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VOL. 59, NO. 134

Thursday, July 14, 1994

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS 1654-94]
RIN 1115-AD66

Temporary Alien Workers Seeking H Classification for the Purpose of Obtaining Graduate Medical Education or Training

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service (Service) regulations with regards to the treatment of certain foreign medical graduates seeking nonimmigrant classification under the H-1B classification as amended by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA). This rule will prohibit a foreign medical graduate from seeking H-1B classification for the purpose of taking a medical residency in the United States. It will also modify the eligibility standards for foreign medical graduates and clarify for businesses and the general public the requirements for medical graduates' classification and admission.

DATES: Written comments must be submitted on or before September 12, 1994.

ADDRESSES: Please submit written comments, in triplicate, to the Records Systems Division, 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 1654-94 on your correspondence.

FOR FURTHER INFORMATION CONTACT:
John W. Brown, Senior Immigration Examiner, Adjudications Division,

Immigration and Naturalization Service, 425 I Street, NW., room 7215, Washington, DC 20536, telephone (202) 514-3240.

SUPPLEMENTARY INFORMATION: Prior to the enactment of the Immigration Act of 1990 (IMMACT), Public Law 101-649, with certain limited exceptions, graduates of foreign medical schools seeking to come to the United States to perform services in the medical professions could obtain H-1B classification only if they were coming pursuant to an invitation from a public or nonprofit private educational or research institution or agency to teach or conduct research, or both, at or for such an institution or agency. This requirement was deleted by Public Law 101-649 which allowed for the admission of foreign medical graduates under the H-1B nonimmigrant classification to perform any and all services, including direct patient care, in the medical professions.

The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Public Law 102-232, December 12, 1991, established, among other things, new criteria for the admission of foreign educated physicians coming to the United States to perform services in the medical professions. Public Law 102-232 amended section 212(j)(2) of the Act to provide that these aliens could obtain H-1B classification in either of two ways as follows:

First, (mirroring the pre-IMMACT language), an alien can be accorded H-1B classification if the alien is coming to the United States pursuant to an invitation from a public or nonprofit private educational or research institution or agency to teach or conduct research, or both, at or for such institution or agency.

Second, an alien may be accorded H-1B classification if he or she has passed the Federation Licensing Examination (FLEX) or an equivalent examination as determined by the Secretary of Health and Human Services. Eligibility under this criterion also requires a demonstration that the alien has competency in oral and written English or that the alien has graduated from a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Since the enactment of MTINA, a number of questions have been raised concerning the legality of graduates of foreign medical schools taking graduate medical education or training, also known as residencies or internships, as H-1B nonimmigrant aliens. It has been argued that a medical residency constitutes ``services in the medical professions'' since a portion of the residency involves providing direct patient care. It has also been argued that a medical residency meets the definition of the term ``specialty occupation'' as contained in section 214(i)(1) of the Act since the position requires the theoretical and practical application of a body of highly specialized knowledge, and a bachelor's or higher degree in the specific specialty is a minimum requirement for entry into the occupation.

It is the opinion of the Service that Congress did not intend the H-1B nonimmigrant classification to be utilized by graduates of foreign medical schools coming to the United States to undertake medical residencies or otherwise receive graduate medical education or training. The Service believes that graduates of medical schools coming to the United States to take medical residencies or otherwise receive graduate medical education or training must seek classification as J-1 nonimmigrant aliens.

The rationale behind this opinion requires an examination of the prior legislation in this area. Congress enacted the Health Professionals Education Assistance Act of 1976 (HPEAA), Public Law 94-484, in response to a number of problems with foreign medical graduates

in the United States. This legislation established the J-1 classification as the sole vehicle for graduates of medical schools to obtain graduate medical education or training in the United States, which clearly includes medical residencies. See sections 101(a)(15)(J) and 212(j)(1) of the Act; see also pre-IMMACT section 101(a)(15)(H)(i) of the Act. Section 212(j)(1) of the Act describes the various requirements for foreign medical graduates coming to the United States to receive graduate medical education or training. Although sections 303(a)(5) (A) and (B) of MTINA provided an avenue for foreign medical graduates to enter the United States in H-1B status to perform services in the medical professions by amending sections 101(a)(15)(H)(i)(b) and 212(j)(2) of the Act, MTINA did not alter the requirements for graduate medical education or training contained in section 212(j)(1) of the Act. It is our opinion that Congress would not place in juxtaposition two such clearly different statutory provisions as section 212(j)(1) and section 212(j)(2) of the Act if it intended the H-1B and J-1 classifications to overlap with respect to foreign medical graduates seeking graduate medical education or training.

Nothing in the legislative history of either IMMACT of MTINA indicates that Congress intended graduates of medical schools to obtain graduate medical education or training under the H-1B classification. In the absence of clear legislative language to the contrary, it is the opinion of the Service that graduates of foreign medical schools must utilize the J-1 classification to undertake medical residencies. Therefore, those aliens who were previously accorded H-1B classification in order to take a medical residency will be required to seek a change of nonimmigrant classification to that of the J-1 nonimmigrant alien.

This rule proposes to amend paragraph (h)(2)(ii) by removing the last two sentences of the paragraph. The change will allow a petitioner to file a single petition for multiple beneficiaries even when the beneficiaries on the petition will be applying for visas at more than one consulate or port-of-entry. Under the prior regulation, the Service required separate petitions for the beneficiaries where the aliens desired to apply for nonimmigrant visas at different consulates or where the alien beneficiaries were going to seek entry at more than one port-of-entry. This proposed revision will save petitioners the time and expense of filing multiple petitions for a group of aliens since, under the proposed rule, only a single petition will be required. The Service will, of course, notify each consular post or port-of-entry listed on the petition of the approval of the petition. The other requirements of the paragraph, i.e., that the aliens will be performing the same service or receiving the same training, for the same period of time and in the same location, have not been changed.

This rule also proposes to amend paragraph (h)(13)(iv), which discusses the limitations on admission for H-2B and H-3 nonimmigrant aliens, by adding a sentence differentiating between an H-3 alien trainee and an H-3 participant in a ``special education exchange visitor program.'' As contained in the previous regulation, any H-3 alien who had spent 18 months in the United States as an H or L nonimmigrant alien could not seek extension, change status, or be readmitted to the United States unless the alien had spent 6 months outside the United States. This paragraph is inconsistent with paragraph (h)(9)(iii)(D)(1) which provides that an H-3 petition for an alien trainee shall be valid for a period of two years.

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. The regulation merely clarifies certain provisions of the MTINA relating to physicians desiring to take medical residencies in this country and modifies certain filing procedures for petitions to reduce filing fees.

Executive Order 12866

This rule is not 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, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 12612

The regulation proposed herein 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 Executive Order 12612, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12606

The Commissioner of the Immigration and Naturalization Service certifies that she has addressed this rule in light of the criteria in Executive Order 12606 and has determined that it will have no effect on family well-being.

List of Subjects in 8 CFR Part 214

Administrative practice and procedures, Aliens, Employment, Organization and functions (Government agencies).

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 214--NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1221, 1281, 1282; 8 CFR part 2.

2. Section 214.2 is amended by:
a. Revising paragraph (h)(2)(ii);
b. Adding paragraph (h)(4)(viii)(D); and by
c. Revising paragraph (h)(13)(iv), to read as follows:

Sec. 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *
(h) * * *
(2) * * *

(ii) Multiple beneficiaries. More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time, and in the same location.

* * * * *

(4) * * *

(viii) * * *

(D) Aliens coming to the United States to receive graduate medical education or training. Aliens coming to the United States to receive graduate medical education or training are not eligible for H-1B classification. Such aliens must seek classification pursuant to section 101(a)(15)(J) of the Act.

* * * * *

(13) * * *

(iv) H-2B and H-3 limitation on admission. An H-2B alien who has spent three years in the United States under section 101(a)(15) (H) and/or (L) of the Act; an H-3 alien participant in a special education program who has spent 18 months in the United States under section 101(a)(15) (H) and/or (L) of the Act; and an H-3 alien trainee who has spent 24 months in the United States under section 101(a)(15) (H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior six months.

* * * * *

Dated: June 9, 1994.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

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