

## CLINICAL J-1 WAIVERS—A PRIMER

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According to the Educational Commission for Foreign Medical Graduates (ECFMG), more than 6,000 foreign medical graduates applied for J-1 sponsorship to begin or extend participation in clinical residency or fellowship training in the United States in 2007–08.<sup>1</sup> All foreign physicians who receive graduate medical training in J-1 nonimmigrant status must either return to their home country or country of last residence for an aggregate of two years, or obtain a waiver of that requirement before becoming eligible to: (1) apply for an immigrant visa; (2) adjust status; (3) apply for an H or L nonimmigrant visa;<sup>2</sup> or (4) change to almost any other nonimmigrant status within the United States.<sup>3</sup> While many J-1 physicians choose to return home at the completion of their J-1 education or training, those who prefer to remain in the United States indefinitely must obtain a waiver of the two-year foreign residency requirement. A J-1 waiver may be granted on the basis of: (1) persecution the physician would suffer if the home residency requirement were enforced; (2) exceptional hardship to a U.S. citizen or lawful permanent resident spouse or child if the requirement were enforced; or (3) the physician's commitment to practice medicine in an underserved area of the United States for at least three years.<sup>4</sup>

The vast majority of J-1 physicians who seek a waiver do so based on the recommendation of an Interested Government Agency (IGA) in exchange for the J-1 physician's commitment to practice full-time clinical medicine for a period of at least three years in an area federally designated as a Health Professional Shortage Area (HPSA), Medically Underserved Area/Population (MUA/MUP),<sup>5</sup> or at a facility operated by the Department of

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<sup>1</sup> See [www.ecfm.org/conference/presentations/evspoverview.pdf](http://www.ecfm.org/conference/presentations/evspoverview.pdf). The Educational Commission of Foreign Medical Graduates (ECFMG) administers the U.S. Department of State's (DOS) J-1 visa program for foreign medical graduates participating in graduate medical training, education, or advanced research at accredited facilities within the United States. ECFMG is responsible for ensuring that all J-1 physicians and sponsoring facilities comply with the federal regulations governing program participation and for verifying the academic credentials and qualifications of foreign medical graduates in the J-1 program.

<sup>2</sup> INA §212(e).

<sup>3</sup> INA §248(a)(3). *Note:* Nonimmigrants subject to INA §212(e) are permitted to change status to A, G, U, or T nonimmigrant classification without first having to returned home for two years or obtained a J-1 waiver. INA §212(e)-subject nonimmigrants seeking other nonimmigrant status (O-1, F-1, B-1/B-2, etc.) must first depart the United States and re-enter using the new classification. This is possible with all visa classifications except H and L.

<sup>4</sup> INA §212(e). *Note:* Unlike other J-1 visa holders, a J-1 physician may not use the home country government's lack of objection as a basis for granting the waiver.

<sup>5</sup> Health Professional Shortage Areas (HPSAs) and Mental Health Professional Shortage Areas (MHPSAs) are geographic areas, population groups, or specific facilities that are determined to have insufficient physician-to-patient population ratios. Medically Underserved Areas/Medically Underserved Populations (MUA/MUP) are similar except that designation is based on a broader range of factors, including infant mortality and the percentage of poor/elderly patients, in addition to the physician-to-patient ratios. All federal shortage area determinations are made by the Health Resources and Services Administration within the U.S. Department of Health and Human Services. See <http://bhpr.hrsa.gov/shortage>.

Veterans Affairs (VA facility).<sup>6</sup> This article will discuss the mechanics of applying for an IGA waiver, the policies and procedures of the various state and federal agencies that agree to act as IGAs, and important strategy considerations when representing foreign physicians and their employers during the waiver process.

## NUTS AND BOLTS

As the J-1 physician nears completion of residency or fellowship training, he or she must begin to seek job offers that will qualify for an IGA clinical waiver. Depending on where the position is located, there may be only one suitable IGA, or several that could agree to support the physician's J-1 waiver application. The attorney must have a good working knowledge of all federal or state IGAs that might have jurisdiction over the employment location, and assess the IGA's program requirements in conjunction with the physician's background and employer's needs, in order to properly advise the physician and/or the potential employer of the appropriate J-1 waiver processing options.

Once the physician has committed to a qualifying offer of employment, the convoluted J-1 waiver application process begins. The application must wend its way through three different agencies: the IGA, the U.S. Department of State (DOS), and the U.S. Citizenship and Immigration Services (USCIS). The first step is applying for a "case number" with DOS by submitting Form DS-3035, J-1 Visa Waiver Recommendation Application. The physician or the attorney must apply online and mail the signed original application form, filing fee, copies of passport information pages, J-1 visa stamp, I-94 card, DS-2019 forms, and signed original G-28 Notice of Entry of Appearance as Attorney or Representative to the DOS processing center in St. Louis, MO.<sup>7</sup> DOS will not complete its processing of a J-1 waiver application until this step has been taken, so it is recommended that practitioners file the electronic and hard copies of the DS-3035 as early as possible in the waiver process.

Next, the physician and the sponsoring employer submit all required documentation to the IGA, following the IGA's specific guidelines and procedures. The IGA then reviews the application and (hopefully) agrees to grant a favorable recommendation in support of the J-1 waiver request. Depending on the IGA, this process can take anywhere from a few weeks to many months. Once the IGA recommends the J-1 waiver, the entire application and IGA recommendation letter are forwarded to the DOS Waiver Review Division (WRD) in Washington, D.C., for review and recommendation. While WRD almost always endorses the IGA's recommendation,<sup>8</sup> it occasionally requests additional documentation before doing so. This process can take anywhere from four to eight weeks (sometimes less), after which WRD issues its own recommendation letter and sends the entire filing to the USCIS Vermont Service Center, which has exclusive jurisdiction over all J-1 waiver applications recommended by an IGA. USCIS then generates the formal J-1 waiver approval notice, typically within no more than two to three weeks. The J-1 waiver approval covers both the J-1 principal as well as accompanying J-2 dependents.<sup>9</sup>

Federal regulations require the J-1 physician to complete the J-1 waiver commitment in H-1B nonimmigrant status.<sup>10</sup> The practitioner should, therefore, take the H-1B requirements into account during the J-1 waiver process to avoid delays later. For example, the salary offered in the J-1 waiver employment contract should comply with wage and hour regulations governing H-1B employees, and the physician should be sure to obtain all documentation required for the H-1B petition, including a medical license in the state where he or she will serve his or her waiver commitment, as far in advance as possible so that the H-1B petition can be submitted in a timely fashion.<sup>11</sup> In this regard, it is important to note that the sponsoring employer may file an H-1B petition on

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<sup>6</sup> INA §214(l). There can be an exception to the requirement to practice in a federally designated underserved location when the IGA is a state department of health. This exception will be discussed in detail below.

<sup>7</sup> See [http://travel.state.gov/visa/temp/info/info\\_1295.html](http://travel.state.gov/visa/temp/info/info_1295.html).

<sup>8</sup> 22 CFR §41.63(e)(4); 22 CFR §41.63(c)(5).

<sup>9</sup> 8 CFR §212.7(c)(9)(i).

<sup>10</sup> 8 CFR §212.7(c)(9)(iii).

<sup>11</sup> For regulations pertaining to H-1B petitions filed on behalf of foreign physicians, see 8 CFR §214.2(h)(4)(viii).

the physician's behalf as soon as WRD issues its recommendation.<sup>12</sup> USCIS will then process the H-1B petition and J-1 waiver approval notice simultaneously. This can be of great benefit to the physician whose J-1 status is about to expire and may need to file a change of status petition to H-1B before USCIS issues the formal approval notice.<sup>13</sup> Another tremendous benefit to the J-1 waiver physician is the fact that all physicians who have been approved for a J-1 clinical IGA waiver are exempt from the statutory H-1B "cap."<sup>14</sup> This permits the physician to commence employment with the waiver sponsoring employer without regard to the numerical restrictions pertaining to other H-1B petitions. The cap exemption is personal to the physician and applies regardless of the nature of the health care facility or organization sponsoring the J-1 waiver.<sup>15</sup>

As one might imagine, processing times for J-1 waiver applications are very unpredictable and can be affected by a host of factors. In general, it is best for the physician to begin the waiver application process at least eight to nine months in advance of his or her desired start date, depending on which IGA is sponsoring the waiver.

### STATE VS. FEDERAL INTERESTED GOVERNMENT AGENCIES

Every state department of health has the authority to sponsor up to 30 J-1 visa waiver physicians per fiscal year.<sup>16</sup> In addition, federal agencies may agree to sponsor an unlimited number of J-1 physicians for IGA clinical waivers.<sup>17</sup> Under the statute, any federal agency may choose to serve as an IGA for a J-1 clinical physician. Previously, many J-1 physicians were sponsored by the U.S. Department of Agriculture and U.S. Department of Housing and Urban Development. However, those programs have now been suspended.<sup>18</sup> At the present time, the only federal agencies with active IGA programs are the U.S. Department of Veterans Affairs, the Appalachian Regional Commission, Delta Regional Authority, and U.S. Department of Health and Human Services.

Whether the IGA is a state or federal entity, the physician must agree to work a minimum of three years as a full-time clinician; must agree to begin work within 90 days of receiving USCIS approval of the J-1 waiver; and, where the physician is contractually obligated to return to his or her home country, the physician must provide a statement of no objection from the home country government in support of the waiver request.<sup>19</sup> The employment must occur at a site that is physically located within a federally designated medical shortage area *except* that physicians working at facilities operated by the Department of Veterans Affairs or up to 10 physicians sponsored by each state need not practice at a facility that is actually located in a shortage area.<sup>20</sup>

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<sup>12</sup> USCIS Memorandum, P. Virtue, "Waiver of Foreign Residency Requirement and Adjustment of Status for J-1 Nonimmigrants," published on AILA InfoNet at Doc. No. 98021740 (posted Feb. 17, 1998). *Note:* Though this memorandum refers only to the submission of an I-485 application prior to final U.S. Citizenship and Immigration Services (USCIS) approval of the J-1 waiver, in practice, USCIS also permits the submission of nonimmigrant petitions based on DOS's favorable recommendation. *See, e.g.,* "CSC/AILA Liaison Working Group Agenda Responses" (Aug. 6, 2008), published on AILA InfoNet at Doc. No. 08103161 (posted Oct. 31, 2008).

<sup>13</sup> INA §214(l)(2)(A) permits a J-1 physician who has obtained a J-1 waiver pursuant to INA §214(l) to change status within the United States notwithstanding INA §248(a)(2), which would normally bar a change of status.

<sup>14</sup> *Id.*

<sup>15</sup> *Note:* Physicians who receive hardship or persecution-based J-1 waivers do not gain the same personal H-1B cap exemption, and, therefore, are subject to the H-1B cap (even if working in an underserved area) unless the H-1B sponsoring employer is otherwise exempt from the H-1B cap.

<sup>16</sup> INA §214(l)(B).

<sup>17</sup> INA, *supra* note 6.

<sup>18</sup> *See* R. Aronson, "The Evolution of the Conrad Waiver Program: Ten Years of State-Based J-1 Waivers to Physicians," *Immigration & Nationality Law Handbook* 187 (AILA 2005–06 Ed.).

<sup>19</sup> INA §§214(1)(A), (C).

<sup>20</sup> INA §214(l)(1)(D).

In addition, those physicians whose J-1 waivers are sponsored by federal IGAs may not enter into employment contracts containing non-compete clauses enforceable against the physician.<sup>21</sup>

## SUMMARY OF IGA POLICIES AND PROCEDURES

### Conrad State 30 Program

Named for its sponsor and strongest proponent, Senator Kent Conrad (D-ND), the Conrad Program was first enacted in 1994<sup>22</sup> to provide additional recruitment options for states seeking to improve the quantity and quality of healthcare available in predominantly rural, underserved areas. The vast majority of J-1 clinicians seeking IGA waivers now utilize the Conrad Program.<sup>23</sup> While no state is *required* to participate, the departments of health in every state and the District of Columbia currently have active Conrad programs. Current federal law permits each state department of health to sponsor up to 30 J-1 waiver applications per fiscal year—including at least 20 for physicians who will work in federally designated shortage areas, and up to 10 for physicians whose practice locations might not be physically located within a shortage area, but who will, nonetheless, treat medically underserved patient populations (flex slots).<sup>24</sup>

The current program is set to expire on September 30, 2009, meaning that physicians who are admitted to the United States for J-1 clinical training after that date (or who acquired J-1 status after that date) will be ineligible for a Conrad waiver unless and until the program has been re-authorized. The program has been extended six times in its history and it is hoped that another re-authorization will be granted.

### Federal Floor

Each state has wide latitude to develop and implement its own policies and procedures for distributing its 30 J-1 waiver slots per fiscal year *so long as* the state guidelines comply with the procedural “floor” established by the federal statute and regulations. To this end, all state programs *must* submit the following documentation to WRD when recommending a J-1 waiver on behalf of a clinical physician:

- A statement of “no objection” from the J-1 physician’s home country *if* the physician is contractually obligated to return to the home country upon completion of graduate medical training;<sup>25</sup>
- Copy of completed Form DS-3035 J-1 Visa Waiver Recommendation Application;<sup>26</sup>
- Letter from the state department of health recommending the J-1 waiver, confirming that the waiver is in the public interest, and indicating the number (1–30) the state assigned to the waiver recommendation for the given fiscal year;<sup>27</sup>
- A signed employment contract for at least a three-year term that includes the name and address of the employer, the geographic area(s) where the physician will work, and a statement that the physician will comply with INA §214(l).<sup>28</sup>

<sup>21</sup> 22 CFR §41.63(c)(4)(i). The policy consideration behind this prohibition seems to be a desire to remove all impediments to the physician continuing to practice in the underserved area following completion of his or her J-1 waiver commitment period. While the regulatory restriction only applies to federal IGA waivers, the majority of the state departments of health have also adopted this as a pre-condition for supporting J-1 waiver requests.

<sup>22</sup> Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994), §220.

<sup>23</sup> U.S. Government Accountability Office, Report to Congressional Requestors, GAO-07-52, Foreign Physicians: Data on Use of J-1 Visa Waivers Needed to Better Address Physician Shortages (Nov. 2006) (acknowledging that, from 2003–05, state departments of health accounted for more than 90 percent of IGA waiver requests on behalf of J-1 clinical physicians).

<sup>24</sup> INA §214(l)(1)(D)(ii).

<sup>25</sup> 22 CFR §41.63(e)(2). In practice, a contractual obligation only attaches to a J-1 physician whose home country provided funding for the graduate medical training, which is rarely the case.

<sup>26</sup> 22 CFR §41.63(e)(3)(i).

<sup>27</sup> 22 CFR §§41.63(e)(3)(ii), (viii). The letter also must provide the J-1 physician’s name, country of nationality or of last residence, and date of birth.

<sup>28</sup> 22 CFR §41.63(e)(3)(iii). *Note:* The regulation states that the physician must agree to comply with INA §214(k). This is the statutory section under which the Conrad program was originally enacted in 1994. It was subsequently moved to INA §214(l)

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- Evidence that the employment will take place in a federally designated shortage area.<sup>29</sup> This regulatory requirement is necessarily obviated in the case of a physician pursuing a flex slot pursuant to INA §214(l)(1)(D)(ii), though the regulations have not caught up with this amendment to the statute;
- Copies of the physician's DS-2019 and/or IAP-66 forms;<sup>30</sup> and
- Copy of the physician's curriculum vitae.<sup>31</sup>

Above and beyond these few federal requirements, each state has absolute discretion to set the criteria for recommending a Conrad J-1 waiver to a physician seeking employment within its boundaries.

### State Ceiling

State policies vary widely and can change frequently. The practitioner must, therefore, be certain to research the state's policy carefully before submitting the J-1 waiver request to the state department of health.<sup>32</sup> Most states policies are available online or upon request from the state's designated J-1 waiver program administrator. When a physician is weighing multiple job offers in different states, the attorney should be prepared to advise the client regarding the relative ease and difficulty of obtaining a waiver recommendation from one state versus another, based on individual state policies and procedures that may affect the feasibility and practicability of pursuing a waiver in a given state.

While it would be impossible to provide a comprehensive analysis of each state's J-1 waiver policy, what follows is a summary of some of the more relevant and consistent variables that a practitioner must consider when advising a client pursuing a Conrad waiver:

- **Duration of commitment period.** While federal regulations require that the physician commit to practicing full-time clinical medicine for at least a three-year period, states are free to require a longer commitment as a condition for recommending a Conrad waiver. Most states require only a three-year employment contract, but several (including North Carolina, New Jersey, and West Virginia) require a four-year employment commitment. This may be a determinative consideration to the client concerned about preserving the ability to adjust status as quickly as possible.
- **Popularity of State.** Some states (*e.g.*, Texas, California, Florida, and New York) tend to exhaust their supply of 30 J-1 waiver slots every fiscal year. In other states (*e.g.*, Virginia, Mississippi, North Carolina, and Kansas), the program is under-utilized, such that a physician may apply later in the fiscal year and still obtain a recommendation. Consequently, when counseling a J-1 physician with offers in multiple states, practitioners will need to advise regarding the likelihood of success in each state given the historical usage of J-1 visa waiver slots by each state's department of health.
- **Filing Deadlines.** The majority of states will accept J-1 visa waiver applications on a rolling basis beginning on October 1, the first day of the fiscal year. However, some states (*e.g.*, New York, Ohio, Arizona, and Indiana) have established limited filing windows within which applications must be submitted. In some instances, practitioners may be approached by clients who have obtained a job offer in a state whose filing deadline has already passed, thereby eliminating the possibility of obtaining a waiver through that state.
- **Filing Fees.** Most state departments of health do not charge a processing fee for the J-1 waiver application above and beyond the federal filing fee that is paid to the DOS. However, some states (including Ohio, Texas, and Oregon) do charge filing fees of \$2,000 or more. This can be a not insignificant sum to the

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in 1996 when the program was extended as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (IIRAIRA).

<sup>29</sup> 22 CFR §41.63(e)(3)(iv).

<sup>30</sup> 22 CFR §41.63(e)(3)(v).

<sup>31</sup> 22 CFR §41.63(e)(3)(vi).

<sup>32</sup> A very helpful resource in this regard can be found at <http://www.visalaw.com/IMG/state30.pdf>. This chart, prepared by the immigration law firm of Siskind Susser, PC, summarizes the policies of and provides contact information for the Conrad State 30 Programs in all 50 states and the District of Columbia. All information about various Conrad State 30 Programs referenced in this article is drawn from this source.

physician/sponsoring employer already burdened with attorney fees and federal filing fees for the J-1 waiver application and eventual H-1B petition.

- **Permissibility of Specialists.** Almost all state departments of health will accept J-1 waiver applications for specialist physicians in addition to “primary care” doctors (which are generally defined to include internal medicine, family practice, obstetrics/gynecology, pediatrics, and psychiatry). However, most states prioritize waiver applications for primary care physicians and/or require additional evidence in support of a J-1 waiver request for a specialist physician. Some states will either not entertain applications from specialists at all (*e.g.*, Idaho, New Jersey, and North Carolina), or will limit the number of waiver recommendations granted to specialists (*e.g.*, Alabama, Florida, Illinois, and Tennessee).
- **Use of Flex Slot Option.** As an initial matter, the practitioner should verify whether the physician’s employment offer is located in a federally designated shortage area. If it is not, that does not necessarily mean the offer will not qualify for a J-1 waiver. All state departments of health are *permitted* to grant up to 10 of their 30 J-1 waivers each year to physicians who will not work at sites that are physically located in federal shortage areas, but which, nonetheless, benefit patients who reside in shortage areas. Almost all states do participate in this “flex slot” option. Some states are willing to award flex slots at any time during the fiscal year (*e.g.*, Virginia, Georgia, and Oklahoma); others distribute flex slots only after a certain point in the fiscal year (*e.g.*, Florida, Arkansas, and Texas); and a few states decline to award any flex slots (*e.g.*, Arizona, Idaho, Connecticut, and Missouri). Many states impose extra documentary requirements on those seeking a flex slot waiver (*e.g.*, Illinois, Louisiana, Michigan, and Pennsylvania). The practitioner must be certain that the physician and sponsoring employer are able to take advantage of the flex slot option by filing at the appropriate time and complying with any additional administrative burdens.
- **Recruitment documentation.** Almost every state will require that the employer provide evidence that it has been searching for a physician for some time before offering a position to a J-1 physician. Many states require at least six months of recruitment evidence (*e.g.*, Oregon, Tennessee, and West Virginia); a few require one year of prior recruitment (*e.g.*, New Jersey, and Utah); others do not set a specific duration but still require a showing of good faith recruitment (*e.g.*, South Carolina, Nebraska, and Connecticut); and a few require no proof of recruitment at all (*e.g.*, Alaska, Oklahoma, and Texas). Some states prescribe specific methods of recruitment that must be used before the waiver request will be granted (*e.g.*, Alabama, Louisiana). However, most states are simply looking to confirm that the employer made some effort to locate a U.S. physician before resorting to the J-1 waiver program. In general, the recruitment evidence need not be extensive, so long as the employer can show something dated within the relevant time period (if applicable) that substantiates its summary of the recruitment process. In the rare circumstance where the employer has not already conducted the required recruitment before offering the position to the J-1 physician, the need to engage in additional recruitment efforts obviously will impact the timing of filing the J-1 waiver application.

This represents only a sampling of the myriad of policy concerns, restrictions and limitations latent in the guidelines and procedures of each individual state. The practitioner must be very attentive to each nuance and particular of the state’s policy in order to navigate the process effectively. That said, the practitioner should not be intimidated by the prospect of working with the state department of health, or requesting an exception to a state requirement where merited. While some states are easier to work with than others, all states are eager to bring quality healthcare to underserved areas within their boundaries. With rare exceptions, state Conrad program administrators are willing to engage with physicians, employers, and attorneys to cure deficiencies in applications and effect compromises that will enable the state to grant a favorable recommendation on the physician’s behalf.

### The Department of Veterans Affairs<sup>33</sup>

The Department of Veteran’s Affairs (VA) will agree to sponsor J-1 waiver applications on behalf of physicians who have received a bona fide offer of employment with a VA hospital. The VA processes its waiver applications in-house without the assistance of outside counsel through a procedure involving multiple levels

<sup>33</sup> The policies and procedures governing J-1 waiver requests sponsored by the Department of Veteran’s Affairs (VA) may be accessed at [www1.va.gov/vhapublications/ViewPublication.asp?pub\\_ID=1219](http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=1219).



of internal review. First, the head of the VA facility submits an application to the Veterans Integrated Service Network (VISN) having jurisdiction over the facility where the physician will be employed. The VISN then reviews the package to ensure it is complete and meets VA guidelines. Next, the application package is sent to VA Health Revenue Center (HRC) in Topeka, KS. The HRC also reviews the application for compliance with rules, regulations, and submission requirements before forwarding the package to the Forensic Medicine Strategic Healthcare Group for final review and recommendation by the Under Secretary for Health (or his or her designee), who then issues a letter recommending the waiver and forwards the application to WRD. The entire process can take at least three to five months from the date the VA facility first begins to prepare the application.

### **Recruitment Requirement**

Perhaps the most laborious and time-consuming aspect of the internal VA waiver process involves documenting the facility's efforts to recruit U.S. physicians. The VA's rules require the facility to undertake comprehensive recruitment efforts to demonstrate that there are no qualified U.S. citizens (USCs) or lawful permanent resident (LPR) candidates for the position eventually offered to the J-1 physician. The application package to the VISN/HRC must include a detailed recruitment report including the name, address, and phone number of the USC or LPR candidates who responded to the advertisement; a copy of their employment application and/or curriculum vitae; source of application; citizenship status; and the outcome of the interview process. In addition, the facility must include copies of: (1) advertisements in professional journals appropriate to the specialty and having a nationwide circulation, dated no more than six months from the date the application is submitted to the HRC; (2) evidence that the facility has made a request to the VA Healthcare Staff Development and Retention Office to refer to the facility the resume of any qualified USC or LPR they have on file; (3) evidence that the position was posted on the VA website; (4) copies of advertisements in local newspapers; and (5) copies of letters to medical schools, professional organizations, and other efforts made by the facility to attract applicants to the position.

### **Dual Appointments**

Most VA hospitals are affiliated with a local medical school, and many physicians employed by VA medical centers hold joint medical school faculty appointments with the affiliated institution. When sponsoring a J-1 waiver physician, the VA's preference is that the physician work exclusively for the VA facility. However, the VA will permit a waiver physician to accept a joint appointment so long as he or she will still work for the VA facility at least 5/8 of the time. It is important to stress, however, that the physician also is subject to the federal requirement to practice clinical medicine with the IGA (in this case, the VA) on a *full-time* basis,<sup>34</sup> which federal regulations define to mean at least 40 hours per week.<sup>35</sup> If the physician wishes to perform medical faculty duties above and beyond his or her full-time clinical employment with the VA, he or she is free to do so, provided of course, that the medical school has filed a separate H-1B petition covering the concurrent employment.

### **Practice Pointers**

An offer of employment from a VA facility can be an excellent option for J-1 waiver sponsorship, particularly for sub-specialist physicians looking to practice in a state whose Conrad program restricts or prohibits state waivers for sub-specialists, as the VA is in consistent need of sub-specialists (*e.g.*, neurologists, surgeons, pathologists, cardiologists, etc.). Because the VA prepares and processes its own J-1 waiver applications, the role of outside counsel is necessarily limited until the waiver is recommended by WRD and the H-1B petition can be filed. However, the J-1 physician may wish to hire an immigration attorney to monitor the progress of the VA facility in shepherding the application through the internal chain of command, and to ensure that the facility's application package complies with the VA's policies and procedures.

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<sup>34</sup> INA, *supra* note 6.

<sup>35</sup> 22 CFR §41.63(c)(4)(i). *Note:* As a practical matter, 5/8 clinical appointments through the VA almost always equate to at least 40 hours per week of clinical employment and, historically, USCIS has not questioned completion of a J-1 waiver commitment based on a 5/8 clinical appointment.

### The Appalachian Regional Commission<sup>36</sup>

The Appalachian Regional Commission's (ARC) J-1 waiver program is limited to those physicians who agree to work full-time as primary care physicians in a HPSA located within the ARC's jurisdiction, which includes portions of Alabama, Georgia, Kentucky, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia, as well as all of the state of West Virginia.<sup>37</sup>

ARC waiver applications must be supported by the governor of the state in which the physician will work. The application is initially submitted to the Conrad program administrator at the applicable state department of health before being forwarded to the ARC for final recommendation. Each state is free to impose additional J-1 waiver criteria beyond those stated in the ARC guidelines. Consequently, the practitioner must not only ensure that the application materials satisfy the ARC program requirements outlined below but also any additional criteria mandated by the particular state.

#### ARC Eligibility Criteria

Regardless of the particular state where the physician will work, all physicians and employers seeking J-1 waiver recommendations from the ARC must comply with the ARC's guidelines and procedures, which include the following:

- **Work Site Location Restriction.** The proposed worksite(s) must be physically located in a HPSA within the jurisdiction of the ARC.
- **Support Letter.** The employer must submit a letter formally requesting the ARC's recommendation of the J-1 waiver application. Although the waiver application is initially submitted to the department of health in the state of intended employment, the J-1 support letter must be submitted in duplicate and addressed to: Ann Pope, Federal Co-chair, Appalachian Regional Commission, 1666 Connecticut Ave. NW, Suite 700, Washington, D.C. 20009.
- **Practice Area Restrictions.** In contrast to Conrad waivers, which may be granted to specialist physicians, only primary care physicians may pursue an ARC waiver. This includes J-1 physicians who have completed residency training and agree to practice in pediatrics, internal medicine, family practice, obstetrics/gynecology, and psychiatry. A physician who has also completed sub-specialty *training* (e.g., child psychiatry, geriatrics), is not necessarily barred from participation in the ARC waiver program, so long as he or she agrees to *practice* primary care at least 40 hours per week. However, some states refuse to support ARC waivers for physicians with sub-specialty training, so the practitioner must review the state's procedures before filing an ARC waiver request for a physician in this situation.
- **Full-Time Practice.** As required by the federal statute, the ARC demands that the physician engage in full-time clinical employment and defines "full-time" to mean at least 40 hours per week. Travel to and from the work site or on-call time may not be counted toward the 40 hour/week commitment. However, in some cases, travel or on-call time may be considered part of a 40-hour work week for obstetricians.
- **Recruitment Efforts.** The ARC requires evidence that the employer has attempted to recruit a qualified USC or LPR physician without success for at least a six-month period. This evidence may include, but is not limited to, advertisements placed in appropriate newspapers and medical journals with national and statewide circulation, and letters sent to residency programs in the state of intended employment, notifying potentially qualified residents of the position opening.
- **Treatment of the Medically Indigent.** The sponsoring employer must submit a written policy agreeing to treat all individuals regardless of ability to pay and agreeing to treat Medicare, Medicaid, and medically indigent patients. In addition, the employer must use a sliding fee scale for patients at or below 200 percent poverty line. The sliding fee scale, policy and procedure must be posted in a conspicuous location in the patient waiting area of the practice site notifying patients of the charges for services and must include

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<sup>36</sup> The policies and procedures governing J-1 waiver requests sponsored by the Appalachian Regional Commission (ARC) may be accessed at [www.arc.gov/index.do?nodeId=24](http://www.arc.gov/index.do?nodeId=24). Or, for additional information, contact Diane Reed, ARC Program Manager (phone: (202) 884-7786; fax: (202) 884-7691).

<sup>37</sup> For a complete list of all counties covered by the ARC program, see [www.arc.gov/index.do?nodeId=27](http://www.arc.gov/index.do?nodeId=27).



information contained in the ARC's sample notice posted on its website.<sup>38</sup> If the worksite's HPSA designation is specific to the low income population group, the employer must submit evidence that it has recently provided care to Medicare, Medicaid, and medically indigent patients, and that it will continue to serve low-income patients during the J-1 waiver physician's employment.

- **Employment Contract Requirements.** The ARC guidelines are very specific with regard to what provisions must be contained within the physician's employment agreement and what may not be included. The contract must: (1) include at least a three-year term; (2) specify that the physician will begin work within 90 days of J-1 waiver approval but may *not* specify an exact start date; (3) include the full street address of the physician's proposed work site(s); (3) include the physician's area of practice; (4) *not* include a restrictive covenant or non-compete clause; (5) include a guaranteed minimum salary for the three-year term; and (6) include the \$250,000 liquidated damage clause available on the ARC website.<sup>39</sup>
- **License Eligibility.** The physician must supply evidence that he or she is either already licensed or eligible for medical licensure in the state of intended employment. Licensure requirements for foreign physicians vary from state to state, so the physician should contact the state licensing board as soon as he or she receives an employment offer to assess license eligibility and avoid undue delays in license issuance.
- **Immigration Status Documentation.** The ARC will not support a J-1 waiver request on behalf of a physician who has been out of lawful U.S. immigration status for more than 180 days. The ARC reviews the physician's DS-2019/IAP-66 forms and other documents to verify immigration status.
- **Physician's Affidavit.** All physicians seeking a J-1 waiver recommendation from the ARC must sign the ARC's "J-1 Visa Policy Affidavit and Agreement."<sup>40</sup> Among other things, in signing the affidavit, the physician acknowledges his commitment to work at least 40 hours per week within a HPSA commencing within 90 days of J-1 waiver approval, and agrees to incorporate the terms of both the J-1 Visa Policy Affidavit and Agreement and the \$250,000 liquidated damages clause into the physician's employment agreement.

### Keeping the Employer Happy

The ARC's prohibition on non-compete provisions in employment contracts is grounded in its concern that the physician not be discouraged from continuing to practice medicine in an underserved area following completion of the J-1 waiver commitment. While this is a legitimate policy consideration, the ban on non-compete provisions may dissuade some employers—who also are legitimately concerned with their continued livelihood—from hiring J-1 waiver physicians. Such employers may be reassured to know that the ARC's guidelines do *not* prohibit the inclusion of non-solicitation provisions (preventing the physician from soliciting the employer's patients or employees when the contract terminates), or sole-employment provisions (requiring the physician to work only for the ARC-sponsoring employer during the term of the agreement). Including these types of provisions in the employment contract may help an otherwise hesitant employer to overcome its objections to the ARC program.

### Keeping the ARC Happy

Once a J-1 waiver request is favorably recommended by the ARC and is ultimately approved by USCIS, only USCIS has legal jurisdiction to rescind the waiver approval or grant a transfer of employment during the J-1 waiver commitment period.<sup>41</sup> Nonetheless, the ARC has strong policy interests in ensuring that its guidelines are followed, and the agency monitors sponsored physicians and employers for compliance with the terms of the J-1 waiver commitment. Employers who violate the ARC's policies are put on a "no sponsor" list, rendering them ineligible to apply for additional J-1 waivers through the ARC program. Physicians who violate the terms of the J-1 waiver—including changing employer or worksite(s) during the J-1 waiver com-

<sup>38</sup> See [www.arc.gov/index.do?nodeId=273](http://www.arc.gov/index.do?nodeId=273).

<sup>39</sup> See [www.arc.gov/index.do?nodeId=275](http://www.arc.gov/index.do?nodeId=275). While the ARC's liquidated damages clause may well be unenforceable as a matter of law, it, nonetheless, remains a required part of the ARC waiver application process.

<sup>40</sup> See [www.arc.gov/index.do?nodeId=274](http://www.arc.gov/index.do?nodeId=274).

<sup>41</sup> INA, *supra* note 6.

mitment period without prior notice to the ARC—are reported to USCIS, and this may, in turn, result in revocation of the J-1 waiver approval.

It is, therefore, recommended that J-1 waiver physicians and employers comply with the ARC guidelines relating to issues that arise following waiver approval, even to the extent that those guidelines may be legally unenforceable. Specifically, if the physician must change employers during the J-1 waiver commitment period due to “extenuating circumstances,” he or she should notify the ARC of this change and obtain a new primary care position in an area covered by the ARC. Upon receipt of the new contract, the ARC will issue a consent letter that can be submitted to USCIS with the physician’s H-1B transfer petition. Similarly, where an employer wishes the physician to begin working at an additional worksite not contemplated by the initial J-1 waiver application, the employer should not only ensure that the new location is also in a HPSA and make any necessary amendments to the physician’s H-1B status (as required by INA §214(l) and USCIS regulations), but should also notify the ARC and obtain its approval prior to commencing work at the new site.

### **The U.S. Department of Health and Human Services<sup>42</sup>**

The U.S. Department of Health and Human Services (HHS) has a long history of sponsoring J-1 waivers on behalf of physicians engaged in research of national significance. However, the focus of this article is the *clinical* waiver program HHS initiated in 2002. The J-1 clinical waiver program is limited to primary care physicians (internal medicine, family practice, pediatrics, obstetrics/gynecology, or psychiatry) who will be employed at facilities that conform to very exacting criteria set forth in the HHS policy guidelines.

### **HHS Eligibility Criteria**

Unfortunately, HHS’s highly restrictive eligibility requirements limit the utility of its clinical waiver program such that only a small number of waiver applications are recommended through this program each year. It is hoped that HHS might lower the barriers to entry in the future so that a greater number of physicians may apply for J-1 waivers through HHS. At the moment, a sponsoring employer must be located within a HPSA with a score of “7” or higher, a standard few facilities meet.<sup>43</sup> In addition, the sponsoring facility may not be a private employer, but must, instead, fit into one of the following categories: (1) a health center that is receiving a grant from the U.S. Health Resources and Services Administration; (2) a rural health clinic; or (3) a Native American/Alaskan native tribal medical facility.

Assuming the sponsoring employer falls into one of the narrow threshold categories outlined above, the employer and physician also must provide the following documentation in support of the J-1 waiver application:

- **Recruitment Efforts.** The employer must document its efforts to hire a qualified USC or LPR physician for the position by providing copies of print advertisements; evidence of online recruitment; copies of a contract between the employer and a recruitment firm; or letter from a recruiter summarizing recruitment efforts made on the employer’s behalf. The recruitment evidence must include the names of any non-foreign physicians who applied and indicate the reason each was disqualified or declined to accept the position.
- **Employment Contract Requirements.** HHS requirements with regard to the content of the contract are very similar to those under the ARC program. Specifically, the contract must: (a) include at least a three-year term; (b) specify that the physician will begin work within 90 days of J-1 waiver approval, but may *not* specify an exact start date; (c) include the full street address of the physician’s proposed work site(s);

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<sup>42</sup> The policies and procedures governing J-1 waiver requests sponsored by the Department of Health and Human Services may (HHS) be accessed at [www.globalhealth.gov/exchangevisitorprogram/reqwaiv\\_clinical.html](http://www.globalhealth.gov/exchangevisitorprogram/reqwaiv_clinical.html). For additional information, contact Michael K. Berry, Bureau of Health Professions, Health Resource and Administration, Department of Health and Human Services, Parklawn Building, Room 8A-55, 5600 Fisher Lane, Rockville, MD 20857 (phone: (301) 443-4154; fax: (301) 594-4076).

<sup>43</sup> HPSA score data can be accessed at the HHS website, <http://bhpr.hrsa.gov/shortage/>. HPSA scores are used by the National Health Service Corps to determine priorities for assignment of clinicians. Scores range from one to 25 for physicians, with a score of 25 being of the highest priority.

(d) include the physician's area of practice; (e) *not* include a restrictive covenant or non-compete clause;<sup>44</sup> (f) include a guaranteed minimum salary for the three year term; (g) be signed by the head of the medical facility and the physician, dated and *notarized*.

- **Prevailing Wage Determination.** HHS requires the employer to submit a prevailing wage determination to ensure that the offered salary complies with H-1B wage and hour requirements.
- **Residency Training.** The physician must have completed residency training in the area applicable to the position (internal medicine, general pediatrics, family practice, obstetrics/gynecology, or psychiatry) within 12 months prior to the anticipated start date of J-1 waiver employment. Physicians with subspecialty training will *not* be considered for an HHS waiver.
- **Credentials Verification.** The physician must complete and fax a "Credentials Verification Enrollment Data Sheet" to the Health Resource and Service Administration J-1 Visa Waiver Unit. This form may be accessed at the HHS website<sup>45</sup> and submitted prior to filing the J-1 waiver request. The form is then used to initiate an electronic evaluation of the physician's credentials.

### Post-Waiver Issues

As discussed above, once a J-1 waiver request is approved by USCIS, only USCIS has legal jurisdiction to take further action on the waiver, *i.e.*, revoke the approval or authorize a physician to transfer his or her J-1 waiver commitment from one facility to another. Nonetheless, it is advisable to notify HHS of changes in J-1 waiver employment and, if possible, request a letter of support from HHS before filing an H-1B transfer petition with USCIS. Likewise, if/when the physician is called on to provide medical services at worksites not included with the initial J-1 waiver request, the employer should ensure that the additional work sites comply with HHS J-1 waiver guidelines as well as the requirements of INA §214(l) and applicable regulations governing H-1B employment.

### The Delta Regional Authority<sup>46</sup>

The Delta Regional Authority (DRA) initiated its J-1 waiver program in 2004 to support employers and physicians in medically underserved areas of the Mississippi Delta region. The DRA's jurisdiction encompasses 252 counties/parishes throughout the states of Alabama, Arkansas, Illinois, Kentucky, Louisiana, Mississippi, Missouri, and Tennessee. To date, the program has recommended more than 80 J-1 waiver requests. The DRA accepts waiver applications on behalf of both primary care physicians and specialists who will be employed in a location that is federally designated as having a shortage of healthcare professionals.

### DRA Eligibility Criteria

Employers and physicians seeking a J-1 waiver recommendation from the DRA must comply with the following requirements:

- **Any Shortage Designation Accepted.** The physician must agree to work at a location within a federally designated shortage area. However, unlike the ARC (which only permits employment in a HPSA), or HHS (which only permits employment in a HPSA with at least a score of "7"), a physician seeking sponsorship of the DRA may work in any type of shortage area, *i.e.*, HPSA, MUA, MHPSA, or MUP.
- **Application Fee.** Unlike the other federal IGAs, the DRA charges a \$3,000 non-refundable processing fee.
- **Photograph.** The DRA requires that a digital photograph of the physician be emailed to the program prior to issuance of the J-1 waiver recommendation.
- **Recruitment Efforts.** The employer must document active recruitment efforts within the 60-day period preceding submission of the waiver request, including advertisements placed at the national and state level

<sup>44</sup> Like the ARC, HHS does not object to the inclusion of non-solicitation or sole-employment provisions in a contract.

<sup>45</sup> See [www.globalhealth.gov/exchangevisitorprogram/j-1\\_supplement-b\\_clinical.pdf](http://www.globalhealth.gov/exchangevisitorprogram/j-1_supplement-b_clinical.pdf).

<sup>46</sup> The policies and procedures governing J-1 waiver requests sponsored by the Delta Regional Authority may be accessed at [www.dra.gov/programs/doctors/](http://www.dra.gov/programs/doctors/). Or, for additional information, contact Amanda Taylor, Delta Regional Authority, 236 Sharkey Ave. Suite 400, Clarksdale, MS 38614 (phone: (662) 624-8600, ext. 26).

specifically targeting the particular position as well as notifications sent to the medical schools of the applicable state. In addition to copies of advertisements, recruitment contracts, print-outs from online job banks, the employer must present a written summary of its recruitment efforts and the responses to that recruitment.

- **Employment Contract Requirements.** Employment contracts submitted in support of DRA waiver requests must: (a) be for a minimum three year term; (b) include the name and address of the sponsoring facility; and (c) *not* include a restrictive covenant or non-compete clause.
- **Physician Affidavit.** The physician must execute the J-1 Visa Waiver Program and Affidavit Agreement, which contains a number of provisions, including a \$250,000 liquidated damages clause (or pro rata payment of \$6,945/month for each month of the three-year waiver commitment the physician fails to complete). This agreement must be incorporated into the physician's employment agreement.<sup>47</sup>
- **Treatment of the Medically Indigent.** The sponsoring employer must agree to treat all patients regardless of ability to pay, including Medicare, Medicaid, and indigent patients. In addition, the employer must offer a sliding fee scale payment arrangement whose terms are publicly posted at the facility. The J-1 waiver application must include a statement from the employer providing a three-year history of the facility's treatment of Medicare, Medicaid, and indigent patient populations, as well as current physician-to-patient ratios in the area, described in geographic and demographic detail.
- **Prevailing Wage Data.** The J-1 waiver application must include prevailing wage data applicable to the physician's area of practice and geographic area of intended employment.<sup>48</sup>
- **License Eligibility.** The physician must either already be licensed or eligible for medical licensure in the applicable state at the time the application is filed. If not licensed at the time of submitting the waiver request, the physician must submit a copy of her state license to the DRA upon commencement of employment.
- **DRA Only.** DRA will not consider the J-1 waiver application of a physician who is simultaneously pursuing an alternative J-1 waiver request through another IGA. An attestation to this effect is included in the J-1 Visa Waiver Program and Affidavit Agreement that physician must sign.

Upon receipt of a complete application package, the DRA will seek the non-objection of the state in which the physician will be placed before agreeing to recommend the waiver request. Processing at the DRA level can take approximately three months before the application is forwarded to WRD for its review and recommendation. Once the J-1 waiver is ultimately approved and the physician begins employment in H-1B status, DRA will monitor and track compliance with program guidelines by requesting reports from the physician and sponsoring facility within the first week of employment and every six months thereafter, as well as through impromptu site visits. Program violations can result in a report of non-compliance to USCIS.

## STRATEGIC CONSIDERATIONS

### Maintaining J-1 Status

It is important to ensure that the J-1 physician has enough time remaining in J-1 status to complete his/her J-1 program and the J-1 waiver process. Once WRD forwards its positive recommendation of the J-1 waiver application to USCIS (which can sometimes occur within as little as a few days but more typically within one to two months), the physician may complete the J-1 program begun before WRD recommended the waiver but the Educational Commission for Foreign Medical Graduates (ECFMG) will no longer grant any extensions of J-1 status to the physician.<sup>49</sup> The physician should therefore ensure that any needed J-1 extensions are requested before WRD recommends the waiver. Withdrawing a J-1 waiver application in order to obtain a

<sup>47</sup> The Program and Affidavit Agreement may be accessed at [www.dra.gov/media/affidavit\\_agreement.pdf](http://www.dra.gov/media/affidavit_agreement.pdf).

<sup>48</sup> See U.S. Department of Labor's online wage data, [www.flcdcenter.com/OesWizardStart.aspx](http://www.flcdcenter.com/OesWizardStart.aspx).

<sup>49</sup> See Letter from Les Gin, General Counsel, United States Information Agency (USIA), to Amy M. Nice (Dec. 18, 1995), reprinted in 73 No. 2 *Interpreter Releases* 47, 47–8, Appx. II (Jan. 10, 1996). See also 71 *Interpreter Releases* 170, 170–71 (Jan. 24, 1994) (discussing USIA letter to Michael Maggio describing impact of J-1 waiver request on ability to extend J-1 status).

J-1 extension is an extremely complicated and time-consuming task, with the additional risk that the parties involved may not be willing to make a second favorable J-1 waiver recommendation once the additional J-1 time has been obtained.

### Travel During the J-1 Waiver Process

While a J-1 waiver application is pending, a physician in J-1 status should be able to travel in and out of the United States without negatively impacting his or her J-1 status or the pending J-1 waiver application, provided that the physician's status is active in SEVIS; he or she is in good standing with the J-1 sponsor; physician has been authorized by the sponsor to travel; and is in possession of a properly endorsed DS-2019 and a valid J-1 visa (unless visa-exempt or re-entering the United States after a trip to a contiguous country or adjacent island after a trip of less than 30 days).<sup>50</sup> The act of seeking a J-1 waiver does not, in and of itself, cancel a physician's current J-1 status. As noted earlier, a physician may even seek to extend his or her J-1 status up until the time that WRD recommends granting the J-1 waiver.

However, once WRD favorably recommends a J-1 waiver application to USCIS, the benefiting physician is no longer considered a bona fide J-1 *participant* in the J-1 program. A fundamental component of the J-1 medical training program is the participating physician's intent to use the knowledge gained from U.S. graduate medical training or education to improve the healthcare situation in the physician's home country. Therefore, only those participants able to witness this intent may be considered bona fide participants in the spirit of the program. As a beneficiary of a J-1 waiver can no longer, in good faith, assert the intent to return home to apply his or her medical knowledge, the J-1 program sponsor—in this case ECFMG—may no longer grant additional J-1 status (*i.e.*, participation) once it is documentarily clear that WRD has recommended a J-1 waiver.<sup>51</sup> However, WRD has clarified that physicians may complete the remaining time of their J-1 program approved by ECFMG prior to WRD's positive waiver recommendation, and that this time includes international travel as long as the physician travels with proper documentation as noted above.<sup>52</sup>

If the physician requires a J-1 visa to reenter the United States, having a J-1 waiver application in process could prove problematic when applying for the visa stamp, as a consular officer may (justifiably) construe this as evidence that the J-1 applicant no longer has the requisite nonimmigrant intent.<sup>53</sup> Overcoming such an assumption would be difficult. Proof of very strong ties outside of the United States may be useful to some degree, but, in most cases, any foreign ties would likely be insufficient to convince a skeptical consular officer that a physician seeking a J-1 waiver has any short-term interest in returning to his or her home country. Given the risk, J-1 physicians should be cautioned against any international travel once they have begun the waiver process, especially if the international travel would require the physician to apply for a new J-1 visa while overseas.

An additional concern with travel after a J-1 waiver has been *granted* is that the re-admission of the physician in J-1 status following waiver approval might re-subject the physician to the two-year home residency requirement under INA §212(e) since admission in J-1 status *after* waiver approval constitutes the "last action" with regard to the J-1's status. So, for example, if a physician whose J-1 program ends in June 2010 obtains a J-1 waiver in April 2010, then departs the United States and re-enters in May 2010 to complete the J-1 program, the physician arguably has become re-subjected to INA §212(e) by virtue of the post-waiver entry in J-1 status to the extent that the approved J-1 waiver only waived INA §212(e) with regard to admissions that occurred prior to the J-1 waiver approval. Unfortunately, USCIS has not provided clear guidance on this issue, although WRD has stated verbally that it is still operating under the guidance of a December 1995 letter

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<sup>50</sup> 8 CFR §212.2(j)(1)(iii).

<sup>51</sup> Each year, the training program, in conjunction with the J-1 physician, must file an extension application with ECFMG to renew the physician's J-1 status for another year. As part of this application process, the physician must attest that he or she "[w]ill return to the country of his nationality or last legal permanent resident upon completion of the education or training for which he came to the United States." 22 CFR §62.27(e)(5)(ii).

<sup>52</sup> Les Gin letter, *supra* note 49.

<sup>53</sup> Unlike H and L nonimmigrants, J-1 visa holders are not permitted dual intent. INA §101(a)(15).

issued by the old U.S. Information Agency (USIA) to the American Immigration Lawyers Association,<sup>54</sup> which it has extrapolated to indicate that a J-1 will not become re-subjected to INA §212(e) as long as the readmission was for the purpose of returning to the same J-1 program covered by the J-1 waiver. Nonetheless, engaging in a different or extended J-1 program upon readmission in J-1 status after a J-1 waiver is obtained would almost certainly re-subject the physician to the two-year home residency requirement and put the physician in the precarious position of requiring a second J-1 waiver in the face of WRD's generally applied "one waiver per customer" policy (discussed in greater detail below).

A J-1 physician should be able to engage in risk-free travel between the time that the J-1 waiver application is filed and the time that WRD favorably recommends the waiver. However, after that time, international travel becomes more problematic for the reasons stated above. Because it is impossible to predict with certainty when the J-1 waiver will be favorably recommended, it is generally advisable for J-1 physicians to refrain from foreign travel until both the J-1 waiver has been granted *and* the H-1B petition has been approved, enabling the physician to re-enter the U.S. using an H-1B visa stamp.

### One Waiver per Customer

In general, WRD takes the position that a physician may only be granted one favorable recommendation of a J-1 waiver application. So, for example, if a physician obtains WRD's endorsement of an IGA waiver but then fails to complete the three-year waiver service commitment, WRD will not agree to recommend a second IGA waiver at a later time so that the physician might overcome INA §212(e). However, WRD will make limited exceptions to this policy when the physician applies for a subsequent waiver under a different J-1 waiver category (*e.g.*, applies for a hardship waiver after receiving an IGA waiver, etc.). Additionally, if a physician receives a J-1 waiver, satisfies the terms of that J-1 waiver commitment, and then engages in another J-1 program that re-subjects him or her to INA §212(e), (*e.g.*, where a physician completes a J-1 residency program, obtains and satisfies the terms of a Conrad waiver, and then enters a second J-1 fellowship program), WRD appears willing to recommend a second J-1 waiver to the physician if he or she otherwise qualifies for a J-1 waiver the second time (*e.g.*, the physician agrees to complete another service commitment under the sponsorship of a second IGA).

### The "90-Day Rule"

The federal statute requires that any physician granted an IGA waiver must "*agree[] to begin employment with the health facility or health care organization within 90 days of receiving such waiver.*"<sup>55</sup> (emphasis supplied). Despite this seemingly simple statutory language, the meaning and scope of the "90-day rule" is a matter of some debate. USCIS interprets the statute to mean that the physician *must actually begin* J-1 waiver employment within 90 days of the date USCIS approves the J-1 waiver.<sup>56</sup> Yet USCIS regulations do not state this but rather track the statutory requirement that the physician must "agree to commence employment within 90 days of receipt of the waiver."<sup>57</sup> WRD also requires that the statutory language of "agreeing" to begin employment be included in the J-1 physician's employment agreement as a condition for recommending the J-1 waiver. As discussed below, there can be a world of difference between "agreeing" to begin work within 90 days and "actually beginning" work within 90 days of USCIS approval.

In light of USCIS's stated policy, the conservative approach is to advise all J-1 waiver physicians that they must actually begin providing medical care pursuant to the terms of their J-1 waiver approval within 90 days of the date USCIS issues the approval notice.<sup>58</sup> As federal regulations require the physician to complete the

<sup>54</sup> Les Gin letter, *supra* note 49.

<sup>55</sup> INA §214(l)(1)(C)(ii).

<sup>56</sup> This language appears on an addendum to the USCIS J-1 waiver approval notice issued to physicians and most likely originates in a 1999 policy memorandum. INS Memorandum, M. Pearson, "Waivers of the Two-Year Foreign Residence Requirement Under Section 212(c) of the Immigration and Nationality Act (the Act)" (October 4, 1999), *published on* AILA InfoNet at Doc. No. 99100490 (*posted* Oct. 8, 1999).

<sup>57</sup> 8 CFR §212.7(c)(9)(i)(C).

<sup>58</sup> INA §214(l)(1)(c)(ii) requires only that the H-1B employment *begins* within 90 days of the receiving a waiver. Therefore, it may be possible to construct a scenario that is acceptable under section 214(l)(1)(c)(ii) and the H-1B regulations where a physician

*continued*



J-1 waiver commitment in H-1B nonimmigrant status, premium processing service will often be needed in order to accommodate a start date within 90 days of J-1 waiver approval. The fact that there are reports (though infrequent) of foreign physicians having their adjustment of status applications denied because they did not begin their H-1B/J-1 waiver employment within 90 days of J-1 waiver approval adds credence to this conservative counsel.

Some practitioners take the alternative position that the 90-day clock does not begin until USCIS approves the H-1B petition authorizing the J-1 waiver employment. The rationale is that, since federal regulations require the physician to complete the waiver commitment in H-1B status, the physician is legally incapable of beginning the employment until the H-1B petition is approved. Those who follow this interpretation wait to file the H-1B petition until they are sure that the physician will be able to begin employment within 90 days of H-1B approval and regardless of when the physician's J-1 application is approved by USCIS.

Still other practitioners assert that the 90-day requirement is satisfied as long as the physician *agrees* in good faith to start the waiver employment within 90 days of receiving a J-1 waiver approval, even if the physician does not *actually* begin within the 90 days. Proponents of this position point out that the statute only requires physicians to “agree”<sup>59</sup> to begin employment, as opposed to a mandate that actual patient care commence within the 90 days, and that as a result of a myriad of circumstances that often exist in nearly every physician waiver case, USCIS cannot penalize physicians for not commencing patient care activities within 90 days of the date the J-1 waiver approval notice is issued. There are a number of reasons why a physician may be unable to commence employment within 90 days of waiver approval, many of which are understandable and unavoidable, including the following:

- The physician may have started his or her waiver process far in advance of residency or fellowship completion either because the sponsoring IGA required early submission or because of a desire to resolve the stressful uncertainty of the waiver process as quickly as possible;
- The IGA, WRD, and/or USCIS may have processed an application unexpectedly quickly (or slowly) despite the practitioner's best efforts to time the application for ease of compliance with the 90-day rule;
- The physician may be legally unable to begin the J-1 waiver employment commitment within 90 days of waiver approval due to *e.g.*, an inability to complete residency/fellowship training within that time frame; unanticipated delays in processing of an H-1B petition; delay in issuance of state medical license or credentialing needed to begin employment; or even a withdrawal of a job offer from the original sponsoring health care facility.

Circumstances such as these that are beyond the physician's control *should* serve as a basis for excusing a violation of the 90-day rule if and when such a violation is detected in the course of adjudicating a future benefit (*e.g.*, adjustment of status) for the physician. In short, it ought to be enough that the physician and the

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begins his or her J-1 waiver service employment within the 90-day window and then takes an early vacation or family leave to take care of any outstanding personal business that the physician must attend to before beginning his or her service in earnest. Note that a worker is generally considered to be maintaining H-1B status even when on vacation or leave, and whether the leave or vacation is paid or unpaid, as long as it is of a duration consistent with normal vacation or leave time, in the case of a leave, is connected to legitimate necessities of the worker, and the worker remains on the petitioning employer's payroll. For physicians serving IGA waiver commitments, it appears that USCIS will allow the physician to count paid leave and vacation towards the required three-year commitment period, but that any unpaid vacation or leave may not be counted and therefore the physician must extend his or her H-1B employment with the waiver sponsor to make up any such previous vacation or leave time.

<sup>59</sup> The *Merriam-Webster Dictionary* defines the term “agree” in part to mean “to concur in” (as an opinion), “to consent to as a course of action,” or “to come to terms.” Retrieved on Feb. 11, 2009, from [www.merriam-webster.com/dictionary/agree](http://www.merriam-webster.com/dictionary/agree). The first and last of these listed meanings work with the argument. To wit, the physician *concurred in* or *came to terms with* WRD and USCIS that he or she would begin within 90 days of getting the waiver but was unable to actually begin despite this concurrence. However, the term “agree” also means “to consent to a course of action” which connotes a more definitive commitment to adhere to the agreement, *i.e.*, to actually begin work within 90 days. It seems that Congress might have easily used the term “concur” rather than “agree” if it intended for the statute to be satisfied as long as there was collaborative thinking between the physician, WRD, and USCIS on the idea of starting patient care within the 90 days, as opposed to an actual commitment by the physician to engage in patient care activities within 90 days of J-1 waiver approval.

attorney have done everything in their power to comply with the 90-day rule and, where that is impossible, it ought to be enough that the physician begins work as soon as possible after the 90-day mark.

Even under the most generous of interpretations, the 90-day rule is problematic and unrealistic as it completely ignores the multitude of changing variables and unpredictable timelines faced by physicians pursuing J-1 waivers through the sponsorship of an IGA. Physicians and their attorneys cannot be expected to predict with exactitude when the J-1 waiver process must be initiated in order to ensure the physician's ability to begin work within 90 days of J-1 waiver approval. Mercifully, most physicians and their attorneys have experienced no problems when they simply do what it takes to secure J-1 waiver and H-1B petition approval prior to the conclusion of the physician's J-1 waiver program, with a view toward complying with the 90-day rule wherever possible.

### **Transfer of Employment During Waiver Commitment**

A J-1 physician who is granted a Conrad or federal IGA waiver pursuant to INA §214(l) must complete all three years of the required H-1B service employment with the same organization or entity that sponsored the J-1 waiver application *unless* the physician can document that “extenuating circumstances” justify a transfer to another federally designated underserved employer. In such a situation, the physician must still agree to complete the balance of the J-1 waiver commitment by working as a full-time clinician in H-1B status with another healthcare facility or entity in a federally designated underserved area location.<sup>60</sup>

### **Defining Extenuating Circumstances**

Neither the statute nor the implementing regulations provide a precise definition of what “extenuating circumstances” justify a transfer of the J-1 waiver commitment from one employer to another, although both state that such circumstances include, but are not limited to, closure of the initial sponsoring facility or hardship to the physician.<sup>61</sup> In practice, transfers of the J-1 waiver commitment tend to be approved in situations where the physician can document either (1) misconduct or malfunction on the part of the initial J-1 waiver sponsoring employer; or (2) extreme personal difficulty in completing the waiver commitment with the initial sponsoring employer.

Employer misconduct or malfunction justifying a transfer of the J-1 waiver commitment may include abusive working conditions, wage and hour violations, failure to provide benefits promised as a condition of employment, or requiring the physician to work outside the underserved area at a location not indicated on the J-1 waiver application. A transfer of the J-1 waiver commitment also might be justified where the employer is unable to generate enough patients to enable the physician to work full-time (as required by INA §214(l)); is forced to terminate the physician due to financial inability to pay; or where the employer goes out of business.<sup>62</sup> Personal hardship to the physician that justifies a transfer must generally be severe and unforeseen,<sup>63</sup> such as a medical condition of either the physician or dependent spouse or child that can only be treated if the family is able to move to another location. In all cases, the burden of proving “extenuating circumstances” rests solely with the physician seeking the transfer.<sup>64</sup>

Historically, USCIS's adjudication of “extenuating circumstances” transfer petitions has been fair and reasonable. In general, physicians arguing for transfer solely on the basis of failure to receive benefits or the imposition of additional “on call” hours not contemplated in the initial contract, tend to be less successful than other, more objective bases for transfer. USCIS also is less inclined to find extenuating circumstances if the physician is still being paid the prevailing wage, or it otherwise appears that the physician is simply seeking transfer to pursue a better paying job, or improved hours.

<sup>60</sup> INA §214(l)(C)(ii).

<sup>61</sup> *Id.*; 8 CFR §212.7(c)(9)(iv).

<sup>62</sup> In this regard, it is important to note the federal regulations specifically mention that closure of the sponsoring facility is not necessarily a ground for transferring the J-1 waiver commitment. 8 CFR §212.7(c)(9)(iv). The implication seems to be that a physician may be able to find a way to continue serving the same patient population through a successor-in-interest employer even if the initial sponsoring facility closes.

<sup>63</sup> 8 CFR §212.7(c)(9)(v).

<sup>64</sup> 8 CFR §212.7(c)(9)(iv).

### Procedure for Requesting an Extenuating Circumstances Transfer

An employer wishing to sponsor a physician for H-1B employment prior to completion of that physician's three-year J-1 waiver commitment must file an H-1B change of employer petition on the physician's behalf that requests a term covering at least the full remaining balance of the three year J-1 waiver commitment period. While there is no legal bar against using H-1B portability provisions in this circumstance, it is wise to avoid using H-1B portability, if possible, so that in the event that USCIS fails to accept the "extenuating circumstances" argument and denies the petition, the physician will not be in a position of having worked for a non-qualifying employer during the J-1 waiver commitment period. For similar reasons, it also is advisable to request premium processing of J-1 waiver transfer petitions.

The J-1 waiver transfer/H-1B petition must include the usual host of documents submitted with a properly filed H-1B change of employer petition, as well as: (1) supporting evidence, establishing the extenuating circumstances justifying J-1 waiver transfer; (2) an employment contract establishing that the physician will practice medicine at the qualifying petitioning health care facility for the balance of the required three-year service period; and (3) "evidence that the geographic area or areas of intended employment indicated in the new H-1B petition are in HHS-designated shortage areas."<sup>65</sup> This last regulatory requirement specifically precludes a physician from transferring a J-1 waiver commitment to a practice site that is not federally designated as underserved, even though the physician may have been granted an initial J-1 waiver based on one of the Conrad flex slots in a non-underserved area. The regulation was written before the introduction of the Conrad flex slot option, and may be amended in the future to permit transfer to a non-underserved site that would otherwise qualify for a Conrad flex slot. But, for the moment, USCIS appears inclined to deny any J-1 waiver transfer petition that requests a transfer to a facility not located within a federally designated health-care shortage area.

It is important to note what is *not* required to transfer a J-1 waiver commitment. The physician need *not* seek a new J-1 waiver from a sponsoring IGA. The J-1 waiver application originally recommended by the IGA and WRD, and approved by USCIS, remains the basis of the physician's J-1 waiver even if the physician is subsequently granted leave to transfer her J-1 waiver employment commitment. The physician is also *not* legally required to obtain any type of endorsement of the employment change from the state department of health or federal IGA that initially supported the physician's J-1 waiver application. Only USCIS has jurisdiction to approve a J-1 waiver transfer request, and it may do so regardless of whether the state department of health or federal IGA agrees to the transfer. While it is helpful for a physician to obtain a letter of support from the initial IGA sponsor when submitting a J-1 waiver transfer petition, and while USCIS might occasionally ask for such a letter prior to approving a transfer request, it is generally not essential to secure the consent of the initial IGA prior to pursuing an "extenuating circumstances" transfer.<sup>66</sup>

In all cases, transfer of employment during the three-year J-1 waiver commitment period must be the exception, not the rule. The statute and regulations may be vague in defining the contours of "extenuating circumstances" but it is abundantly clear that Congress intended the J-1 physician to complete the full three-year commitment period with the initial sponsoring employer in almost every instance, and provided only a very narrow option for transfer where remaining with the initial sponsoring employer would mean non-compliance with federal law or would impose an extreme level of personal hardship on the physician or his or her family.

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<sup>65</sup> 8 CFR §212.7(c)(9)(vi)(B).

<sup>66</sup> *Note:* Despite the fact that state and federal IGAs lack legal jurisdiction to approve or withhold consent for a J-1 waiver physician seeking transfer, many IGAs have, nonetheless, promulgated policies and procedures that purport to require consent of the IGA before a transfer of employment may take place. These are unenforceable as a matter of law. However, as a point of collegiality and professionalism, it is a wise practice to work collaboratively with the IGA whenever possible to ensure that it is aware of and (hopefully) endorses the physician's need to change employment. While the IGA has no legal authority to approve or deny a J-1 waiver transfer request, it certainly has the ability to recommend to USCIS that a waiver approval be revoked if it feels the physician has disrespected the IGA's policies. Further, it only makes sense to maintain cordial relations with state and federal IGAs with whom both the practitioner and sponsoring employer may work in other contexts.

## **Immigration Options for the Physician Who Cannot Obtain J-1 Waiver Approval Before the Conclusion of the J-1 Program**

Many J-1 physicians find themselves in the unfortunate position of being unable to cross the J-1 waiver finish line prior to the expiration of their J-1 program. These physicians require creative counsel to identify options for extending their nonimmigrant stay while they wait for J-1 waiver and/or H-1B petition approval. What follows is a summary of alternative visa categories and strategy tips that can be employed when counseling such clients.

### **Extension of J-1 Status**

A J-1 physician who needs additional time to complete the J-1 waiver process may have the option of extending his or her J-1 status for the purpose of extending a J-1 program, enrolling in another program, or studying for board examinations. A J-1 physician is authorized to pursue graduate medical education and training for a period of up to seven years, *or* for a period of time normally required to achieve stipulated training objectives set by the relevant member section of the American Board of Medical Specialists® and/or the accredited length of training as defined by the Accreditation Council for Graduate Medical Education (ACGME),<sup>67</sup> whichever is less, plus an additional 30 days of non-work-authorized stay.<sup>68</sup> Therefore, while there is no entitlement to a full seven years of J-1 status to complete graduate medical education or training, that is the generally accepted maximum length of J-1 stay.

Additional time beyond the general seven-year period may be granted if the physician can prove that his or her home country (and not just the physician) has an “exceptional need” for a physician with the additional training and/or qualifications that would be obtained during an extended period of J-1 stay.<sup>69</sup> Additional J-1 stay beyond the general seven years also may be granted to allow the physician to study and sit for the board certification examination for an approved American Board of Medical Specialists® board or certification.<sup>70</sup> Continued supervised medical practice may be allowed during this extended time only if the continued practice is necessary to take the board certification exam.<sup>71</sup> Extensions to take a board certification exam are usually granted by ECFMG for a period limited to the end of the month in which the board examination is given, for a total period of no longer than six months.

Extending J-1 status, particularly for the purpose of studying for a board examination, can be an effective and painless way to preserve and extend the nonimmigrant status of a physician who may not have initiated the J-1 waiver process in time to obtain approval prior to the conclusion of the J-1 program. Practitioners should counsel physicians who need extra time to pursue this option early in the J-1 waiver process, because a physician will be ineligible for J-1 extensions of stay—including extensions for the purpose of studying for and taking a board certification exam—once WRD has forwarded its favorable J-1 waiver recommendation to USCIS.

### **Alternative Nonimmigrant Visa Categories Not Requiring Waiver**

Section 212(e) of the INA bars a physician subject to the two-year home residency requirement from applying for an immigrant visa, permanent residence (even through marriage to a USC) or H or L nonimmigrant visa until the physician either satisfies the requirements of a J-1 waiver or returns home for two years. Section 248 of the INA bars a physician subject to the two-year home residency requirement and who last entered in J-1 status from changing nonimmigrant classification (except to A, G, T, or U status) unless the physician has received a J-1 waiver.<sup>72</sup> Therefore, a physician subject to the two-year home residency requirement who is

<sup>67</sup> Training and study in a non-American Board of Medical Specialists® Boarded subspecialty may occur in some circumstances. See 22 CFR §62.27(e)(4).

<sup>68</sup> 22 CFR §62.27(e)(2).

<sup>69</sup> *Id.*

<sup>70</sup> 22 CFR §62.27(e)(3). See [www.abms.org](http://www.abms.org) for a list of approved American Board of Medical Specialists® Boards and Certifications.

<sup>71</sup> 22 CFR §62.27(e)(4).

<sup>72</sup> INA §248(a)(2) only prohibits a change of status to any nonimmigrant classification other than A, G, T, or U for a physician subject to the two-year home residency requirement, if the physician “came to the United States or acquired such [J-1] classification in order to receive graduate medical education or training.” A physician subject to INA §212(e) may apply to USCIS for O-1 status and then depart the United States and obtain an O-1 visa to request admission in O-1 status, although a change of

*continued*

eligible to obtain a nonimmigrant visa in a category other than H or L, or who is visa-exempt, may be able to continue working and residing in the United States even if he or she has not secured a J-1 waiver. However, if the physician ultimately wishes to pursue LPR status, the use of these other nonimmigrant categories only defers the physician's ultimate need to either obtain a J-1 waiver or to return home from two years. While pursuing an alternative nonimmigrant classification does not relieve the physician from the bars of INA §212(e), seeking admission in an alternative visa status can be an excellent way to buy more time needed to complete an often unpredictably lengthy J-1 waiver process. Following is a summary of the nonimmigrant visa categories most commonly used by physicians other than the H-1B.

### **Trade NAFTA (TN)**

A Canadian or Mexican citizen who is subject to the two-year foreign residence requirement of INA §212(e) may, nevertheless, enter in TN status without first fulfilling the two-year home residence requirement or obtaining a waiver, because the statute does not bar entry in TN nonimmigrant status. However, the TN category is of limited value to most physicians, as TN status is only available to doctors entering to conduct research and/or teach at a public or private institution,<sup>73</sup> with only incidental patient care permitted. To obtain TN nonimmigrant status, the physician must be a citizen of either Canada or Mexico and possess a provincial license, a state license, or an M.D. degree.<sup>74</sup> The physician need not possess a license in the state of intended employment, because clinical physicians are ineligible for TN status. TN status also can be a valuable option for physicians who have exhausted their six-year limit in H-1B status, should they desire to engage only in research or teaching.

### **O-1 Outstanding Ability**

To qualify for O-1 status, a physician must demonstrate sustained national or international acclaim and recognition for achievements in a particular field of expertise.<sup>75</sup> This is established by showing at least three or more of the following criteria: receipt of nationally recognized prizes or awards; membership in associations that require outstanding achievements of their members; published material in professional publications or major media about the nonimmigrant concerning the nonimmigrant's work in the field; participation on a panel, or individually, as a judge of the work of others in the field; scientific, scholarly, or business-related contributions of major significance in the field; authorship of scholarly articles in the field of professional journals or other major media; employment in a critical or essential capacity for organizations and establishments that have a distinguished reputation; and receipt of a high salary or other remuneration commanded by the physician for services and other comparable evidence.<sup>76</sup> There is no explicit statutory limitation on the period of stay for an O-1—often called the “Super Star” visa—as applicants must demonstrate that they have risen to the top of their field.

USCIS has become increasingly restrictive in adjudicating O-1 petitions. It is imperative to consider the following when assessing a physician's eligibility for O-1 classification status:

- Graduate fellowships, student prizes, dean's lists, travel awards, research fellowships, and grants carry little to no weight. However, substantial (*i.e.*, multi-million dollar) research funding from such organizations as the National Institutes of Health, National Science Foundation, etc. will sometimes be credited as a qualifying “prize” or “award” within the meaning of the regulation.

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status to O-1 while remaining in the United States is not available without first having returned home for two years or obtaining a J-1 waiver. Arguably, there is no prohibition in the statute on a change of status to H or L if the subject physician last entered the United States in a status other than J-1. However, even if the physician is able to hopscotch to H status through entry in O, TN, B, F, etc., he or she still cannot leave and return in H or L status, unless Canadian, or by utilizing the automatic visa revalidation rule. This is because INA §212(e) still prevents such an individual from being issued an H or L nonimmigrant visa until he or she obtains a J-1 waiver.

<sup>73</sup> 8 CFR §214.6(c).

<sup>74</sup> 8 CFR §§214.6(c), (d).

<sup>75</sup> 8 CFR §214.2(o)(1)(ii)(1).

<sup>76</sup> 8 CFR §214.2 (o)(3)(iii).

- Membership in professional associations or societies will not be considered if the organization is a “pay to join” group. For membership to count in support of an O-1 petition, the organization must have a higher selective standard for admission and choose its members at a national or international level. Also, the physician must hold the rank of senior member, fellow, or other similar selective rank within the association or society.
- Published abstracts do not carry the same weight as full-length articles.
- Mere publication of articles in peer-reviewed, internationally circulated academic journals will not be enough to support an O-1 petition. Instead, it must be shown that the physician’s publication record is substantially above the norm for professionals in the field, and that the physician’s published articles have made a substantial, greater than normal, impact in the field.
- Mere citation to the physician’s work in an article or study authored by another does not satisfy the regulatory criterion of showing “published material about the alien.” The article or study must actually discuss the physician and his or her work in-depth.
- Specialization does not automatically equate to extraordinary ability.
- The supervision of undergraduate and graduate students is an inherent part of most university teaching positions, and, therefore, does not count as judging the work of others in the same or similar field.
- Not every original contribution to the field of medicine is considered an “important” contribution.
- Mere presentations at conferences or meetings are typically not sufficient to support a physician’s O-1 petition. To satisfy the O-1 regulatory standard, the physician’s presentation must have been featured or otherwise distinguished from the other presentations made at a given conference or meeting (*e.g.*, a plenary session at a national or international conference).
- Mere leadership of a division or department is insufficient evidence of employment in a critical or essential capacity. The O-1 petition must establish the national or international reputation of the entire organization as well as that of the separate section or division lead by the physician. Further, mere recognition within the institution of the physician’s role is not sufficient. Instead, the physician must be recognized nationally or internationally, and this recognition must exist because the physician is responsible for a part of the organization’s success or standing within the field.

## **E-2 Treaty Investor**

The E-2 category may be available to a physician from a qualifying E-2 country<sup>77</sup> who seeks to develop and direct the operations of an enterprise in which he or she has invested, or is investing, a substantial amount of capital.<sup>78</sup> No particular dollar amount is defined as constituting a substantial investment. Instead, a proportionality test is used to compare the amount of the investment to the total cost of the business.<sup>79</sup> For example, if the cost of a medical clinic in a particular location is \$300,000 and the physician invests \$200,000, then the physician will likely be found to have made a substantial investment in the enterprise. Borrowed funds may be counted towards the amount of the investment, but only if the investor is personally liable for the loan or his own personal property serves as the collateral for the loan.

## **F-1 Student, B-1/B-2 Visitor and Visa Waiver**

Physicians subject to INA §212(e) may enter the United States to engage in full-time study (using an F-1 visa) or for brief visits (using a B-1/B-2 visa or the Visa Waiver Program), although INA §248 does bar the physician from changing status to F-1 or B-1/B-2 without first obtaining a J-1 waiver. Further, as with the other above-mentioned alternatives, a former J-1 physician in F-1 or B-1/B-2 status remains ineligible to obtain permanent residence until first complying with INA §212(e) or obtaining a waiver of that requirement.

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<sup>77</sup> For a list of qualifying countries, see [http://travel.state.gov/visa/frvi/reciprocity/reciprocity\\_3726.html](http://travel.state.gov/visa/frvi/reciprocity/reciprocity_3726.html).

<sup>78</sup> 8 CFR §214.2(e).

<sup>79</sup> 8 CFR §214.2(e)(14).



## Canadians Entering on H-1B Without a Visa

Canadian citizens are exempt from presenting a valid visa upon entering the United States unless they are seeking entry in either E or K status.<sup>80</sup> As INA §212(e) only bars physicians subject to the two-year home residency requirement from applying for an H visa stamp<sup>81</sup> and as Canadian citizens do not need a visa to enter the United States in H-1B status, it is possible for a Canadian clinical physician to enter the United States in H-1B status even if he or she is subject to the two-year home residency requirement and has not yet received a J-1 waiver. Procedurally, this must be done by having the sponsoring employer file an H-1B petition requesting consular notification rather than change of status (which is prohibited by INA §248). Once approved, the physician would apply for a visa-free admission in H-1B status at the U.S./Canadian border. While the literal wording of INA §212(e) may help a Canadian physician to achieve a temporary end-run around the two-year home country requirement, it does not absolve the physician of the eventual need to either comply with that requirement or obtain a waiver before applying for LPR status in the United States.

## Visa Revalidation

In a somewhat similar vein, a physician without a J-1 waiver from any country except Syria, Libya, Iraq, Iran, Cuba, North Korea, and Sudan may be able to exploit the automatic revalidation rule<sup>82</sup> to avoid the INA §212(e) bar on obtaining an H-1B visa without a J-1 waiver and the INA §248 bar on a stateside change of status to H-1B by having an employer file an H-1B petition on his or her behalf for consular notification, and then taking the approval notice for that petition on a trip of less than 31 days to Canada, Mexico, or an adjacent island other than Cuba, along with a valid passport containing a still valid or expired J-1 visa, and a valid DS-2019. The physician could then apply for readmission in H-1B status for the duration noted on the approval notice of his or her H-1B petition. Once a non-Canadian physician uses the visa revalidation rule to get out of J-1 status and into H-1B status, he or she may no longer use the automatic revalidation rule for trips to a contiguous country or territory, or adjacent island. This is because revalidation in this context would, in effect, constitute issuance of an H-1B visa in violation of INA §212(e).

Like the use of a visa-free entry for Canadian physicians, use of the visa revalidation rule is really just a way of deferring the inevitable need for the physician to return home for two years or obtain a J-1 waiver. Most physicians will presumably be interested in traveling more than just once to Canada or Mexico as well as in pursuing permanent resident status. Additionally, use of the revalidation rule in this context should only be attempted with caution and plenty of disclosure to the physician that not all ports-of-entry understand or agree with the intricate legal analysis permitting the use of visa revalidation for an individual who is still subject to INA §212(e).

## CONCLUSION

Representing J-1 physicians seeking clinical waivers of the requirements of INA §212(e) can be equal parts confusing, challenging, frustrating and fatiguing. But it also is very rewarding to have a hand in what is ultimately a “win-win” situation. At the end of the day, the J-1 clinical waiver program gives foreign physicians an opportunity to remain in the United States that they might not otherwise have had, and gives medically underserved patients access to medical care that might not otherwise have been available. It is well worth navigating the perils and pitfalls of the process in order to achieve so desirable an outcome.

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<sup>80</sup> 22 CFR §41.2.

<sup>81</sup> “No person admitted under section 101(a)(15)(j) or acquiring such status after admission ... (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant *visa* under section 101(a)(15)(H) or section 101(a)(15)(L)” (emphasis added). INA §212(e).

<sup>82</sup> 22 CFR §41.112(d).

## THE HAKE HARDSHIP SCALE: A QUANTITATIVE SYSTEM FOR ASSESSMENT OF HARDSHIP IN IMMIGRATION CASES BASED ON A STATISTICAL ANALYSIS OF AAO DECISIONS\*

by Bruce A. Hake and David L. Banks\*\*

“Empiricism!” howls Guildenstern to  
Rosencrantz. “Is that all you have to offer?”

—Tom Stoppard  
*Rosencrantz and Guildenstern are Dead*

### INTRODUCTION

One way to obtain a waiver of the J-1 foreign residence requirement is to prove that one’s U.S. citizen or permanent resident family members would suffer exceptional hardship. I have concentrated on J-1 hardship waivers for over 10 years and have written several articles on the topic, which someday may be combined to make a book. This article is the most original part of that project. In principal, the scope of this work extends beyond J-1 hardship waivers, because the quantitative system proposed in this article should be useful in all immigration contexts that require proof of hardship, although modifications would be needed for other contexts.

A complete discussion of hardship waivers under U.S. immigration law would best be divided into three parts: (1) standards (law and history); (2) procedure; and (3) grounds (the facts; what works and what does not). My 1994 article<sup>1</sup> covered all these parts in preliminary fashion.

### Hardship Standards

In 2001, I refined my work on hardship standards. A first version was published by the Ameri-

can Immigration Lawyers Association (AILA).<sup>2</sup> A more developed version was later published by Matthew Bender.<sup>3</sup> These articles on hardship standards demonstrated that the “extreme hardship” standard for suspension of deportation/cancellation of removal is exactly the same as the “exceptional hardship” standard for J-1 hardship waivers (leaving aside the issue of whether hardship to the applicant is supposed to count). In addition, they demonstrated that all hardship standards in U.S. immigration law are essentially identical (with the one exception of the “exceptional and extremely unusual” standard for suspension/removal).

Those two articles also proposed a novel interpretation of the concepts of “exceptional” and “extreme.” Hardship that is serious enough to justify special consideration under the law involves two components: (1) it must be unusual in terms of probability of occurrence (“exceptional”) and/or (2) it must be unusual in terms of gravity of harm (“extreme”). These concepts have a complementary and reciprocal relationship. At the end, these articles speculate about the development of an objective scale to measure legal hardship in immigration cases. This instant article gives life to that speculation.

My 2002 “Hardship Standards” article tried to describe all hardship standards in U.S. immigration law, but it missed one interesting example. I learned that in December 2003, when *Bender’s Immigration Bulletin* published an extremely good article on J visa issues, which includes a deep review of the leg-

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In the text, first-person references are to Mr. Hake.

<sup>1</sup> Hake, “Hardship Waivers For J-1 Physicians,” 94-2 *Immigration Briefings* (Feb. 1994).

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<sup>2</sup> Hake, “Hardship is Hardship: The Equivalency of Hardship Standards in U.S. Immigration Law,” 2 *Immigration & Nationality Law Handbook* 384 (2001–02 ed.).

<sup>3</sup> Hake, “Hardship Standards,” 7 *Bender’s Immigr. Bull.* 59 (Jan. 15, 2002). This version is clearer about the existence of a solitary exception (the “exceptional and extremely unusual” standard) and it contains a better analysis of the Board of Immigration Appeals’s latest precedents.

islative history.<sup>4</sup> Among other things, that article is noteworthy for pointing out that the earliest statement of the standard for J-1 hardship waivers, a State Department regulation from 1958, referred to “undue hardship.”<sup>5</sup> Moreover, the regulation permitted waiver of the residence requirement on account of hardship to the J-1 himself.

### Hardship Procedure

Though J-1 hardship waiver procedure is adequately covered by my 1994 article, and is updated by the State Department’s J-1 web pages,<sup>6</sup> a summary is useful here. All J-1 exchange visitors are not subject to the J-1 two-year foreign residence requirement. Under INA §212(e), there are three ways to become “infected” with the residence requirement (government funding; training in a skill on the Skills List for one’s country; or graduate medical education), and there are four ways to seek a “cure” (no objection statement from home country; recommendation from an Interested Government Agency (IGA); personal risk of persecution; or exceptional hardship to one’s qualifying relatives, that is, one’s U.S. citizen or lawful permanent resident spouse and/or children).

All J-1 waiver applications commence with filing of a Form DS-3035 Data Sheet with the State Department’s Waiver Review Division (WRD). In response, one receives a WRD case number, which must be placed on subsequent application materials. After that, procedures are distinct for the four waiver categories. The next step for no objection waivers and IGA waivers is application to one’s foreign government, or to a U.S. federal agency, respectively. In contrast, hardship or persecution waivers next require filing of Form I-612 with the U.S. Citizenship and Immigration Services, formerly the benefits arm of INS (USCIS) regional service center having jurisdiction over the applicant’s place of residence. A Form I-612 may be used for a hardship waiver ap-

plication, or for a persecution waiver application, but not both.

This article sometimes uses the expression “Form I-612 application” as a shorthand for “J-1 exceptional hardship waiver application.” When it does so, it is always referring to Form I-612 hardship waiver applications, unless otherwise specified.

Upon receipt of the Form I-612, the USCIS then conducts a review of the hardship claim and the supporting evidence. In analyzing a hardship application, the USCIS looks for evidence of hardship to the qualifying relatives if the exchange visitor alone returns to the country to which the residence obligation is owed, leaving the qualifying relatives in the United States, and also to evidence of hardship if the exchange visitor and the family depart the United States and reside abroad together.

To win a Form I-612 hardship waiver case, one must satisfy the USCIS that the applicant’s U.S. citizen or LPR spouse and/or children would face a comparable combination of hardships whether or not they relocate with the applicant to the home country or stay by themselves in the United States. Ignorance of this so-called “two-step” rule is a major cause of denials. A related rule is that hardship to the applicant is not supposed to count (but, of course, extreme harm to the applicant necessarily will result in serious hardships to the family members). In presenting a hardship waiver case, one must give systematic attention to how all the various identifiable hardship factors will or will not affect the family members under all the travel alternatives. One must prove that an “exceptional” level of hardship exists under all the alternatives. There is no shortcut for making this proof.

### Hardship Grounds

This article addresses the third part of my planned book on J-1 hardship waivers: hardship waiver grounds. A preliminary version was published in 2002.<sup>7</sup> Instead of a boring review of case law, this article includes insights from my more than 10 years of concentration in this area. It also describes the Hake Hardship Scale, an attempt to rationalize the decision-making in this area.

My articles have attempted to prove that all hardship standards in U.S. immigration law are identical (with just one exception involving the standard for

<sup>4</sup> Naomi Schorr and Stephen Yale-Loehr, “The Odyssey of the J-2: Forty-Two Years of Trying Not to Go Home Again,” 2 *Immigration & Nationality Law Handbook* (2004–05 ed.).

<sup>5</sup> *Id.* at, citing 22 CFR §63.6 (1958) (“The application [for a waiver of the two-year residence requirement] must be supported by documentary evidence that ineligibility for permanent residence would (a) impose undue hardship upon the exchange visitor that could not have been anticipated at the time exchange visitor status or the last extension of stay as an exchange visitor was granted . . . .”) (emphasis added).

<sup>6</sup> <http://travel.state.gov/jvw.html>.

<sup>7</sup> Hake, “The Hake Hardship Scale (Beta Version),” 1 *Immigration & Nationality Law Handbook* 237 (2002–03 ed.).

cancellation of removal). Therefore, the Hake Hardship Scale should be generally applicable to all applications for immigration relief that require proof of hardship. As presented here, however, the scale is designed for Form I-612 hardship cases. Other contexts would require some adjustments, because the threshold eligibility requirements vary from category to category.

### State Department Adjudications Policy

The role of the Waiver Review Division of the Department of State in J-1 hardship waiver proceedings is fundamental in J-1 waiver cases. For a J-1 waiver based on hardship or persecution to be granted, a Form I-612 waiver application must be approved by both the USCIS and the State Department. As noted above, the other two kinds of J-1 waivers, as set forth in INA §212(e), do not start with the filing of a form with the USCIS.

In general, in Form I-612 hardship cases, the USCIS review concentrates on the question of the existence of exceptional hardship. If the USCIS determines that exceptional hardship exists, the subsequent State Department review involves a balancing of that hardship against J-1 program and policy considerations. The “program and policy” considerations examined by the State Department have never been formally published.

This article focuses on the relatively more concrete assessment of hardship by the USCIS, not on the program and policy review by the State Department. Under current practice, a solid case that is recommended for approval by the USCIS probably has a good chance of being recommended for approval by the State Department as well. The State Department is most likely to disagree with a USCIS waiver recommendation if the applicant’s J-1 program was funded by the U.S. government. Note well that both USCIS and State Department adjudications practices are always subject to change without notice.

### THE TROUBLE WITH NORMAL

The trouble with normal is that it always gets worse.<sup>8</sup> Adjudicators frequently find ways to twist the law in the name of normality to justify the infliction of suffering. The task of the advocate is to prove the exception.

<sup>8</sup> Bruce Cockburn, lyric from song “The Trouble with Normal,” album “The Trouble with Normal” (1983).

The first two of Buddha’s Four Noble Truths are: (1) life is suffering; (2) suffering is desire. Reading hardship law, one may wonder whether many American officials did not stop at that point in their moral education, oblivious to other truths about duty and compassion. Decision after decision blithely recites that suffering is normal: everybody desires to stay with family and friends and neighbors and employers in the United States, and yes, it will rip out hearts to force this family apart, but that is okay because it is “normal.” Again, the task of the advocate is to prove the exception. One tries to make the adjudicator see and feel the human realities of the persons in the case.

Although it has never been clearly articulated in any published decision, the underlying reasoning in all hardship waiver decisions (even beyond immigration law) is this: (1) hardship is normal (we all suffer); (2) the claimed hardship must be worse than that suffered by the hypothetical average person in analogous circumstances. In the J-1 hardship waiver context, this means showing that the hardship faced by the applicant’s American (U.S. citizen and permanent resident) family members would be worse than that faced by the hypothetical American family of an average J-1 exchange visitor forced to return to his home country for two years, whether or not the family accompanies him. It is useful to treat that as a cardinal rule and organizing principle. One does not win a hardship waiver case by making a laundry list of hardship factors and then shoveling in the standard background documents. Instead, one should try to keep the focus on how all the factors, considered together, take the case outside the realm of the normal.

The USCIS Administrative Appeals Office understands this. Here is the AAO’s summary of the facts in a successful appeal I handled:

The record clearly establishes that the applicant’s spouse would suffer exceptional hardship if he abandoned his present career in the United States to accompany his wife and child to Colombia where his life would be at risk as a United States citizen. The record also contains specific documents which reflect that the applicant’s husband would be faced with certain additional problems and anxieties, such as fear for the safety of his wife and/or child if she returned to Colombia without him where her personal chance of being kidnapped, tortured or killed is greater than 25%. *These anxieties go beyond the normal.* It is concluded that the record now also contains evidence

of hardships including separation, fear and anxiety which, in their totality, rise to the level of exceptional as envisioned by Congress if the applicant's husband remains in the United States while she returns to Colombia either with or without their child.<sup>9</sup>

The lawyer cover letter in that case had specified the following as the main hardships:

1. The risk of violent hardship to the applicant's American husband and child, in view of the indescribably dangerous situation in Colombia.
2. The risk of long-term hardships for her American husband and child if Dr. X herself were kidnapped or physically injured.
3. The risk of disruption of the superlative career of the applicant's husband.
4. The special risk of permanent psychological damage to the applicant's newborn baby if he is exposed to the extreme chaos and violence of Colombia.
5. Risks of hardship to other Americans and to the public interest of the United States, in view of the exemplary quality of medical care provided to Americans by Dr. X and her husband.

One could have specified many other hardships. But those were the main ones. The AAO did a good job in its summary. Notice the AAO's emphasis on the fact that the application proved clearly, using specific documents, that the hardship to the applicant's American spouse and child were significantly beyond the normal hardships faced by the family of an average J-1 exchange visitor. The application took hundreds of pages to demonstrate that reality. The applicant, her supporters, and her lawyer spent hundreds of hours preparing the case. The USCIS service center probably spent less than 30 minutes reviewing it. Indeed, based on the text of the initial summary denial, it appears that the adjudicator could not have even read all of the five-page cover letter. Nonetheless, the elaborate preparation work was useful, because it built the foundation for a successful appeal.

<sup>9</sup> *Matter of [name redacted]*, File No. A74-944-520, slip op. at 5 (AAO Feb. 7, 2001) (emphasis added) (copy on file with author).

Here are additional authorities for the cardinal rule that one must prove that the hardships are beyond the normal:<sup>10</sup>

“The uprooting of family, the separation from friends, and other *normal processes of readjustment* to one's home country after having spent a number of years in the United States are not considered extreme, but represent the type of inconvenience and hardship experienced by the families of most aliens in the respondent's circumstances.” *Shooshtary v. INS*, 39 F.3d 1049, 1051 (9th Cir. 1994) (citing *Matter of Chumpitazi*, 16 I&N Dec. 629 (BIA 1978)).

“[W]ere the children to remain in the United States with their mother, there was no evidence that the hardships they would suffer would be more than the *normal hardships* expected due to separation from a family member.” *Onasanya v. INS*, No. 95-2943, slip op. at 7 (4th Cir. Mar. 31, 1997) (citing *Chiaramonte v. INS*, 626 F.2d 1093, 1101 (2d Cir. 1980)).

“Regarding her friendships, the IJ found that they fell within the general rule that *the severance of normal friendships does not rise to the level of extreme hardship*.” *Parchamento v. INS*, No. 95-70491, slip op. at 6 (9th Cir. Jan. 24, 1997) (citing *Shooshtary v. INS*, 39 F.3d 1049, 1051 (9th Cir. 1994)).

“‘Extreme hardship’ will not be found without a showing of significant actual or potential injury, in the sense that the petitioner will suffer hardship ‘substantially different from and more severe than that suffered by the ordinary alien who is deported.’” *Kuciemba v. INS*, No. 95-3454, slip op. at 5-6 (citing *Palmer v. INS*, 4 F.3d 482, 487 (7th Cir. 1993)).

“The Salamedas, who have advanced degrees, are more able to make a transition than most. They have children accustomed to the United States, but that is normal rather than extreme. *Normal and extreme are legal antipodes*. Unless the word ‘extreme’ has lost all meaning, this is a routine case. The BIA is entitled to be hard-nosed, to take ‘extreme’ literally.” *Salameda v. INS*, 70 F.3d 447, 453 (7th Cir. 1995) (Easter-

<sup>10</sup> See my first 2002 article, *supra* note 3, for demonstrations that (1) “exceptional” and “extreme” basically mean the same thing, and (2) suspension cases are relevant in the Form I-612 context. Emphasis is added in the quotations below with italics.

brook, C.J., dissenting). This quotation from a dissenting judge accompanies an important decision in a case litigated by AILA member Royal F. Berg of Chicago. The majority opinion was written by famous judge Richard Posner. The decision vacated an order denying the Salamedas's application for suspension of deportation, finding that the BIA had disregarded the couple's community assistance and suggesting that the BIA also consider hardship to the couple's noncitizen child.

"The BIA denied the motion, concluding that Brice had failed to demonstrate a *prima facie* case of extreme hardship because he had not established that he would either suffer any more than an *average deportee* or that the new government would revert to repression." *Brice v. INS*, 806 F.2d 415, 418-19 (2d Cir. 1986).

"Exceptional hardship contemplates more than *normal personal hardship*." *Talavera v. Pederson*, 334 F.2d 52, 58 (6th Cir. 1964) (citing "Report No. 721 of the House of Representatives, dated July 17, 1961, prepared by Subcommittee No. 1 of the Committee on the Judiciary on the 'Immigration Aspects of the International Education Exchange Program'").

"Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad." *Keh Tong Chen v. Attorney General*, 546 F. Supp. 1060, 1063 (D.D.C. 1982) (citing *Mendez v. Major*, 340 F.2d 128, 132 (8th Cir. 1965); *Talavera v. Pederson*, 334 F.2d 52, 58 (6th Cir. 1964)). This is the most important J-1 hardship waiver opinion. Anyone who practices in this area should study it carefully, especially because this is the case most often cited by the USCIS in Form I-612 denial decisions and they always cite it incorrectly. In fact, this case strongly favors the applicant in almost every context. The court granted summary judgment for the plaintiff on the ground that the legacy INS failure to demonstrate explicit consideration of evidence in the record regarding the child's hardship claim was arbitrary and capricious. Moreover, the decision holds that where an applicant's spouse and children are U.S. citizens, exceptional hardship may be found based solely on the consequences of the spouse and children remaining in the United States. The decision strongly dis-

parages the USCIS's conventional "two-step" analysis in these cases.

## DIALECTICS

This section contains practice tips on preparing a successful hardship waiver case.

It takes great effort to provide adequate evidence for the argument that an applicant's family faces a constellation of hardships that are abnormal. At the same time, one cannot get lost in a trackless wilderness of marginal arguments, extraneous facts, and generic documents.

Some lawyers veer too far toward the superficial. They see only the forest, and all forests look alike from a distance. Not long ago a prospective associate commented that he "could not fathom" how anybody could spend 15 or more hours on a waiver case. He works for a charitable organization cranking out hundreds of cases a year. He proclaimed that he was always thoroughly prepared in a few hours, even in suspension or asylum cases. This poor soul did not have a clue about how to conduct factual development in a difficult case, although he thought he was an expert. For myself, I cannot fathom how anybody could expect, starting from scratch with no experience, to even begin to prepare a wise, truthful, complex, thoroughly documented, intelligently integrated and conveniently cross-referenced written description of a family's hardship waiver predicament, especially where so much is at stake, in anything less than 15 hours. When I started, I often spent over 60 hours on Form I-612 cases. I am now much more efficient, but my staff and I still never spend less than 20 hours on a case. The average is probably closer to 40 hours or more, all things included. These are labor-intensive cases.

Other lawyers, alas, get lost in murky depths. They get so lost in the trees that they forget the forest. I have reviewed unsuccessful hardship waiver applications that reflect extensive, diligent labor, combined with a hefty shoveling-in of generic background documents, but no coherent distillation, no cogent introduction and conclusion. It looks as if they imagine it best to shoot wildly in all directions, hoping some random shot may ring a bell. This approach is a mistake. One has to work hard, but working hard is not enough.

Pondering these observations, it seems to me that effective hardship waiver advocacy requires a kind of "dialectic." One must start with a quick, superficial (but hopefully informed) condensation of the



major hardships. What are the two or three main hardships? Blam, blam, blam! That is the thesis.

Next one must go beyond that into the depths. One should give the clients homework. One should try to make sure that every chance has been taken to dig up all possible cognizable hardships. One must be comprehensive. One must interview the clients at length, often more than once. Mountains of documents may be assembled. Energetic clients will send hundreds of clippings. One has to deal with exhibits that reference sub-exhibits that reference sub-exhibits, and so forth. The sworn affidavits, which I believe must be drafted by the applicants themselves pursuant to very detailed instructions, must be carefully edited and rewritten in light of the law and the available evidence. I find it helpful during the most tedious aspects of this work to keep a picture of the clients near my computer. This is the antithesis.

Too many lawyers stop at the first step or somewhere during the second. To win consistently, I think you have to go through those two steps—and then forge on to a concise and focused summary of the main points, while drawing attention to the depths of evidence available in support. This is the synthesis.

There are an infinite number of ways to *truthfully* describe any situation. My playful description here of a “dialectic” in the analysis of a hardship case has puzzled some readers. To say it another way, in the interest of clarity, the “thesis” is an initial, rapid-fire proposition that the whole case comes down to one or two or maybe three main hardships; the “antithesis” is a very detailed assessment of all identifiable hardship factors in a case in combination with a very detailed assessment of available evidence; and the “synthesis” is a final, prioritized description of the main hardship factors in the context of all the identifiable hardships. The final synthesis is more nuanced than the initial impression, and at this stage the list of main hardship factors will sometimes vary from the initial impression. Of course, any complex intellectual project requires similar steps. Isolation of these steps in the hardship waiver preparation process is useful for helping to make sure that preparation has indeed been adequate.

This dialectic is reflected in the formal way that I organize a hardship waiver application. I believe the affidavits are the main documents. They should reflect this dialectical process: starting with a summary, going into the details in an intelligently structured way, and then synthesizing the main points in conclusion. The exhibits are all selected to support

the affidavits. The evidence consists of affidavits and supporting documents and photographs, and that is all summarized in an annotated table of exhibits. In my cases the table of exhibits usually runs to more than 20 pages, and it often exceeds 50 pages. It took me years to realize that the lawyer cover letter should be the last step, not the first. The lawyer cover letter should be only a few pages long. It briefly summarizes the family’s circumstances, briefly summarizes the key hardships, and points toward the table of exhibits, which points in turn to the affidavits.

The completed Form I-612 hardship waiver application, one might say, is a kind of fractal, in the sense that each component replicates the overall dialectical structure. Of course, one does not use fancy language like that in a real application. Instead, one should strive to make sure that everything is clear and that nothing is included that is redundant or not clearly relevant.

Prospective hardship cases are all over the map in terms of merit and in terms of the time required for preparation. Sometimes the main hardships are obvious. If a U.S. citizen child has just had heart surgery, it may not be necessary to venture very far into the hardships the family would also face because they are members of a persecuted religious minority. Cases like that obviously do not take as much time as others. On the other hand, sometimes it seems obvious that there is no exceptional hardship. In such cases, an interview will usually reveal fairly quickly whether there is a case to be made. I turn down the majority of people who request my help, because everything depends on the facts and often the facts are just not there. In a significant number of cases, however, it is not obvious, even after an interview or two, whether or not there is an approvable case to be made, and yet intuition tugs and conscience does not permit a quick dismissal. It may be difficult to develop a coherent way to describe the situation. Those are the cases a lawyer remembers. So far my record is five-and-a-half hours at an initial interview before the clients and I figured out a compelling way to argue a case.

A hardship waiver application must be complete. I have seen losing applications, for which lawyers charged steep fees, that comprised fewer than 15 pages, including the forms. But a hardship waiver application should not be unduly long. This is a big problem for me. Many of my applications have been over four inches thick. Over time, I’ve been trying to pare them down ruthlessly, with mixed success.

Blaise Pascal once wrote to a friend, “I’m sorry this letter is so long, but I did not have time to shorten it.” I have started to use a separate final step just to shorten an application, after everything is together.

### CATALOGS AND CASES

A former immigration judge commented to me that what is going on at bottom in all hardship adjudications is a discrimination between people who are “really suffering” and people who are “really, really suffering.” How does one even begin to draw bright lines to guide advocates and adjudicators?

Conventional legal training gets lawyers in trouble in the hardship area. Until this article, I do not believe there had been an attempt at a rigorous empirical study of hardship waiver factors. Instead, we have two things: (1) catalogs of grounds in legal writings, and (2) murky statements in legal opinions citing to other legal opinions. Most of the case law in this area is incoherent, and all of it is incomplete. There are a few thoughtful exceptions, such as the court’s opinion in *Keh Tong Chen*. In sum, however, the case law in this area is a swamp. One can find authority for certain principles. From the case law, however, it is impossible to find a cogent set of fundamental principles, and it is easy to be misled (for example, in my opinion, it is easy to overestimate the importance of amorphous sociocultural hardships). In addition, most of the case law in this area is quite dated by now, so its factual relevance is becoming increasingly attenuated, even though the underlying law has not changed.

Therefore, this article does not march through the typical summary of case law and regulations. My first 2002 article<sup>11</sup> recites all sections in immigration statutes and regulations, plus the most important case law, regarding the concept of “hardship.” My 1994 article contains a list of all published federal judicial and administrative opinions regarding Form I-612 hardship cases, with annotations regarding the major hardship grounds mentioned by the opinions, and there have been no published opinions since then in this exact area of Form I-612 cases.<sup>12</sup> A practitioner should be familiar with those legal

sources, especially *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978), which is still the closest thing we have to an authoritative list of important factors in any immigration hardship determination.<sup>13</sup> Not much light could be generated, however, from trying to reconcile the above sources using conventional tools of legal analysis and exposition. Moreover, although it would be interesting, not much light would be shed by using conventional tools of legal exposition to compare the *Anderson* factors with the hardship scale proposed in this article.

Thus, in view of the murky legal authorities and the absence of clear guidelines from the government (as one can find, for example, regarding other equally complex topics in the *Foreign Affairs Manual*), the only reliable guide is experience. As Oliver Wendell Holmes and the later Legal Realists taught, there is no such thing as a logically correct answer to the question of what is the law; finding the law means making a prediction of what courts will do. One cannot find the law of hardship waiver applications in a handful of published decisions. One has to find it in the results in many cases over time.

Several preliminary issues should be clarified before describing the Hake Hardship Scale.

### PARTIES, GROUNDS, AND THE PUBLIC INTEREST

Three factors must coalesce for a J-1 hardship waiver to be approvable.

First, one must consider the people involved in the application. The applicant must show that hardship is faced by a U.S. citizen or lawful permanent resident spouse and/or child. If this threshold eligibility is established, one can also show (and the government will reckon) hardship to other third persons, such as a U.S. citizen father-in-law who is dying of cancer.

Second, one must show that the combination of hardships is “exceptional.” One must consider the factual grounds of hardship.

Third, one must also show that it is in the public interest to grant the waiver. This is an express requirement of INA §212(e), which is often overlooked by practitioners new to this area.

<sup>11</sup> *Supra* note 3.

<sup>12</sup> Hake 1994 article, *supra* note 1, Appendix 1 at 51–60. That appendix missed one case: *Matter of DePerio*, 13 I&N Dec. 273 (Dep. Assoc. Comm. 1968) (Philippines; U.S. citizen child with allergic condition plus heart murmur and cardiac enlargement requiring follow-up; waiver granted).

<sup>13</sup> *See also* the list of hardship factors for special rule suspension under the Nicaraguan and Central American Relief Act (NACARA) that are set forth at 8 CFR §240.58.

These three factors are entangled. None of these factors should ever be considered in isolation. Therefore, when I think about “hardship waiver grounds,” in the sense of thinking about what kinds of cases are likely to be approved and which are not, I tend to think of these three factors as an undivided whole. In presenting the application, I always distinguish these three factors in order: (1) who is involved in the application; (2) what is their predicament; and (3) how does this affect the public interest? In assessing whether a case is approvable, however, I think of the facts regarding the persons involved, the facts regarding the kinds of hardship, and the facts regarding the public interest, as a connected set of “hardship factors.” This way of viewing the problem is reflected in the structure of the Hake Hardship Scale that follows.

It is important to note here that the number of persons affected in a hardship waiver case has a direct impact on the likelihood of success, regardless of the specified hardship grounds. This has always been true in the law. In *Matter of Nassiri*, 12 I&N Dec. 756 (Dep. Assoc. Comm. 1968), the INS granted an exchange visitor foreign residence requirement waiver on the ground of exceptional hardship to a citizen spouse and citizen children. The decision is noteworthy for its enunciation of this “general rule”:

As a general rule, where both the spouse and child(ren) of an exchange visitor alien are United States citizens or lawful permanent residents, exceptional hardship within the meaning of section 212(e) of the [INA] exists as a result of the difficulty experienced by a family with children in parting from their relatives, friends and familiar surroundings and attempting to adjust to life in a foreign country where they are not familiar with the language, mores or culture; additionally, an alien who goes abroad without his family seldom commands sufficient salary to support his family in the United States, and care for the family generally precludes acceptance of employment by the wife.

*Id.* Congress has taken no action since 1968, the year the *Nassiri* case was decided, to indicate that it disagrees with that general rule, nor has any court or administrative authority repudiated it. Individual USCIS adjudicators, however, often seem oblivious of the rule.

The important *Keh Tong Chen* case has a lengthy analysis of this point, finding that the legacy INS nearly always approves a waiver where there is both

a U.S. citizen spouse and child. *See* 546 F. Supp. at 1065 (“It is highly unusual for the INS to refuse to waive the foreign residence requirement where the applicant has both a citizen-spouse and a citizen-child.”) (citing cases).

In a case of mine, the AAO stated: “The government’s interest in furthering the exchange program’s goals remains constant regardless of the number of resident alien or citizen relatives the applicant has in this country. *But the more relatives the applicant has who are citizens, the more the balance tips in favor of granting the applicant a waiver.*”<sup>14</sup> This statement contrasts the public policy interests and the private personal interests. The opinion then proceeded immediately to a factual discussion of the hardships facing the applicant’s wife and child (as quoted above). This is a good example of the blending in practice of the private personal interests, public interests, and factual hardship grounds.

#### TIME OF DECISION AND COUNTRY VARIABLES

J-1 hardship waiver law has not changed in substance for over 25 years. The patterns of facts that will win, however, fluctuate. Sometimes the fluctuations are dramatic. The most dramatic fluctuation occurred in a period of about 18 months from about January 1999 to June 2000, the time surrounding the abolition of the U.S. Information Agency (USIA), which went out of existence on October 1, 1999. J-1 hardship waivers had always been considered difficult to win, but during that period they became almost impossible to win. Since then, overall approval rates have apparently returned to approximately the same level as before that dark period. Now, however, more denials are apparently being issued by the USCIS at the outset, before a case has gone to the State Department, while fewer cases are apparently being denied by the State Department after a case has made it through the USCIS gauntlet. In addition, from time to time adjudication policies fluctuate at the USCIS service centers. At present, however, on balance, the combinations of factors that will win are essentially identical to those that have always been considered meritorious in this area, aside from that one dark period.

<sup>14</sup> *Matter of [name redacted]*, File No. A74-944-520, slip op. at 4-5 (AAO Feb. 7, 2001) (emphasis added) (copy on file with author).

Overall approval rates for Form I-612 cases are unknown, because the USCIS does not report statistics in this area. (I confirmed this fact in 2002 through Freedom of Information Act requests to the four service centers and to the legacy INS national office.) Some experienced lawyers believe the overall approval rate is only about 10 percent. My own informed guess is that the overall approval rate (cases recommended for approval by both the USCIS and the USIA or State Department) is now probably about 30 or 40 percent. Since I never accept a case unless it meets stringent criteria, my own success rate in over 150 cases is now approximately 88 percent. During the dark period from about January 1999 to June 2000, however, my success rate was only 30 percent (although some of those denials have by now been reversed), and I was told by other lawyers that their success rate during that period was zero. Subsequently, however, things have returned to where they were before: it is difficult to get a hardship waiver, but not impossible, if indeed there are exceptional hardships. I mention these facts as a matter of interesting history, and also because of the problem that that anomalous period poses for an attempt to conduct empirical analysis in this area. Decisions reached during that period are best disregarded.

Another important part of the hardship waiver process is the issue of “country variables.” Does the likelihood of success depend not only on when the application is decided, and by what USCIS service center, or does it also depend on the applicant’s home country? Do citizens of some countries consistently get the “short end of the stick” while those from other countries get an automatic pass? It is common for prospective clients to ask “which countries are getting waivers these days?” I have asked in the past at AILA-USIA liaison meetings whether the USIA kept per-country statistics for waiver cases, and the answer was negative. Over the years I have heard some lawyers say that they think citizens of some countries (such as India, Egypt, or the Philippines) have an especially difficult time getting a hardship waiver approval, while those from other countries (such as Bosnia or Kuwait) obtained approvals without obstacles. After years of concentrating in this area, I have come to the belief that the government is usually reasonably neutral about the country of origin. By far the major reason why per-country results vary dramatically is that extremely dangerous political conditions in certain countries at certain times are an objectively significant hardship factor. On balance I believe the government gives

responsible weight to this factor, with some egregious exceptions.

## THE HAKE HARDSHIP SCALE

### Genesis of the Idea

I first started trying to invent a quantitative tool for the assessment of hardship in immigration cases in 1992, 12 years ago. The idea has finally matured.

I never accept a hardship waiver case unless it meets certain criteria: (1) I personally believe it involves serious hardship; (2) there is a very good chance that it is approvable under established law and practice; (3) I am free to take the case at the time; and (4) there is no special reason to decline, such as a conflict of interest. Applying these criteria, I turn down the majority of people who want to hire me.

Of those criteria, the most important is the estimation of approvability. For years my rule of thumb was not to accept a case unless I felt it had at least a 75 percent chance of success. Because I have so much experience in this narrow area, my own gut prediction about success is probably about as accurate as could be found anywhere. But it always bothered me that I did not have a stronger empirical basis.

Before I completed this article, in thinking generally over my work and about the thickets of reasoning in the case law, I had thought that a comprehensive listing of relevant hardship factors would need to be very complex. In April 2002, however, I had an inspiration one night and discovered to my delight that the opposite is true. In fact, one can put the entire structure of pertinent hardship waiver factors on a single page.

### Original Version

The original 2002 version of the Hake Hardship Scale was based on a systematic analysis of the major hardship factors in my last 50 successful Form I-612 hardship cases. I discovered through this empirical analysis that *every single* important hardship factor fell within just six hardship categories, with no loose ends. Altogether, one needs just 10 categories for a complete and practical analysis of hardship waiver cases:

#### *Three categories for persons involved in the case—*

1. *U.S. citizen spouse or child?*
2. *LPR spouse or child?*
3. *Third persons facing very serious hardships?*

**One category for the public interest—**

4. Significant *public interest* factors?

**And just six categories for specific hardship grounds—**

5. *Medical hardships* to spouse or child?
6. *Psychological hardships* to spouse or child?
7. Career or educational disruptions to spouse or child?
8. Very serious financial hardships?
9. *Sociocultural hardships* upon relocation to the home country?
10. Significant risk of physical harm due to *political violence*?

**Usefulness of a Limited Number of Categories**

It can take great effort to establish the gravity or probability of different kinds of harms. For instance, it may take many documents to prove that a family faces a risk of physical harm from political violence that is so serious that it must be given weight. Moreover, there may be much overlap between related categories. For instance, certain extreme sociocultural factors (such as the ongoing genocide being inflicted on the Shia religious minority in Pakistan) may cause (1) a significant risk of physical harm due to political violence, (2) serious psychological hardships, (3) serious medical hardships, and (4) profound career disruption, and they may defeat J-1 program and policy goals by making futile any effort by the applicant to employ his U.S. training in the home country. Nonetheless, it is useful to realize that fact development can be channeled into such a small number of main categories in every single case.

**The Hardship-Minimizing Travel Alternative**

A major reason why people lose at J-1 hardship waiver applications if they try on their own or with an inexperienced lawyer is due to ignorance of the USCIS “two-step” analysis, which is the central dogma of J-1 hardship waiver law. One has to prove that the U.S. qualifying relatives would face hardships in the home country if the entire family were to relocate together, but usually this is easy and in any event it is not sufficient. The core of the case is to show that the U.S. qualifying relatives would face comparably exceptional hardships if the family were to adopt the travel alternative that minimizes hardship to the qualifying relatives, which typically involves several of the family members staying in the

United States. (If the applicant’s spouse is not a U.S. citizen or LPR, then the analysis is somewhat simplified, but one still needs to prove that the children could not stay in the United States for two years.)

Therefore, in using the Hake Hardship Scale to assess the approvability of a case, the primary focus is on whether or not the situation scores a sufficient number of points under the hardship-minimizing travel alternative. In many cases (including most of the ones involving a U.S. citizen spouse), the hardships would be even more serious if the entire family relocated for two years or more to the applicant’s home country. But the key is the hardship-minimizing travel alternative.

In practice, it is often difficult to maintain clarity about distinctions under the “two-step” analysis, especially where there are more than two hypothetical travel alternatives. I make a point to discover the most likely alternative that the family really would follow if forced to choose (one has to find out; real answers are all over the map), and I tend to emphasize this reality, while giving less attention to the merely hypothetical alternatives.

**Scoring the Various Hardships**

Once one has identified the major hardship factors in a case, one needs a way to score them to make an assessment as to whether the case is likely to be approved. The scoring perhaps may give a modicum of credit to the lawyer’s belief about what the law “should” be, but to be useful in practice it should be based almost entirely on an objective and accurate reflection of the government’s action in real cases.

It is crucial to emphasize that one must be extremely skeptical and conservative in assigning point totals for categories that permit a range. Only the most clearly serious facts justify the higher numbers, and only when those facts can be supported by authoritative evidence. For instance, the mere fact that one can articulate some kind of “medical hardship” does not necessarily get you even one point.

**Details of the Scoring System**

After much thought, one night of inspiration when years of fuzzy thinking seemed to snap into clarity,<sup>15</sup> and then two years of working with the

<sup>15</sup> The factor analysis and contradiction-checking leading to the assignment of scoring weights for different categories is somewhat inspired by the mathematical field of “fuzzy logic,” which has recently been influential in computer sci-

scale, I propose that the factors should be weighted (scored) as follows:

1. **U.S. citizen** spouse or child? Five points for a U.S. citizen spouse and/or five points for a U.S. citizen child. One point for each additional U.S. citizen child. If I were the adjudicator, I would give five points for each U.S. citizen child, but in practice the government does not decide like that. If that were the actual rule of decision, a hardship finding would be made by the USCIS in every case involving two or three U.S. citizen children, and that is plainly not the reality (notwithstanding the authority cited above regarding the dependence of the probability of approval on the number of citizens involved). If a spouse or child obtained U.S. citizenship through naturalization, subtract one-half point. Under the law, all U.S. citizens are equally deserving of protection from their government. In practice, however, the government gives somewhat less weight to the suffering of naturalized citizens. In AAO decisions, for example, during terse summaries of the material facts, the AAO nearly always goes out of its way to mention that a spouse was naturalized where that is the case.

2. **LPR** spouse or child? *Four points for an LPR spouse or child. One point for each additional LPR child.* The scoring here is based on the bedrock principle of American immigration law, which has been consistently affirmed by the Supreme Court in many cases for over 100 years, that aliens' rights increase over time as their ties to the community increase. The fundamental American legal principle is equality before the law and morally all persons are equal, so I'm uncomfortable to give less weight to the suffering of a green card holder than to a citizen. Nonetheless, in practice the government gives less weight. Indeed, as noted above, it sometimes seems to give less weight to naturalized citizens, and such discrimination sometimes appears to reflect ethnic biases.

3. **Third persons** facing very serious hardships? *One to five points (per person).* These situations are unusual and very fact-specific. In the great majority of cases one could not assign any points in this category. Even in cases involving significant suffering to

third persons, such as extended family members, one usually could not accurately assign more than one or maybe two points. Nonetheless, in a few of my victories the only significant hardship has been extremely serious hardship to a third person, such as a grandparent of a qualifying relative dying of cancer. Such rare cases may merit four or five points.

4. Significant **public interest** factors? *One to three points.* The statute requires that all J-1 waiver approvals must be grounded on a finding by the Attorney General that approval is in the public interest. All cases involve some degree of public interest in view of the ties of the applicant's family to the community. One or rarely two or three points should be assigned here in unusual cases where there is some special, strong public interest factor. My favorite example is a client who was asked to serve on a special project to develop an anthrax vaccine during the time of the anthrax terrorist attacks in 2001. My preference would be to permit higher scores in this category in certain cases, but my impression is that the government typically will not do so.

5. **Medical hardships** to spouse or child? *One to six points (per person as appropriate).* This is the big enchilada. One has to be very skeptical and honest in assessing the evidence. An assignment of five or six points requires a definite life-and-death risk. If there are several qualifying relatives with medical hardships, one adds up the points for each. Note that the State Department's Waiver Review Division routinely sends claims of medical hardship to a separate bureau for an opinion on whether the medical condition can be treated in the home country, so it is crucial to provide documentation from credible medical authorities in the home country.

6. **Psychological hardships** to spouse or child? *One to five points (per person as appropriate).* Again, one has to be very skeptical and honest in assessing the evidence. An assignment of four or five points requires an extremely serious risk of catastrophic mental breakdown or suffering that would be unconscionable to inflict. In practice, it is difficult to prove to the satisfaction of the government that a psychological hardship is exceptional. This topic alone could support an entire article. In brief, I rarely use psychiatric letters unless there is a pre-existing, substantial history of clinical psychiatric illness. Exceptional cases may require a report from a forensic psychologist. In the rare cases where there is no apparent outward hardship, but there is in fact very serious and unusual inward hardship (based, for instance, on past trauma such as torture

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ence, especially in the areas of artificial intelligence research and the development of so-called "expert systems." See generally McNeill and Freiberger, *Fuzzy Logic: The Discovery of a Revolutionary Computer Technology—and How It Is Changing Our World* (Simon & Schuster, New York, 1993).



in Bosnia or suicide of a brother), I have had success relying on legal authorities insisting that the government must look at the individual's actual circumstances, with analogies to the "thin-skinned plaintiff" rule in tort law (a tortfeasor is ordinarily liable for all the plaintiff's injuries, even if most persons would not have suffered injury from the same act). Reports from treating mental health professionals are often of little use in proving psychological hardship, but they are useful to prove the fact of treatment. In practice, the USCIS and the State Department are often more reluctant to tear asunder the bond of an existing, prior relationship with a mental health professional than with a spouse or child.

7. **Career or educational disruptions** to the spouse (or, in theory, child)? *One to two points.* This factor has strong support in the case law. There must be real proof of disruption.

8. Very serious **financial hardships**? *One point.* Only rare cases get even one point for this usually disparaged factor. In the 50 cases I analyzed for the first version of this article, only 13 identified this as a major hardship. My rule of thumb is whether there is a real risk that children may go without essential needs or that a mortgage could not be paid.

9. **Sociocultural hardships** upon relocation to the home country? *One point.* This factor includes things like mistreatment of women in Muslim societies, language problems, educational deficiencies, and the like. There is quite a bit of discussion of factors like this in the case law, and some lawyers give great emphasis to this category. I personally assigned just one point in this category in only seven out of the 50 cases I analyzed for the first version of this article. Some lawyers will differ with me, but I just do not think this category is compelling or effective. When "sociocultural" hardships are sufficiently extreme to be counted on the hardship scale, I think it is usually better to treat them as psychological or occasionally medical hardships, or in terms of the risk of physical harm due to political violence.

10. Significant risk of physical harm due to **political or sectarian violence**? *One to three points.* No matter how white-hot the danger, such risk is always inherently attenuated. If the applicant has been specifically singled out for harm, a better option may be to file on Form I-612 for a waiver based on risk of persecution. My preference would be to sometimes permit up to five points in this category. In practice, the government usually does not give that much weight. I assigned the full three points in

this category to only 10 of the 50 cases I analyzed for the first version of this article. Proof of the danger in this category can require extensive documentation, organized into numerous subcategories. In Pakistan, for example, an applicant's family may face significant risks (1) due to the danger of kidnapping, (2) due to their religious affiliation, (3) due to their American ties, (4) due to past political affiliations, and so forth. Nonetheless, this all falls under one core category, where the key concept is risk of physical harm due to political (or sectarian) violence.

11. **Adverse factors.** U.S. immigration law has many kinds of applications for relief where the government performs a balancing process, weighing positive factors ("equities") against adverse factors. In my latest work on the Hake Hardship Scale, I have started to use an additional column to record adverse factors, which cause a reduction in the total points scored for a case. As noted above, I deduct one-half point for a naturalized spouse. I deduct one point for each specific problem, of the kinds likely to be articulated by the AAO as negative factors. Examples include absence of documentary evidence for specific points, recency of marriage of a J-1 exchange visitor to an American, and so forth. In addition, I deduct *five* points if the J-1's program was supported by U.S. government funding.

### Enough to Win

What does one do with those scores? It might appear that an exceptional hardship finding should require just 10 points, but in practice one needs 11 or more. A score significantly above 11 should be approved quickly and smoothly. A case scoring less than 10 points is not even in the ballpark and should not be accepted by a lawyer.

In my view, a case involving a U.S. citizen child and a U.S. citizen spouse (10 points), and nothing more, should always be enough. Clearly the government does not agree. One also needs at least one substantial articulable hardship in one of the six hardship categories. Therefore, one needs at least 11 points.

My final hypothesis is that a winnable case requires (1) at least 11 points, plus (2) at least one clearly exceptional and provable hardship (or, one might say, 11 points and a good story), plus (3) if the J-1 program was funded by the U.S. government, then substantial special additional factors must exist, such as spectacular levels of hardship to qualifying relatives or spectacularly high-level political help.

What about a case involving one U.S. citizen child with a very serious medical hardship, and no other hardships? If it really is a very serious medical problem, that application will almost always be approved. That is why I have the medical hardship category weighted up to six, because five for the child plus five for a serious medical hardship would only total 10, not enough compared to the previous example involving a citizen spouse and child. Five for the child plus six for the very serious medical condition would total 11, which is sufficient. If one clearly scores 11 points, one does not need to go extensively into all the other hardships that may exist for the family.

In reviewing cases to compile the scoring ranges for the Hake Hardship Scale, I posed many such comparisons. I tried my best to give accurate numbers. So, for instance, childhood asthma without a history of hospitalization might get a 1 or maybe a 2, but not more. Scoring each case as accurately as possible, in the preliminary version of this article I found that all 50 approved cases did in fact score 11 or more. Moreover, the range of scores that significantly exceed 11 accurately reflects my subjective impression of the seriousness of the cases, and in most of them the government's response time was appropriate. The highest score on the list was 27, in a case where a permanent resident spouse, a wonderful woman, died in childbirth giving birth to the applicant's fifth child. On my emphatic urging, that case was approved by the State Department's Waiver Review Division 40 minutes after its arrival from the USCIS service center.

### **Usefulness of Case Law**

I have always tried in each case to identify and emphasize a small set of "main hardship factors." My main tools are intuition and empathy. Over the years I have been as confused as anyone by the case law in this area. As discussed above, I have a low opinion of most of the case law in this area. But knowledge of the case law does prevent certain mistakes. For example, the average man on the street, faced with the prospect of being forcibly separated from his wife and children for two years or more, would probably regard the pains of spousal separation, and the emotional and developmental hardships of parent-child separation, as the dominant hardships. The USCIS, however, has always followed the cruel rule that such hardships do not count in the Form I-612 context, because they are imagined to be normal. Similarly, people are often greatly traumatized by things like worries over the decreasing

chance of having children that could result from a two-year interruption of infertility treatments. But this argument has nearly always fallen on deaf ears. There is no point beating these dead horses. Aware of the case law and actual administrative practice, one must simply state the truth about these kinds of hardships (for these kinds of real suffering must be treated with dignity), but these factors must not be emphasized. Instead, one focuses on the factors that will "work," ever mindful of the need for absolute fidelity to the truth of the family's situation.

### **Latest Supporting Data**

As noted above, the first version of the Hake Hardship Scale was based on an analysis of my 50 previous approved J-1 hardship waiver cases. The first published article included a spreadsheet summarizing the hardship factors in those 50 cases. This analysis was useful. Among other things, it confirmed that 11 points did appear to be the accurate breakpoint between likely success and likely failure. None of the 50 successful cases scored less than 11 points, and the overall range was from 11 to 27.

But there are problems with that data set. First, one needs to review comparable numbers of approvals and denials in order to speak with scientific authority. Second, since all 50 cases were prepared by me, it is impossible to know whether the result is biased by my personal reputation or skills. For instance, it is conceivable that other lawyers, not knowing my manner of presenting a case, might not also consistently win cases that score 11 or 12 points. Third, this data set is inescapably biased toward my own impressions as to what are the most important factors in hardship waiver cases. It is conceivable that other lawyers might win cases by looking at very different kinds of factors that I tend to ignore.

Accordingly, over the past two years I have thought about ways to base the Hake Hardship Scale on better data. I could not rely on my own cases. First of all, I did not have enough comparable denials, because I've had only 19 denials in 11 years, and 12 of those came during the anomalous year of 1999. Further, even if I had sufficient denials to compare, I could not avoid the other possible biases caused by using only my own cases.

The best alternative data set I have been able to assemble consists of 140 decisions of the AAO spanning the years from 1985 to 2002. Of those 140 decisions, 85 are denials and 55 are approvals. All

are decisions on the merits on Form I-612 hardship waiver applications.

I coded all 140 decisions using a 30-line coding sheet. The data were analyzed in several ways by statisticians at the Institute of Statistics and Decision Sciences at Duke University. This article focuses on the results from fitting a logistic regression model to the data.

This data set is far from perfect. First, it only includes cases that were initially denied by the legacy INS. Therefore, it does not include cases initially approved by the legacy INS. This significantly skews the varieties of major hardship factors identified in the decisions. I am certain from my own experience that the most significant kind of hardship is serious medical problems of a spouse or child. Such cases are often approved comparatively quickly, and they almost never require an appeal to the AAO. Therefore, this most important kind of hardship factor rarely appears in the 140 AAO decisions I analyzed. My initial data set of 50 of my own cases contains a more accurate distribution of the most important hardship factors.

Second, this AAO data set is silent on the question whether the cases were ultimately approved after favorable recommendation of the USIA or State Department.<sup>16</sup> It is certain that many of the 55 cases approved at the AAO level had to be subsequently denied by the legacy INS after negative recommendations from USIA or DOS, especially those cases that involved U.S. government funding of the exchange program. My initial data set of 50 of my own cases was also superior in this respect, since it only included cases that were finally approved after favorable recommendation of both the legacy INS and the USIA or State Department.

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<sup>16</sup> If a case is denied by the Immigration Service without its being sent to the State Department for a State Department advisory opinion, one has a right of administrative appeal to the AAO. 8 CFR §103.1(f)(3)(iii)(G). On such an appeal, the AAO may order the Service to recommend approval and transmit the application to the State Department, but the AAO may not grant a final approval. In contrast, if the Service denies a hardship waiver application based on a negative State Department opinion, there is no right of administrative appeal and courts have held (improperly in my opinion) that there is no right of judicial appeal. In such circumstances, one can sometimes still prevail by filing a de novo application, which I term a “renewed” application. See Hake 1994 article, *supra* note 1, at 22–24.

Third, many of the 85 denials were of very poor quality. Some involved waiver applications that never should have been filed in the first place, because there were no qualifying relatives and thus the government did not have statutory power to approve. Many were filed in ignorance of the “two-step” rule described above and thus actually did not identify even one exceptional hardship under the hardship-minimizing travel alternative. Such cases have little value in assessing the significance of different kinds of hardship claims.

Nonetheless, this AAO data set is probably the best and most neutral data available on the question of which factors are important in Form I-612 hardship waiver cases.

Using an established technique called logistic regression, the statistical analysis found that the Hake Hardship Scale is a significant predictor of approving or denying cases. Specifically, when regressing the log odds of P[granted] and P[denied] ( $\text{logit}(P[\text{granted}]) = \ln\{P[\text{granted}]/(1-P[\text{granted}])\}$ ) over the score on the Hake Hardship Scale, the following model was fit:

$$\text{logit}(P[\text{granted}]) = -9.2127 + 0.8938 \\ \times (\text{Total Score}).$$

The p-value for the coefficient on the explanatory variable “Total Score” is (using scientific notation) 2.07 E-06. The interpretation is that the results are highly significant. If the Hake Hardship Scale were not related to the probability of success, then there are only approximately two chances in a million of obtaining a result that supported its value so strongly as does this data. This is so notwithstanding the potential problems with the AAO data set identified above. Results in all cases may very well match the Hake Hardship Scale even more closely.

In short, the structure of the Hake Hardship Scale, and its assignment of weights to different factors, is highly accurate from a statistical perspective, at least insofar as it predicts the results in the analyzed cases.

One can plot the predicted probability of granting an application versus the Total Score (*see chart on next page*).

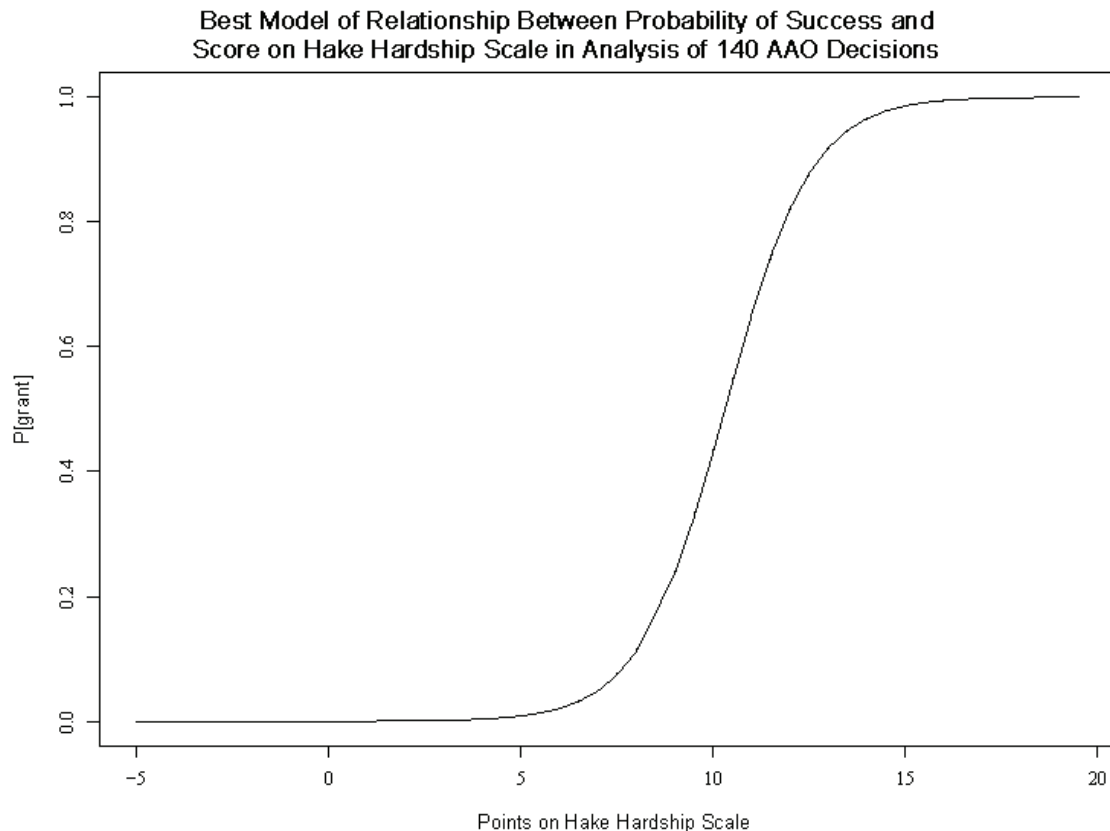
The chart is a graph of the statistical model that best represents the AAO data. It shows that the chance of success is low until one reaches a score of 11 points, after which the chance of success rises sharply. By other, less sophisticated measures, the accuracy of the Hake Hardship Scale may seem even more remarkable.

Of the 140 cases analyzed, 16 scored exactly 11 points. Of those, 15 were approved, representing a 94 percent success rate. That is an even higher success rate than indicated by the chart above.

Of the 140 cases analyzed, 55 scored 11 or more points. Of those, 50 were approved, representing a 91 percent success rate.

Moreover, of the 140 cases analyzed, 129 turned out to have results that are consistent with the pre-

total for the persons involved, a possible score for special public interest factors, and a total for the exceptional hardships involved in the hardship-minimizing travel alternative. As noted above, statistical analysis showed that the total score on the Hake Hardship Score is highly significant statistically. An additional statistical analysis that regressed the logit( $P[\text{granted}]$ ) over the three main components showed that the total for persons, as well as the total



dictions of the Hake Hardship Scale. Only 11 decisions had contrary results. In particular, six cases were actually granted for which the Hake Hardship Scale would have predicted denials. Those cases scored 9, 10, 10, 10, 9, and 10 points, respectively.

Five cases were actually denied for which the Hake Hardship Scale would have predicted approvals. Those cases scored 15, 13, 12.5, 11.5, and 11 points, respectively.

Of these 11 “outlier” decisions, all are close in score to the predictions of the Hake Hardship Scale, except only for the denials that scored 15, 13, and 12.5 points. In my opinion, those three cases are clearly anomalous and wrongly decided.

As described above, there are three main components to a score on the Hake Hardship Scale: the

for hardships, are also highly significant statistically. In other words, not only is the Hake Hardship Scale’s overall score highly statistically significant, but the balance among the two main components of the score also is statistically accurate.

The score for public interest, in this data set, was not found to be statistically significant. However, this factor should not be overlooked. Of the 140 decisions, a special public interest factor or factors was recognized by the AAO in only 10 decisions. Of these, 6 cases were denied and 4 were approved. Of the 4 that were approved, 3 of them needed the public interest points in order to reach 11 points on the Hake Hardship Scale. Sometimes this one detail means the difference between victory and defeat. This fact, incidentally, is also supported by many of the published precedent decisions in this area.

Unfortunately, the AAO data set did not permit much in the way of intelligent nuancing of the originally proposed Hake Hardship Scale, because the range of hardships represented in these decisions turned out not to be particularly representative of what one observes in practice. Additional statistical analysis found that only three specific hardship categories—psychological hardship to a spouse, psychological hardship to a child, and financial hardship to the qualifying relatives—were statistically significant. Moreover, the data set was too small to permit refinement of the range of scores that are permitted within particular categories on the hardship scale. Nonetheless, the statistical analysis showed very clearly that the overall system is highly accurate at predicting success.

### ***Role of U.S. Government Funding***

Of the 140 AAO cases that were analyzed, 72 (or approximately 50 percent) involved U.S. government funding of the exchange program, according to the AAO. Some of these specifications of U.S. government funding, especially from the earlier cases, may be inaccurate, but the overall total is probably fairly close to accurate. Of the 72 that were said to involve U.S. government funding, 53 were denied and only 19 were granted. Note further that of these 19 that were successful at the AAO level, many or most were probably ultimately denied after USIA or State Department review, because it is the latter agencies that are primarily concerned with the so-called “program and policy” considerations, unlike the Immigration Service, which is primarily concerned with the existence or not of exceptional hardship to qualifying relatives. These totals clearly confirm the almost overwhelming problems posed by U.S. government funding. My estimate that the existence of U.S. government funding should be assigned an adverse weight of five points appears to be remarkably accurate, at least in terms of predicting the chance of a case being recommended for approval by the Immigration Service. It is unknown whether that number accurately reflects the final results after State Department review.

### ***Role of Pro Se Applications***

In my 1994 article on J-1 hardship waivers, based on review of a set of AAO decisions, I commented that I was struck by the fact that pro se applicants often prevailed, whereas persons with similar cases lost when represented by lawyers: “Although the sample was not large enough to support a general conclusion, this apparent contrast seems to stand on

its head the conventional wisdom that immigration law is so complicated that unrepresented applicants are like lambs to the slaughter.”<sup>17</sup> For idealistic reasons, I would like to think that worthy foreigners fare well when they argue their cases on their own. Unfortunately, the larger set of AAO decisions that I just finished analyzing belies such notions. Of the 140 decisions, 44 involved pro se applicants. Of these, 28 cases were denied and just 16 were approved. This represents a 36 percent success rate. In contrast, the other 96 cases involved persons represented by a lawyer. Of these, 39 were approved and 57 were denied (representing a 41 percent success rate). On balance, I now think the role of skilled legal counsel is more important than I had been assuming.

### **ADDENDUM: QUESTIONS AND ANSWERS**

Following are responses to some questions posed by AILA members.

1. *Why didn't you include defeats, to show that losing cases score less than the 11 points claimed to be necessary for approval?* This question was raised regarding the first version of this article, which was based on analysis of my last 50 approved cases. At the time I responded:

One could do this from the published case law, and I invite the reader to go through the exercise. I do not think that would be genuinely useful. One could do this by analyzing unpublished AAO decisions supporting a USCIS denial, and I intend to do that in a later version of this paper. One could also do this by surveying other lawyers' cases, but I have attempted to gather denials from other lawyers, so far without success. I cannot do this from my own decisions. So far my record of getting Form I-612 cases through the USCIS at the outset (that is, prior to review by the USIA or the State Department) is 100 percent (including cases that had to be appealed to the AAO). I am sure I have never filed a Form I-612 case that scored less than 11 on the above scale, and I have never had a case denied at the outset by the USCIS, so I have no way to prove from my own cases what causes defeat at the USCIS level. This is a study of what works, not a study of what does not work. Of the approximately 15 percent of my cases that were denied by the USIA or the State Department, all scored at least

<sup>17</sup> Hake, *supra* note 1, at 17.

11 points on the scale, and I believe that all were wrongly decided. I have made arrangements to have these results reviewed by a statistician, who tells me I should be able to use a technique called logistical regression to refine my analysis, but doing so rigorously will require a control group of 50 denials.

As discussed above, the present version of the Hake Hardship Scale is based on an analysis of AAO cases, both approvals and denials.

*2. How do you know that the cases were not won by good lawyering rather than on the facts?* In the first version of this article, I responded as follows:

I think lawyers tend to overestimate the importance of their own contributions in many cases. Of the cases above, there are a few, especially those involving proof of unusual psychological hardship, that may have been denied if handled by a less skillful lawyer. On balance, however, I like to believe that while cases may be lost by bad lawyers, good lawyers do not so much achieve victory as preserve it. In hardship cases, everything really does depend on the facts (and perhaps to some degree on the lawyer's reputation for honesty). A good lawyer will take the time to discover, appreciate and develop the important facts, while a bad lawyer will not. In doing so, however, the lawyer is bound by the facts. The greatest lawyering in the world will not win a hardship case if the facts do not justify a waiver. As a practical measure, that means the best lawyering in the world should not win a case that scores less than 11 points on the scale. As an ethical matter, that means that a lawyer should not accept a case that seems to be an objective loser from the outset, that is, a "frivolous" case, absent a well understood, good faith basis for an extension, modification, or reversal of existing law.

For the record, after two years of trying to use the hardship scale in practice, and after my recent analysis of AAO cases, I have changed my mind on this. I'm now inclined to think that having a good lawyer is indispensable in all but the rare cases that involve an indisputably exceptional level of hardship.

*3. What is this scale good for?*

The Hake Hardship Scale might have many salutary uses. It should help lawyers organize approvable cases. It should help build a bulwark against arbitrary and capricious denials by the USCIS. It should help establish the importance of certain hard-

ship factors, such as unusual psychological hardships, that currently are given insufficient weight by the USCIS. It should improve efficiency both in law offices and government offices by sparing time wasted on ineffective arguments and exhibits. It should generally make it easier for persons facing exceptional hardships to obtain relief by giving coherent, empirical weight to consistency of grants of relief in similar cases. It should make it harder for USCIS officers to rely on certain irrelevant objections that appear frequently in boilerplate denials. In many cases it would dramatically clarify the important issues (for instance, whether a claimed psychological hardship should be scored two points or four points, which might well be the difference between victory and defeat). It should reduce anxiety by making the likelihood of success or failure more certain for aliens contemplating applying for a waiver. Of these benefits, the most important should be the possibility that this approach may help build a bulwark against arbitrary and capricious denials by the USCIS. The strength of such a bulwark, of course, will depend on the extent to which this approach is considered and discussed within the USCIS and within the immigration bar. It is possible that an even greater benefit of this approach might be to limit the number of frivolous cases accepted by lawyers who have not carefully studied the law and the facts. Such a limitation would be of general benefit to worthy aliens and their lawyers, who would not have to compete against mountains of frivolous cases, the existence of which poisons the mood of adjudicators and makes it harder for the worthy cases to receive requisite attention.

*4. Doesn't a fixed scale like this make it harder for lawyers to win unusual cases?*

Nobody likes restraints on his discretion and creativity. One of the great trends in American law over the past century has been toward increasing rationalization of the law. More and more law is thought through and written down. In general, administrative discretion has been steadily curtailed and replaced by fact-specific regulations. As any immigration lawyer knows, pressures on administrative discretion may have evil consequences. Mechanical rules are no substitute for a wise heart. All things considered, however, the objectivication of the law is a good thing. Beyond these short comments, this deep jurisprudential theme is outside the scope of this article. With regard to the question whether the fixed scale makes it harder to win unusual cases, my answer is that in general the oppo-

site is probably true, and to the extent the objection may be true it is probably a good thing. If something like the Hake Hardship Scale were ever implemented formally in the law, there would definitely need to be a general catchall category for other kinds of hardship grounds not clearly covered in the scale, as mentioned above. The catchall category should probably permit a score of up to six, so that a rare case involving one U.S. citizen spouse or child plus one very serious special hardship could justify a waiver. Special claims, of course, require a special level of proof. The catchall category would make sure that every single case that really does involve “exceptional hardship” could be approved. In addition, however, the ordered structure of the rest of the scale would increase certainty, efficiency, and the likelihood of approval for the majority of meritorious cases. In over 150 Form I-612 cases, I have never encountered a hardship that could not be covered on the scale described above. But perhaps such a thing exists.

5. *Lawyers deal with words, not numbers. Only a “computer guy” would come up with something ridiculous like this.*

This was the initial response of one famous AILA member, who knows better if he will pause to think about it. I would suggest he remind himself of the litigation career of Louis Brandeis and the social science data employed in the “Brandeis brief” prepared by Thurgood Marshall for *Brown v. Board of Education*. Of course, the proposed Hake Hardship Scale is light-years from that. But it is, in fact, a respectable form of legal analysis that has practical value.

6. *Shouldn't a hardship scale be based on a societal consensus, rather than on the history of USCIS decisions?*

Yes, of course it should. But that is a much higher mountain than this comparatively modest proposal. In theory, if the USCIS were to aim for greater accuracy in its hardship determinations, it should commission survey research to determine how the American public actually would weight the various hardships faced by aliens and their families. Guidelines for adjudicators should generally be weighted to match the societal consensus, and where the USCIS policy deviated dramatically from that societal consensus (for instance, with regard to the risk of infertility caused by spousal separations) then the USCIS should be required to give a public explanation and hold that explanation open for public comment. Since the likelihood of this actually hap-

pening is zero, I would suggest that advocates attempt to move the pattern of hardship waiver adjudications more closely toward the actual social values (which arguably the USCIS has a duty to uphold) by incorporating social science data into arguments as to why certain hardships should be assigned certain weights. For example, a particular USCIS adjudicator might not have the wisdom or experience to understand why witnessing the suicide of a brother could make a person vulnerable to exceptionally serious psychiatric distress in the future, even though superficially the person might appear to be very successful in his professional life. The adjudicator might make a snap judgment that the person's psychological sufferings deserved about one point, while the advocate might judge it to be a rare case deserving of five points. Victory or defeat would hang on this one assessment. In such a situation, it would probably not be sufficient to rely on statements of the applicant supported merely by one psychiatric letter. Instead, it might be useful to present empirical data about Post Traumatic Stress Disorder and the ways that disorder has become recognized and respected by American science and by the American public in general. Such proof would help shape the decision to the real social values at stake. Note that the existence of the hardship scale would make it easier to understand why this was the core issue, thereby helping the lawyer to know what information to gather, and helping the adjudicator to understand why that information is important. Thus, the scale would increase the chance of an accurate and wise decision consistent with American values.



# **J-1 Waivers In-Depth**

January 31, 2012

## **Additional Resources**

**DOS J-1 Waiver Review Liaison Assistance (Updated 1/23/12)**

<http://www.aila.org/content/default.aspx?docid=17224> [AILA Doc No. 05081962]

**AILA/DOS Liaison Q&As on WRD (10/18/2011)**

<http://www.aila.org/content/default.aspx?docid=37429> [AILA Doc No. 11102423]

**Practice Pointer: Payment of H-1B Attorney's Fees**

<http://www.aila.org/content/default.aspx?docid=37472> [AILA Doc No. 11103166]

**AILA Amicus Says H-1B Fee Regulation Should Not Extend to J-1 Waivers**

<http://www.aila.org/content/default.aspx?docid=37912> [AILA Doc No. 11121235]