Foreign-born Scientists and the Two-year Home Residency Rule

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It is not unusual for foreign-born scientists to come to the United States in J-1 status. J-1 visas permit exchange visitors, such as research scholars, physician scientists/trainees, and professors to come to the United States with non-immigrant status. The J-1 visa program, which is administered by the U.S. Department of State (DOS), is designed to promote the exchange of knowledge, expertise, and skills.

Many J-1 visas, however, come at a high price: the holders are subject to the two-year home residency requirement (Section 212(e) of the INA). This means that the foreign national is not permitted to change to H-1B status or lawful permanent residence until s/he has returned to the home country for a two-year period.

Foreign scientists are most commonly subject to the two-year home residency rule for the following reasons: (1) S/he is on the “skills list” maintained by the DOS, meaning that s/he is engaged in a field that is designated by the home government as being in short supply in that country, (2) the exchange visit was financed, directly or indirectly, by the United States or a foreign country’s government, or (3) the exchange visitor has come to the United States to participate in a residency or fellowship program.

Fortunately, there are several ways to apply for a waiver of the home residency rule. What follows is a description of the more common methods used. One way to obtain a waiver is to invoke the sponsorship of an interested government agency (IGA). If, for example, a scientist is involved in research that is critical to NASA, then NASA, as the IGA, could request a waiver. Another way is to apply for the waiver based upon a “no objection” statement by the home

government. This involves the preparation and submission of a statement (along with supporting documents) that the foreign government does not object to the individual staying in the United States even though s/he previously agreed to leave for two years. This requires the applicant to obtain a “no objection” letter from the embassy of the

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foreign country. Usually, the embassies have very specific protocols to follow in this regard.

A third way to obtain a waiver is to prove that an “exceptional hardship” will be suffered by a U.S. citizen spouse or child if the applicant is forced to leave the United States. For example, where a foreign national has a U.S. citizen child who requires medical treatment that is available in the United States, but not the home country, the foreign national may be eligible for a hardship waiver.

Regardless of which method is chosen, it is important to know that all waiver requests are processed through the DOS. Ultimately, it is up to the DOS to issue a recommendation to the U.S. Department of Homeland Security Citizenship and Immigration Service (CIS).

The decision on the waiver application then comes from CIS.

Oftentimes, a waiver can be difficult to obtain. Individuals who undertake the waiver process should be ready to spend a significant amount of time and money on the process, and should plan ahead in order to be assured that the process runs smoothly. For example, if one is going to seek a “no objection” waiver, he/she should start the process of obtaining that letter well in advance of the time that they want to apply for the waiver. Often times, waiver applications can take nine months to a year, or even longer, to process.

Of course, before applying for a waiver, one needs to determine whether he/she is actually subject to the two-year home residency rule. In making this determination, one starts by looking at the passport and the IAP-66 Form or the DS-2019 Form. These documents may state that INA § 212(e) is applicable, or they may be silent on the issue. However, the analysis does not end here because one cannot assume that these documents are correct; passports and/or forms often contain errors. It is not unusual for the official who made the initial determination on the applicability of INA § 212 (e) to have been mistaken. For this reason, prior to applying for a waiver, it may be a good idea for the applicant to consider making an “Advisory Opinion Request” to the Waiver Review Division of DOS. If it turns out that the individual is not subject to the home residency rule, then they can avoid undergoing the time-consuming waiver process.

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