regardless of the number of moves, physicians are granted just one 6-year period to complete the required service time.

*Will the Service Require a Physician To Relocate to Another Underserved Area If the Initial Area Loses Designation as an Underserved Area?*

The interim rule does not require that a physician relocate to another underserved area should the area the

physician is practicing full-time clinical medicine lose its designation as an underserved area. The purpose of such a designation is to foster a greater physician presence in underserved areas. The Service believed one of the desired results of the statutory amendment is for physicians to take up residency in these areas and become integral parts of the community. Once an area is no longer designated as an underserved area, however, the Service can no longer grant national interest waivers for physicians to practice in that area (other than for physicians who will work in a VA facility).

*What Action Will the Service Take If the Alien Physician Does Not Submit the Required Evidence Needed To Complete the Adjustment Process?*

The interim rule establishes, at section 245.18(i), that the Service will deny the application for adjustment of status and revoke approval of the Form I-140 if a physician fails to file proof of the physician's completion of the service requirement in a timely fashion.

**Request for Comments**

The Service is seeking public comments regarding this interim rule. In particular, the Service is interested in hearing from States on the Service's intended method of vesting State departments of public health with the authority to issue attestations for alien physicians. The Service welcomes suggestions on this and all other topics concerning the information contained within this interim rule.

**Good Cause Exception**

The Service's implementation of this rule as an interim rule, with provisions for post-promulgation public comments, is based on the "good cause" exceptions found at 5 U.S.C. 553 (b)(B) and (d)(3). The reason and necessity for immediate implementation of this interim rule without prior notice and comment is that the new legislation became effective upon enactment and requires the Service to alter the processing of immigrant petitions where the petitioner is requesting a national interest waiver based on service as a physician at a VA facility or in an area designated by the Secretary of HHS as having a shortage of health care professionals. Issuing an interim rule allows the regulatory provisions to become effective in a relatively short period of time, and allows alien physicians to begin taking advantage of the new provisions without further delays.

The Service is also aware of the effect that delays in issuing these interim

regulations may have on public health in underserved areas of the United States. For this reason, the Service has already consulted with and incorporated suggestions from other Federal agencies involved with physician shortage issues, including HHS, the VA, the Departments of State and Agriculture, and the Appalachian Regional Commission.

For these reasons, the Commissioner has determined that delaying the implementation of this rule would be unnecessary and contrary to the public interest, and that there is good cause for dispensing with the requirements of prior notice. However, the Service welcomes public comment on this interim rule and will address those comments prior to the implementation of the final rule.

**Regulatory Flexibility Act**

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant economic impact on a substantial number of small entities. While some physicians will self-petition and establish self-operated medical practices or clinics, the Service anticipates that the majority of physicians taking advantage of the provisions outlined within this regulation will be employed by hospitals, clinics, or other medical facilities. In these instances, the effect on hospitals, clinics, or other medical facilities considered small entities will be positive by expanding the labor pool of qualified physicians eligible to be employed in designated underserved areas.

**Unfunded Mandates Reform Act of 1995**

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1-year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse

effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

#### Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Under Executive Order 12866, section 6(a)(3)(B)–(D), this proposed rule has been submitted to the Office of Management and Budget for review. This rule is mandated by the Nursing Relief for Disadvantaged Areas Act of 1999 in order to create an incentive for qualified alien physicians to practice medicine in medically underserved areas of the United States.

#### Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a federalism summary impact statement.

#### Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

#### Paperwork Reduction Act of 1995

The evidence requirements contained in § 204.12 and § 245.18 that must be submitted with the Forms I-140 and I-485 are considered information collections. Since a delay in issuing this interim rule could have an impact in providing public health services in underserved areas of the United States, the Service is using emergency review procedures for review and clearance by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (PRA) of 1995.

The OMB approval has been requested by September 21, 2000. If granted, the emergency approval is only valid for 180 days. Comments concerning the information collection should be directed to: Office of Information and Regulatory Affairs, OMB Desk Officer for the Immigration

and Naturalization Service, Office of Management and Budget, Room 10235, Washington, DC 20503.

During the first 60 days of this same period a regular review of this information will also be undertaken. Written comments are encouraged and will be accepted until November 6, 2000. Your comments should address one or more of the following points:

- (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The Service, in calculating the overall burden this requirement will place upon the public, estimates that approximately 8,000 physicians may apply for the national interest waivers annually. The Service also estimates that it will take the physicians approximately 1 hour to comply with the new requirements as noted in this interim rule. This amounts to 8,000 total burden hours.

Organizations and individuals interested in submitting comments regarding this burden estimate or any aspect of these information collection requirements, including suggestions for reducing the burden, should direct them to: Immigration and Naturalization Service, Director, Policy Directives and Instructions Branch, 425 I Street NW., Room 5307, Washington, DC 20536.

#### List of Subjects

##### 8 CFR Part 204

Administrative practice and procedures, Aliens, Employment, Immigration, Petitions.

##### 8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

#### PART 204—IMMIGRANT PETITIONS

1. The authority citation for part 204 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1003, 1151, 1153, 1154, 1182, 1186a, 1255, 1641; 8 CFR part 2.

2. Section 204.12 is added to read as follows:

#### § 204.12 How can second-preference immigrant physicians be granted a national interest waiver based on service in a medically underserved area or VA facility?

(a) *Which physicians qualify?* Any alien physician (namely doctors of medicine and doctors of osteopathy) for whom an immigrant visa petition has been filed pursuant to section 203(b)(2) of the Act shall be granted a national interest waiver under section 203(b)(2)(B)(ii) of the Act if the physician requests the waiver in accordance with this section and establishes that:

(1) The physician agrees to work full-time (40 hours per week) in a clinical practice for an aggregate of 5 years (not including time served in J-1 nonimmigrant status); and

(2) The service is;

- (i) In a geographical area or areas designated by the Secretary of Health and Human Services (HHS) as a Medically Underserved Area, a Primary Medical Health Professional Shortage Area, or a Mental Health Professional Shortage Area, and in a medical speciality that is within the scope of the Secretary's designation for the geographical area or areas; or

(ii) At a health care facility under the jurisdiction of the Secretary of Veterans Affairs (VA); and

(3) A Federal agency or the department of public health of a State, territory of the United States, or the District of Columbia, has previously determined that the physician's work in that area or facility is in the public interest.

(b) *Is there a time limit on how long the physician has to complete the required medical service?*

(1) If the physician already has authorization to accept employment (other than as a J-1 exchange alien), the beneficiary physician must complete the aggregate 5 years of qualifying full-time clinical practice during the 6-year period beginning on the date of approval of the Form I-140.

(2) If the physician must obtain authorization to accept employment before the physician may lawfully begin working, the physician must complete the aggregate 5 years of qualifying full-time clinical practice during the 6-year period beginning on the date of the Service issues the necessary employment authorization document.

(c) *Are there special requirements for these physicians?* Petitioners requesting the national interest waiver is described in this section on behalf of a qualified alien physician, or alien physicians self-

petitioning for second preference classification, must meet all eligibility requirements found in paragraphs (k)(1) through (k)(3) of § 204.5. In addition, the petitioner or self-petitioner must submit the following evidence with Form I-140 to support the request for a national interest waiver. Physicians planning to divide the practice of full-time clinical medicine between more than one underserved area must submit the following evidence for each area of intended practice.

(1)(i) If the physician will be an employee, a full-time employment contract for the required period of clinical medical practice, or an employment commitment letter from a VA facility. The contract or letter must have been issued and dated within 6 months prior to the date the petition is filed.

(ii) If the physician will establish his or her own practice, the physician's sworn statement committing to the full-time practice of clinical medicine for the required period, and describing the steps the physician has taken or intends to actually take to establish the practice.

(2) Evidence that the physician will provide full-time clinical medical service:

(i) In a geographical area or areas designated by the Secretary of HHS as having a shortage of health care professionals and in a medical speciality that is within the scope of the Secretary's designation for the geographical area or areas; or

(ii) In a facility under the jurisdiction of the Secretary of VA.

(3) A letter (issued and dated within 6 months prior to the date on which the petition is filed) from a Federal agency or from the department of public health (or equivalent) of a State or territory of the United States or the District of Columbia, attesting that the alien physician's work is or will be in the public interest.

(i) An attestation from a Federal agency must reflect the agency's knowledge of the alien's qualifications and the agency's background in making determinations on matters involving medical affairs so as to substantiate the finding that the alien's work is or will be in the public interest.

(ii) An attestation from the public health department of a State, territory, or the District of Columbia must reflect that the agency has jurisdiction over the place where the alien physician intends to practice clinical medicine. If the alien physician intends to practice clinical medicine in more than one underserved area, attestations from each intended area of practice must be included.

(4) Evidence that the alien physician meets the admissibility requirements established by section 212(a)(5)(B) of the Act.

(5) Evidence of the Service-issued waivers, if applicable, of the requirements of sections 212(e) of the Act, if the alien physician has been a J-1 nonimmigrant receiving medical training within the United States.

(d) *How will the Service process petitions filed on different dates?*

(1) *Petitions filed on or after November 12, 1999.* For petitions filed on or after November 12, 1999, the Service will approve a national interest waiver provided the petitioner or beneficiary (if self-petitioning) submits the necessary documentation to satisfy the requirements of section 203(b)(2)(B)(ii) of the Act and this section, and the physician is otherwise eligible for classification as a second preference employment-based immigrant. Nothing in this section relieves the alien physician from any other requirement other than that of fulfilling the labor certification process as provided in § 204.5(k)(4).

(2) *Petitions pending on November 12, 1999.* Section 203(b)(2)(B)(ii) of the Act applies to all petitions that were pending adjudication as of November 12, 1999 before a Service Center, before the associate Commissioner for Examinations, or before a Federal court. Petitioners whose petitions were pending on November 12, 1999, will not be required to submit a new petition, but may be required to submit supplemental evidence noted in paragraph (c) of this section. The requirement that supplemental evidence be issued and dated within 6 months prior to the date on which the petition is filed is not applicable to petitions that were pending as of November 12, 1999. If the case was pending before the Associate Commissioner for Examinations or a Federal court on November 12, 1999, the petitioner should ask for a remand to the proper Service Center for consideration of this new evidence.

(3) *Petitions denied on or after November 12, 1999.* The Service Center or the Associate Commissioner for Examinations shall reopen any petition affected by the provision of section 203(b)(2)(B)(ii) of the Act that the Service denied on or after November 12, 1999, but prior to the effective date of this rule.

(4) *Petitions filed prior to November 1, 1998.* For petitions filed prior to November 1, 1998, and still pending as of November 12, 1999, the Service will approve a national interest waiver provided the beneficiary fulfills the

evidence requirements of paragraph (c) of this section. Alien physicians that are beneficiaries of pre-November 1, 1998, petitions are only required to work full-time as a physician practicing clinical medicine for an aggregate of 3 years, rather than 5 years, not including time served in J-1 nonimmigrant status, prior to the physician either adjusting status under section 245 of the Act or receiving a visa issued under section 204(b) of the Act. The physician must complete the aggregate of 3 years of medical service within the 4-year period beginning on the date of the approval of the petition, if the physician already has authorization to accept employment (other than as a J-1 exchange alien). If the physician does not already have authorization to accept employment, the physician must perform the service within the 4-year period beginning the date the Service issues the necessary employment authorization document.

(5) *Petitions filed and approved before November 12, 1999.* An alien physician who obtained approval of a second preference employment-based visa petition and a national interest waiver before November 12, 1999, is not subject to the service requirements imposed in section 203(b)(2)(B)(ii) of the Act. If the physician obtained under section 214(1) of the Act a waiver of the foreign residence requirement imposed under section 212(e) of the Act, he or she must comply with the requirements of section 214(1) of the Act in order to continue to have the benefit of that waiver.

(6) *Petitions denied prior to November 12, 1999.* If a prior Service decision denying a national interest waiver under section 203(b)(2)(B) of the Act became administratively final before November 12, 1999, an alien physician who believes that he or she is eligible for the waiver under the provisions of section 203(b)(2)(B)(ii) of the Act may file a new Form I-140 petition accompanied by the evidence required in paragraph (c) of this section. The Service must deny any motion to reopen or reconsider a decision denying an immigrant visa petition if the decision became final before November 12, 1999, without prejudice to the filing of a new visa petition with a national interest waiver request that comports with section 203(b)(2)(B)(ii) of the Act.

(e) *May physicians file adjustment of status applications?* Upon approval of a second preference employment-based immigrant petition, Form I-140, and national interest waiver based on a full-time clinical practice in a shortage area or areas of the United States, an alien physician may submit Form I-485, Application to Register Permanent Residence or Adjust Status, to the

appropriate Service Center. The Service will not approve the alien physician's application for adjustment of status until the alien physician submits evidence documenting that the alien physician has completed the period of required service. Specific instructions for alien physicians filing adjustment applications are found in § 245.18 of this chapter.

(f) *May a physician practice clinical medicine in a different underserved area?* Physicians in receipt of an approved Form I-140 with a national interest waiver based on full-time clinical practice in a designated shortage area and a pending adjustment of status application may apply to the Service if the physician is offered new employment to practice full-time in another underserved area of the United States.

(1) If the physician beneficiary has found a new employer desiring to petition the Service on the physician's behalf, the new petitioner must submit a new Form I-140 (with fee) with all the evidence required in paragraph (c) of this section, including a copy of the approval notice from the initial Form I-140. If approved, the new petition will be matched with the pending adjustment of status application. The beneficiary will retain the priority date from the initial Form I-140. The Service will calculate the amount of time the physician was between employers so as to adjust the count of the aggregate time served in an underserved area. This calculation will be based on the evidence the physician submits pursuant to the requirements of § 245.18(d) of this chapter. An approved change of practice to another underserved area does not constitute a new 6-year period in which the physician must complete the aggregate 5 years of service.

(2) If the physician intends to establish his or her own practice, the physician must submit a new Form I-140 (with fee) with all the evidence required in paragraph (c) of this section, including the special requirement of paragraph (c)(1)(ii) of this section and a copy of the approval notice from the initial Form I-140. If approved, the new petition will be matched with the pending adjustment of status application. The beneficiary will retain the priority date from the initial Form I-140. The Service will calculate the amount of time the physician was between practices so as to adjust the count of the aggregate time served in an underserved area. This calculation will be based on the evidence the physician submits pursuant to the requirements of § 245.18(d) of this chapter. An approved

change of practice to another underserved area does not constitute a new 6-year period in which the physician must complete the aggregate 5 years of service.

(g) *Do these provisions have any effect on physicians with foreign residence requirements?* Because the requirements of section 203(b)(2)(B)(ii) of the Act are not exactly the same as the requirements of section 212(e) or 214(l) of the Act, approval of a national interest waiver under section 203(b)(2)(B)(ii) of the Act and this paragraph does not relieve the alien physician of any foreign residence requirement that the alien physician may have under section 212(e) of the Act.

#### **PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE**

3. The authority citation for part 245 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1182, 1255, sec. 202, Pub. L. 105-100, 111 Stat. 2160, 2193; sec. 902, Pub. L. 105-277, 112 Stat. 2681; and 8 CFR part 2.

4. Section 245.18 is added to read as follows:

##### **§ 245.18 How can physicians (with approved Forms I-140) that are serving in medically underserved areas or at a Veterans Affairs facility adjust status?**

(a) *Which physicians are eligible for this benefit?* Any alien physician who has been granted a national interest waiver under § 204.12 of this chapter may submit Form I-485 during the 6-year period following Service approval of a second preference employment-based immigrant visa petition.

(b) *Do alien physicians have special time-related requirements for adjustment?*

(1) Alien physicians who have been granted a national interest waiver under § 204.12 of this chapter must meet all the adjustment of status requirements of this part.

(2) The Service shall not approve an adjustment application filed by an alien physician who obtained a waiver under section 203(b)(2)(B)(ii) of the Act until the alien physician has completed the period of required service established in § 204.12 of this chapter.

(c) *Are the filing procedures and documentary requirements different for these particular alien physicians?* Alien physicians submitting adjustment applications upon approval of an immigrant petition are required to follow the procedures outlined within this part with the following modifications.

(1) Delayed fingerprinting. Fingerprinting, as noted in the Form I-

485 instructions, will not be scheduled at the time of filing. Fingerprinting will be scheduled upon the physician's completion of the required years of service.

(2) Delayed medical examination. The required medical examination, as specified in § 245.5, shall not be submitted with Form I-485. The medical examination report shall be submitted with the documentary evidence noting the physician's completion of the required years of service.

(d) *Are alien physicians eligible for Form I-766, Employment Authorization Document?*

(1) Once the Service has approved an alien physician's Form I-140 with a national interest waiver based upon full-time clinical practice in an underserved area or at a Veterans Affairs facility, the alien physician should apply for adjustment of status to that of lawful permanent resident on Form I-485, accompanied by an application for an Employment Authorization Document (EAD), Form I-765, as specified in § 274a.12(c)(9) of this chapter.

(2) Since section 203(b)(2)(B)(ii) of the Act requires the alien physician to complete the required employment before the Service can approve the alien physician's adjustment application, an alien physician who was in lawful nonimmigrant status when he or she filed the adjustment application is not required to maintain a nonimmigrant status while the adjustment application remains pending. Even if the alien physician's nonimmigrant status expires, the alien physician shall not be considered to be unlawfully present, so long as the alien physician is practicing medicine in accordance with § 204.5(k)(4)(iii) of this chapter.

(e) *When does the Service begin counting the physician's 5-year or 3-year medical practice requirement?* Except as provided in this paragraph, the 6-year period during which a physician must provide the required 5 years of service begins on the date of the notice approving the Form I-140 and the national interest waiver. Alien physicians who have a 3-year medical practice requirement must complete their service within the 4-year period beginning on that date.

(1) If the physician does not already have employment authorization and so must obtain employment authorization before the physician can begin working, then the period begins on the date the Service issues the employment authorization document.



(2) If the physician formerly held status as a J-1 nonimmigrant, but obtained a waiver of the foreign residence requirement and a change of status to that of an H-1B nonimmigrant, pursuant to section 214(1) of the Act, as amended by section 220 of Public Law 103-416, and § 212.7(c)(9) of this chapter, the period begins on the date of the alien's change from J-1 to H-1B status. The Service will include the alien's compliance with the 3-year period of service required under section 214(l) in calculating the alien's compliance with the period of service required under section 203(b)(2)(B)(ii)(II) of the Act and this section.

(3) An alien may not include any time employed as a J-1 nonimmigrant physician in calculating the alien's compliance with the 5 or 3-year medical practice requirement. If an alien is still in J-1 nonimmigrant status when the Service approves a Form I-140 petition with a national interest job offer waiver, the aggregate period during which the medical practice requirement period must be completed will begin on the date the Service issues an employment authorization document.

(f) *Will the Service provide information to the physician about evidence and supplemental filings?* Upon receipt of the adjustment application, the Service shall provide the physician with the following information and projected timetables for completing the adjustment process.

(1) The Service shall note the date that the medical service begins (provided the physician already had work authorization at the time the Form I-140 was filed) or the date that an employment authorization document was issued.

(2) A list of the evidence necessary to satisfy the requirements of paragraphs (g) and (h) of this section.

(3) A projected timeline noting the dates that the physician will need to submit preliminary evidence two years and 120 days into his or her medical service in an underserved area or VA facility, and a projected date six years and 120 days in the future on which the physician's final evidence of completed medical service will be due.

(g) *Will physicians be required to file evidence prior to the end of the 5 or 3-year period?*

(1) For physicians with a 5-year service requirement, no later than 120 days after the second anniversary of the approval of Petition for Immigrant Worker, Form I-140, the alien physician must submit to the Service Center

having jurisdiction over his or her place of employment documentary evidence that proves the physician has in fact fulfilled at least 12 months of qualifying employment. This may be accomplished by submitting the following.

(i) Evidence noted in paragraph (h) of this section that is available at the second anniversary of the I-140 approval.

(ii) Documentation from the employer attesting to the full-time medical practice and the date on which the physician began his or her medical service.

(2) Physicians with a 3-year service requirement are not required to make a supplemental filing, and must only comply with the requirements of paragraph (h) of this section.

(h) *What evidence is needed to prove final compliance with the service requirement?* No later than 120 days after completion of the service requirement established under § 204.12(a) of this section, an alien physician must submit to the Service Center having jurisdiction over his or her place of employment documentary evidence that proves the physician has in fact satisfied the service requirement. Such evidence must include, but is not limited to:

(1) Individual Federal income tax returns, including copies of the alien's W-2 forms, for the entire 3-year period of the balance years of the 5-year period that follow the submission of the evidence required in paragraph (e) of this section;

(2) Documentation from the employer attesting to the full-time medical service rendered during the required aggregate period. The documentation shall address instances of breaks in employment, other than routine breaks such as paid vacations;

(3) If the physician established his or her own practice, documents noting the actual establishment of the practice, including incorporation of the medical practice (if incorporated), the business license, and the business tax returns and tax withholding documents submitted for the entire 3 year period, or the balance years of the 5-year period that follow the submission of the evidence required in paragraph (e) of this section.

(i) *What if the physician does not comply with the requirements of paragraphs (f) and (g) of this section?* If an alien physician does not submit (in accordance with paragraphs (f) and (g) of this section) proof that he or she has completed the service required under § 204(n) of this chapter, the Service shall serve the alien physician with a written notice of intent to deny the alien

physician's application for adjustment of status and, after the denial is finalized, to revoke approval of the Form I-140 and national interest waiver. The written notice shall require the alien physician to provide the evidence required by paragraph (f) or (g) of this section within 30 days of the date of the written notice. The Service shall not extend this 30-day period. If the alien physician fails to submit the evidence within the 30-day period established by the written notice, the Service shall deny the alien physician's application for adjustment of status and shall revoke approval of the Form I-140 and of the national interest waiver.

(j) *Will a Service officer interview the physician?*

(1) Upon submission of the evidence noted in paragraph (h) of this section, the Service shall match the documentary evidence with the pending form I-485 and schedule the alien physician for fingerprinting at an Application Support Center.

(2) The local Service office shall schedule the alien for an adjustment interview with a Service officer, unless the Service waives the interview as provided in § 245.6. The local Service office shall also notify the alien if supplemental documentation should either be mailed to the office, or brought to the adjustment interview.

(k) *Are alien physicians allowed to travel outside the United States during the mandatory 3 or 5-year service period?* An alien physician who has been granted a national interest waiver under § 204.12 of this chapter and has a pending application for adjustment of status may travel outside of the United States during the required 3 or 5-year service period by obtaining advanced parole prior to traveling. Alien physicians may apply for advanced parole by submitting form I-131, Application for Travel Document, to the Service office having jurisdiction over the alien physician's place of business.

(l) *What if the Service denies the adjustment application?* If the Service denies the adjustment application, the alien physician may renew the application in removal proceedings.

Dated: August 30, 2000.

**Doris Meissner,**

*Commissioner, Immigration and Naturalization Service.*

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