



AMERICAN
IMMIGRATION
LAWYERS
ASSOCIATION

January 14, 2020

USCIS Public Engagement
U.S. Citizenship and Immigration Services
20 Massachusetts Ave., NW
Washington, DC 20529

Re: USCIS Policy Manual: Volume 7, Part A, Chapter 8, Section D. Portability Provisions

Dear USCIS Public Engagement:

The American Immigration Lawyers Association (AILA) would like to bring to USCIS' attention what appears to be a misstatement of law in the USCIS Policy Manual. The error is contained in the USCIS Policy Manual in Volume 7, Part A, Chapter 8, Section D, entitled "Portability Provisions." The error itself is only tangentially related to the portability provisions. It pertains more directly to a conflation of two distinct provisions of law related to physicians; namely, physicians subject to the two-year home residency requirement of INA §212(e); and those eligible to apply for permanent residency based on a commitment to work in a medically underserved area or at a Veterans Affairs (VA) facility.

The language at issue in the USCIS Policy Manual states as follows:

National Interest Waiver Physicians

Physicians with an approved immigrant petition based on a national interest waiver (NIW) are subject to the two-year home residence requirement of INA §212(e) and may seek to qualify for waiver of that requirement by providing their medical services for three or five years in a medically underserved area or Department of Veterans Affairs (VA) facility.¹

This language is incorrect because it suggests all physicians with approved NIW petitions are subject to INA §212(e). This is not the case. Only physicians who complete graduate medical training in J-1 status are subject to INA §212(e)'s two-year home residence requirement. Pursuant to INA §214(l), those physicians may seek a waiver of the two-year home requirement through an interested government agency or state health agency by providing full-time medical service in a federally designated shortage area for at least three (3) years. Physicians who complete their three (3) year service obligation are no longer required to return home for two years; in essence, they are now "waived" of the requirement stipulated in INA §212(e). Yet this waiver does not automatically lead to permanent residence. Rather, the physician must take separate steps to apply for permanent residence, and the physician NIW is one such option. Those physicians who obtained a waiver based on committing to provide medical services in a federally designated underserved area can simply add two (2) additional years to their three (3) year J-1 waiver obligation to meet the total five (5) year service obligation.

However, the physician NIW is not limited to those who held J-1 status; physicians who were never subject to INA §212(e) may also apply for permanent residence through the PNIW. According to 8 CFR §204.12(1)-(2), "**any physician** (namely doctors of medicine and doctors of osteopathy) ...shall be granted

¹ 65 FR 53889 (Sept 6, 2000).

a national interest waiver...if the physician...who agrees to work full-time (40 hours per week) in a clinical practice for an aggregate period of 5 years” and the service is in a designated medical shortage area. (emphasis added).

The error in Volume 7, Part A, Chapter 8, Section D is problematic, and this is where portability is tied in, because later in this section, the USCIS Policy Manual states that “USCIS may grant the transfer only if the applicant has already fulfilled the required medical service for the INA 212(e) waiver.” Since many physicians do not have an INA §212(e) service obligation, this section of the USCIS Policy Manual should be clarified.

AILA respectfully suggest that USCIS make the following changes to Volume 7, Part A, Chapter 8, Section D of the USCIS Policy Manual, specifically under the sub-heading entitled “National Interest Waiver Physicians”:

National Interest Waiver Physicians

Some physicians with an approved immigrant petition based on a physician national interest waiver (PNIW) may be subject to the two-year home residence requirement of INA §212(e). Those physicians who are in receipt of a waiver of INA §212(e) pursuant to INA §214(l) are permitted to file an adjustment of status application before they complete their required three (3) years of medical service. In these cases, USCIS holds adjudication of the adjustment application in abeyance until the applicant has fulfilled and documented the medical service requirement both under INA §214(l) (the three (3) year service component) and under INA §203(b)(2)(B)(ii) (the five (5) year service component). The time worked in satisfaction of the 3 year J-1 waiver commitment under INA 214(l) may also be counted toward satisfaction of the NIW requirement under INA §203(b)(2)(B)(ii) so long as the employment takes place at a location that is either a Department of Veterans Affairs (VA) facility or at a location that has been designated by the U.S. Department of Health & Human Services as a Health Professional Shortage Area or Medically Underserved Area.

A physician who is not subject to the two-year home residence requirement of INA §212(e) may also file an NIW petition based on a commitment to work for at least 5 total years as a full-time clinical physician in either a VA facility or at a location that has been designated by the U.S. Department of Health & Human Services as a Health Professional Shortage Area or Medically Underserved Area.

An NIW physician may file a self-petition based on establishing his or her own medical practice or may become the beneficiary of a separate employment-based second preference immigrant petition for a prospective employer (whether before or after filing the application for permanent resident status). If the second petition is approved and the new employment takes place in a Health Professional Shortage Area or Medically Underserved Area or VA facility, the applicant may request transfer of the adjustment application to the second petition. In this scenario, the priority date of the initial NIW petition is retained.²

² See [8 CFR 204.12\(f\)\(1\)](#) or [8 CFR 204.12\(f\)\(2\)](#).

An I-140 petition approved for an NIW physician is a five-year contractual obligation; once the physician fulfills the five-year service obligation, the terms of the contract are satisfied and the physician is eligible to adjust status to that of a permanent resident. The portability provisions do not apply in this context.³

We thank you for your consideration of this matter. If you require any additional information or clarification, please contact Sharvari (Shev) Dalal-Dheini at (202) 507-7621 or by email at sdalal-dheini@aila.org.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION

³ See U.S. CITIZENSHIP & IMMIGRATION SERVICES, DEPT. OF HOMELAND SECURITY, HQ70/6.2; AD06-46, INTERIM GUIDANCE FOR ADJUDICATING NATIONAL INTEREST WAIVER (NIW) PETITIONS AND RELATED ADJUSTMENT APPLICATIONS FOR PHYSICIANS SERVING IN MEDICALLY UNDERSERVED AREAS IN LIGHT OF SCHNEIDER V. CHERTOFF, 450 F.3D 944 (9TH CIR. 2006) (“SCHNEIDER DECISION”) (January 23, 2007), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/schneiderintrm012307.pdf.