

## A, G, AND J VISAS

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### A VISAS

A visas are used by diplomats, officials, and employees of foreign governments recognized by the United States, who are entering the United States on official business.<sup>1</sup> The recognition and control of these individuals concerns international relations, and the supervision of this group is primarily the concern of the State Department.<sup>2</sup> The State Department has assigned the following visa classification symbols to the nonimmigrants admitted under this section:

- A-1: diplomatic or consular officers, and members of their immediate families;
- A-2: other foreign government officials or employees, and members of their immediate families; and
- A-3: attendants, servants, and personal employees, and members of their immediate families.<sup>3</sup>

DHS admitted 175,119 people in A status in fiscal year 2009.<sup>4</sup>

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<sup>1</sup> INA § 101(a)(15)(A), 8 U.S.C. § 1101(a)(15)(A).

<sup>2</sup> Charles Gordon, Stanley Mailman, Stephen Yale-Loehr & Ronald Y. Wada, 1–3 Immigration Law and Procedure § 13.01[1].

<sup>3</sup> 22 C.F.R. § 41.12.

<sup>4</sup> Gordon, *supra* note 2, at § 13.02[1] (citing to U.S. Dep't of Homeland Security (DHS), 2009 Yearbook of Immigration Statistics (Table 25), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf) (last visited Sept. 25, 2014)).

## ELIGIBILITY FOR A CLASSIFICATION

State Department regulations detail the classes of foreign government officials entitled to nonimmigrant diplomatic status:

A-1 classification is given to duly accredited foreign diplomatic or consular officers, heads of foreign states, and principal executive, legislative, or judicial officials of foreign states coming to perform official duties for their governments, as well as their immediate family members.<sup>5</sup>

A-2 classification is given to full-time employees of foreign diplomatic missions or consular posts who are not within the A-1 classification, noncitizens coming to perform duties and services for their governments, and their immediate family members.<sup>6</sup>

A-3 classification is given to the attendants, servants, or personal employees of A-1 and A-2 nonimmigrants.<sup>7</sup>

## TERMS OF ADMISSION

Individuals coming to the United States in diplomatic or quasi-diplomatic status have been accorded wide exemption from immigration restrictions.<sup>8</sup> Foreign ambassadors, public ministers, career diplomatic and consular officers, and the members of their immediate families are not subject to any immigration restrictions unless the President deems additional security controls are necessary.<sup>9</sup> People in A-1 and A-2 categories may remain in the United States without the need to apply for extension of stay, provided the Secretary of State continues to recognize them as members of the diplomatic category.<sup>10</sup> An A-3 visa holder is admitted for up to three years, which can be extended for two-year periods upon an appropriate showing of need.<sup>11</sup> Nonimmigrants admitted as family members of A nonimmigrants may also attend school without changing their status.<sup>12</sup>

A-1s and A-2s are normally given a reasonable time to depart the United States at the conclusion of their assignments.<sup>13</sup> The State Department generally interprets a reasonable time to be thirty days following the end of the assignment.<sup>14</sup>

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<sup>5</sup> 9 Foreign Affairs Manual (FAM) § 41.22 n.1.

<sup>6</sup> 9 FAM § 41.22 n.2.

<sup>7</sup> 9 FAM § 41.21 n.6.

<sup>8</sup> Gordon, *supra* note 2, at § 10.08[1].

<sup>9</sup> *Id.* (citing to INA § 102, 8 U.S.C. § 1102).

<sup>10</sup> Gordon, *supra* note 2, at § 13.03 (citing to 8 C.F.R. § 214.2(a)(1)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (citing to 8 C.F.R. § 248.3(e)(2)).

<sup>13</sup> *Id.* (citing to USCIS, Adjudicator's Field Manual § 30.5(a)(2)).

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

## EMPLOYMENT AUTHORIZATION FOR SPOUSES AND DEPENDENTS

Based on agreements between the Department of State and various foreign governments, certain dependents of government employees assigned to official duties in the United States may be employed in the United States.<sup>15</sup> The procedure for obtaining employment authorization is complex and requires the submission of Form I-566 to the Department of State.<sup>16</sup>

Children born to diplomats in the United States are considered to be LPRs.<sup>17</sup>

### CHANGE OF STATUS

A-1 and A-2 dependent visa holders may change status. To do so, they must submit a copy of their Form I-94 and Form I-566, Interagency Record of Request A, G, or NATO Dependent Employment Authorization or Change/Adjustment to/from A, G, or NATO Status, certified by the U.S. Department of State.<sup>18</sup> The process for change of status for A-3 visa holders can also be found in the Instructions for Form I-539.<sup>19</sup>

### ADJUSTMENT OF STATUS

Those holding A or G nonimmigrant visa status, or having an occupation that would allow them to have such status, cannot file for adjustment of status unless they complete Form I-508 to waive diplomatic rights, privileges, and immunities, and submit a completed Form I-566.<sup>20</sup> Section 13 of the Immigration and Nationality Act (INA) of 1957<sup>21</sup> permits adjustment of status for A or G visa holders, without any other basis for adjustment, if they have failed to maintain status and can demonstrate compelling reasons why they cannot return to the home country.<sup>22</sup> The applicant must demonstrate that this is in the U.S. national interest and not contrary to national welfare, safety, and security to grant them permanent resident status.<sup>23</sup>

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<sup>15</sup> *Id.* at § 13.04 (citing to U.S. Dep't of State, List of Bilateral Work Agreements and De Facto Work Arrangements (updated June 2014),

<http://www.state.gov/documents/organization/133570.pdf> (last visited Sept. 25, 2014)).

<sup>16</sup> *Id.* See also 8 C.F.R. §§ 214.2(a)(5) & (6), which outline the application process.

<sup>17</sup> 8 C.F.R. § 101.3.

<sup>18</sup> Instructions for Form I-539, Application to Extend/Change Nonimmigrant Status, <http://www.uscis.gov/sites/default/files/files/form/i-539instr.pdf> (last visited Sept. 26, 2014).

<sup>19</sup> *Id.*

<sup>20</sup> Instructions for I-485, Application to Register Permanent Residence or Adjust Status, <http://www.uscis.gov/sites/default/files/files/form/i-485instr.pdf> (last visited Sept. 26, 2014).

<sup>21</sup> Pub. L. No. 85-316, 71 Stat. 642, as modified, Pub. L. No. 97-116, 95 Stat. 1611 (Dec. 29, 1981).

<sup>22</sup> Kurzban's Immigration Law Sourcebook (10<sup>th</sup> ed.) at 617. See also Section 13 (Diplomat), <http://www.uscis.gov/green-card/other-ways-get-green-card/green-card-through-section-13-diplomats/section-13-diplomat> (last visited Sept. 26, 2014). This page discusses eligibility, application process, and required supporting evidence.

<sup>23</sup> *Id.*

## G VISAS

The Immigration and Nationality Act grants nonimmigrant status to the following groups of noncitizens identified with designated international organizations:

- G-1: principal resident representatives of a recognized foreign member government to an international organization, their staffs, and members of their immediate families;
- G-2: other representatives of a recognized foreign member government to an international organization, and members of their immediate families;
- G-3: representatives of a nonrecognized or nonmember foreign government to an international organization, and members of their immediate families;
- G-4: international organization officers or employees, and members of their immediate families; and
- G-5: attendants, servants, or personal employees of G-1, G-2, G-3, and G-4 noncitizens, and members of their immediate families.<sup>24</sup>

### ELIGIBILITY FOR G CLASSIFICATION

To qualify for G status a noncitizen need not be a national of the government he or she represents.<sup>25</sup> The individual must be coming to the United States to pursue official duties and not for personal business or pleasure.<sup>26</sup> The following international organizations are designated by executive order of the President as entitled to benefits under the International Organizations Immunities Act:<sup>27</sup> African Development Bank; African Development Fund; African Union (formerly Organization of African Unity); Asian Development Bank; Border Environmental Cooperation Commission; Caribbean Organization (formerly Caribbean Commission); Commission for Environmental Cooperation; Commission for Labor Cooperation; Commission for the Study of Alternatives to the Panama Canal; Customs Cooperation Council; European Bank for Reconstruction and Development; European Space Agency (formerly European Space Research Organization); Food and Agriculture Organization; Global Fund to Fight AIDS, Tuberculosis and Malaria (Global Fund); Great Lakes Fishery Commission; GRECO (Council of Europe in Respect of the Group of States Against Corruption); Hong Kong Economic and Trade Offices; Inter-American Defense Board; Inter-American Development Bank; Inter-American Institute for Cooperation for Agriculture (formerly Inter-American Institute of Agricultural Sciences); Inter-American Investment Corporation; Inter-American Statistical Institute; Inter-American Tropical Tuna Commission; International Atomic Energy Agency; International Bank

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<sup>24</sup> INA § 101(a)(15)(G), 8 U.S.C. § 1101(a)(15)(G).

<sup>25</sup> Gordon, *supra* note 2, at § 19.02[1][b][i] (citing to 22 C.F.R. § 41.24(b)(2)).

<sup>26</sup> *Id.* (citing to 22 C.F.R. § 41.24(b)(1)).

<sup>27</sup> *Id.* (citing to International Organizations Immunities Act, ch. 652, Pub. L. No. 79-291, 59 Stat. 669 (1945) accord 22 C.F.R. § 41.24(a)). See also U.S. Dep't of State, 9 FAM § 41.24 Exhibit I.

for Reconstruction and Development (World Bank); International Boundary and Water Commission, United States and Mexico; International Center for Settlement of Investment Disputes; International Civil Aviation Organization; International Coffee Organization; International Committee of the Red Cross; International Cotton Advisory Committee; International Cotton Institute; International Criminal Police Organization (INTERPOL) (limited privileges); International Development Association; International Development Law Institute; International Fertilizer Development Center; International Finance Corporation; International Food Policy Research Institute (limited privileges); International Fund for Agricultural Development; International Hydrographic Bureau; International Joint Commission-United States and Canada; International Labor Organization; International Maritime Organization (formerly the Intergovernmental Maritime Consultative Organization); International Maritime Satellite Organization; International Monetary Fund; International Organization for Migration (formerly Provisional Intergovernmental Committee for the Movement of Migrants for Europe and Intergovernmental Committee for European Migration); International Pacific Halibut Commission; International Secretariat for Volunteer Service; International Telecommunications Satellite Organization (INTELSAT); International Telecommunication Union; International Union for Conservation of Nature and Natural Resources (limited privileges); International Wheat Advisory Committee (International Wheat Council); Interparliamentary Union; Israel-United States Binational Industrial Research and Development Foundation; ITER International Fusion Energy Organization; Korean Peninsula Energy Development Organization; Multilateral Investment Guarantee Agency; Multinational Force and Observers; North American Development Bank; North Pacific Anadromous Fish Commission; North Pacific Marine Science Organization; Organization for American States (includes Pan American Union); Organization for Eastern Caribbean States; Organization for Economic Cooperation and Development (formerly the Organization for European Economic Cooperation); Organization for the Prohibition of Chemical Weapons; Pacific Salmon Commission; Pan American Health Organization (includes Pan American Sanitary Bureau); South Pacific Commission; United International Bureau for the Protection of Intellectual Property (BIPRI); United Nations; United Nations Educational, Scientific and Cultural Organization; United Nations Industrial Development Organization; Universal Postal Union; World Health Organization; World Meteorological Organization; World Intellectual Property Organization; World Tourism Organization; and World Trade Organization.

#### TERMS OF ADMISSION

International noncitizens G-1 through G-4 are permitted to remain as long as the Secretary of State continues to recognize them as members of this class.<sup>28</sup> G-1s through G-4s need not have any foreign residence to which they intend to return.<sup>29</sup> G-5s are usually admitted for up to three years.<sup>30</sup>

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<sup>28</sup> Gordon, *supra* note 2, at § 19.02[3] (citing to 8 C.F.R. § 214.2(g)(1)).

<sup>29</sup> *Id.* (citing to *Elkins v. Moreno*, 435 U.S. 647 (1978) (G-4 noncitizens could seek reduced tuition as state residents)).

<sup>30</sup> *Id.* (citing to 8 C.F.R. § 214.2(g)(1)).

## EMPLOYMENT AUTHORIZATION FOR SPOUSES AND DEPENDENTS

G-1 and G-3 noncitizens may apply for permission to work if there is a reciprocal work arrangement between the United States and the noncitizen's state of nationality.<sup>31</sup> A G-4 dependent may obtain approval to accept employment even if there is not a reciprocal agreement in force between the United States and the noncitizen's state of nationality.<sup>32</sup> The G-4 applicant must first submit Form I-556 to the Department of State.<sup>33</sup> If approved, the form is submitted to USCIS with Form I-765.<sup>34</sup> The regulations do not provide for employment authorization for G-2 and G-5 dependents.<sup>35</sup>

## CHANGE OF STATUS

G-1 through G-4 nonimmigrants may apply for change of status by using Form I-539. To do so, the G-1 through G-4 nonimmigrant must submit a copy of the I-94 and Form I-566 certified by the State Department.<sup>36</sup> The process for G-5 nonimmigrants is also set forth in the instructions.<sup>37</sup>

## ADJUSTMENT OF STATUS

Those holding G nonimmigrant visa status can adjust status as described above. Additionally, INA § 101(a)(27)(I) confers special immigrant status, which includes the right to apply for permanent resident status, on the following categories of children and spouses of current or former officers and employees of international organizations, as well as on retired officers and employees themselves:<sup>38</sup>

- Unmarried son or daughter of an officer or employee, or former officer or employee, who: (a) while maintaining G-4 status, has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of the application for a visa or for adjustment of status as a special immigrant, and for a period or periods aggregating at least seven years between the ages of five and 21 years; and (b) applies for a visa or adjustment of status as a special immigrant no later than his or her 25th birthday or October 24, 1988, whichever is later;<sup>39</sup>

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<sup>31</sup> *Id.* (citing to 8 C.F.R. § 214.2(g)(5)).

<sup>32</sup> *Id.* (citing to 8 C.F.R. § 214.2(g)(5)(ii)).

<sup>33</sup> *Id.* (citing to 8 C.F.R. § 214.2(g)(6)).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Instructions for Form I-539, Application to Extend/Change Nonimmigrant Status, <http://www.uscis.gov/sites/default/files/files/form/i-539instr.pdf> (last visited Sept. 26, 2014).

<sup>37</sup> *Id.*

<sup>38</sup> Gordon, *supra* note 2, at § 35.08 (citing to INA § 101(a)(27)(I), 8 U.S.C. § 1101(a)(27)(I)).

<sup>39</sup> *Id.* (citing to INA § 101(a)(27)(I)(I)).

- The surviving spouse of an officer or employee of such an international organization who: (a) while maintaining G-4 status, has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the date of the application for a visa or for adjustment of status as a special immigrant, and for a period or periods aggregating at least 15 years before the date of the death of such officer or employee; and (b) applies for a visa or adjustment of status as a special immigrant no later than six months after the officer's or employee's death or October 24, 1988, whichever is later;<sup>40</sup>
- A retired officer or employee of such an international organization who: (a) while maintaining G-4 status, has resided and been physically present in the United States for periods totaling at least one-half of the seven years before the application for a visa or adjustment of status as a special immigrant, and for a period or periods aggregating at least 15 years before his retirement from the international organization; and (b) applies for such visa or adjustment of status no later than six months after his or her retirement or six months after October 25, 1994, whichever is later;<sup>41</sup>
- The spouse of a retired officer or employee who obtains such special immigrant status, accompanying or following to join as a member of his or her immediate family.<sup>42</sup>

The following benefits were conferred on these groups of people by the Immigration Technical Corrections Act of 1988:<sup>43</sup>

- Permission to apply for adjustment of status even though they engaged in unauthorized employment or otherwise violated status;<sup>44</sup>
- Members of this group are considered to be residing and physically present in the United States during the principal noncitizen's absence to conduct official business or because of customary leave. This provision will only apply if the principal noncitizen continues to have a duty station in the United States; it will not apply to an unmarried son or daughter enrolled in a school outside the United States.<sup>45</sup>

Petitions for special immigrant international employees must be filed on Form I-360 at the appropriate Service Center concurrently with an application for adjustment of status.<sup>46</sup>

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<sup>40</sup> *Id.* (citing to INA § 101(a)(27)(I)(ii)).

<sup>41</sup> *Id.* (citing to INA § 101(a)(27)(I)(iii)).

<sup>42</sup> *Id.* (citing to INA § 101(a)(27)(I)(iv)).

<sup>43</sup> *Id.* (citing to Pub. L. No. 100-525, 102 Stat. 2609).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Gordon, *supra* note 2, at § 35.08.

## J VISAS<sup>47</sup>

### TWO-YEAR FOREIGN RESIDENCE REQUIREMENT AND WAIVERS—BACKGROUND

Some J-1 exchange visitors (that is, aliens admitted as nonimmigrants under section 101(a)(15)(J) of the Immigration and Nationality Act (INA)) are subject to the two-year foreign residence requirement of INA § 212(e).<sup>48</sup> A person subject to the requirement is subject to certain disabilities until he/she obtains a waiver or fulfills the requirement.<sup>49</sup> In particular, he/she may not apply for an H or L visa stamp, nor for permanent resident status, or an immigrant visa, and, with certain exceptions, may not change status inside the United States to another nonimmigrant status.<sup>50</sup>

INA § 212(e) lists three ways to become subject to the two-year foreign residence requirement: (1) U.S. or foreign government funding; (2) training in an area on the Skills List for the home country; and (3) graduate medical education.<sup>51</sup> This section also sets forth four bases upon which to seek a waiver (exceptional hardship; persecution; no objection statement; and interested government agency recommendation, of which there are many subcategories).<sup>52</sup>

#### *Government Financing*

An exchange visitor is subject to the two-year foreign residence requirement if his/her participation in the exchange program was financed in whole or in part, directly or indirectly, by an agency of the government of the United States or by the government of the country of his/her nationality or last residence.<sup>53</sup> A program is financed directly if the funding comes, entirely or partially, from the U.S. government or the exchange visitor's government.<sup>54</sup> A program is financed indirectly if the funding for the program comes through an international organization with funds contributed by either the United States or the exchange visitor's government.<sup>55</sup> Government financing that does not come directly to the exchange visitor should not subject to visitor to the two-year foreign residence requirement if it was not used for the purpose of bringing the exchange visitor to the United States to participate in the program.<sup>56</sup> That said, the State Department Waiver Review Division tends to err on the side of finding people subject in

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<sup>47</sup> This section is a basic overview of J-1 visas, provided for the purposes of the panel.

<sup>48</sup> Brian C. Schmitt & Bruce A. Hake, *Judicial Review of J-1 Waiver Denials Based on Negative State Department Recommendations*, 17 *Bender's Immigr. Bull.* 1385–87 (July 15, 2012) (citing to 8 U.S.C. § 1182(e)).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* (citing to INA §§ 214(l) and 248, 8 U.S.C §§ 1184(l) and 1258).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 1 Gregory Siskind, William Stock & Stephen Yale-Loehr, *J Visa Guidebook*, § 6.1.1 (Lexis Nexis) [hereinafter *J Visa Guidebook*].

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

this circumstance. Fulbright funding is the most common form of funding seen in J-1 practice. This kind of case is especially difficult to win.<sup>57</sup>

### *Skills List*

An exchange visitor is subject to the two-year foreign residence requirement if he/she, at the time of obtaining exchange visitor status, was a national or resident of a country that had designated the exchange visitor's field of specialized knowledge or skill as clearly required by the country.<sup>58</sup> The current skills list and previous skills list can be found on the State Department's website.<sup>59</sup>

### *Graduate Medical Education or Training*

Exchange visitors who come to the United States to receive graduate medical education or training are subject to the two-year foreign residence requirement.<sup>60</sup> An exchange visitor coming to engage in graduate medical education or training must be sponsored by the Educational Commission on Foreign Medical Graduates (ECFMG).<sup>61</sup>

### *J-2 Derivatives*

The State Department and the USCIS consider the spouse or child of a J-1, who enters as a J-2, to be subject to the two-year foreign residence requirement if the J-1 is subject to the requirement.<sup>62</sup> If the J-1 receives a waiver, the J-2s who are derivatively subject also receive a waiver.<sup>63</sup> If the J-1 fulfills the two-year foreign residence requirement and the J-2 remains in the United States, the State Department's position is that the J-2 must still independently fulfill the two-year foreign residence requirement.<sup>64</sup> J-2 family members who are subject to the two-year foreign residence requirement cannot independently apply for a waiver on their own except in the following limited circumstances, where the State Department will act as an interested

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<sup>57</sup> Bruce A. Hake, *U.S. Government Funding in J-1 Waiver Cases—The Worst Form of the Disease*, in 2006–2007 Immigration & Nationality Law Handbook 681 (AILA 2006).

<sup>58</sup> J Visa Guidebook, *supra* note 53, at § 6.1.2.

<sup>59</sup> <http://travel.state.gov/content/visas/english/study-exchange/exchange/exchange-visitor-skills-list.html> (last visited Sept. 29, 2014).

<sup>60</sup> J Visa Guidebook, *supra* note 53, at § 6.1.3.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at § 6.1.4. *See also* 22 C.F.R. § 41.62(c)(4) & 8 C.F.R. § 212.7(c)(4). These regulations make the J-2 derivative subject if the J-1 is subject. Our law firm challenged these regulations because the State Department offered no reason for the change and did not engage in formal rule-making under the APA 5 U.S.C. § 553. *See Khan v. Kerry*, No. Civ. 2014cv01338 (C.D. Cal. filed Feb. 21, 2014). *Khan v. Kerry* sought the review of a not favorable recommendation on a J-1 hardship waiver application. The State Department acquiesced to the grant of a waiver shortly after the filing of the complaint; thus a notice of dismissal was filed prior to the regulatory challenge, moving forward.

<sup>63</sup> J Visa Guidebook, *supra* note 53, at § 6.1.4.

<sup>64</sup> *Id.*

government agency: (1) the J-1 and J-2 spouse divorce; (2) the J-1 spouse dies; or (3) the J-2 children reach the age of 21.<sup>65</sup>

### *Determining Whether the Two-Year Foreign Residence Requirement Applies*

Annotations on J visa stamps and DS-2019s (formerly IAP-66s) are frequently incorrect and are not legally binding. Consular officers frequently determine that the two-year foreign residence requirement applies, even when it does not.<sup>66</sup> One can request an advisory opinion from the State Department Waiver Review Division to determine whether one is subject.<sup>67</sup> Alternatively, the exchange visitor can present evidence to the USCIS in the course of applying for change or adjustment of status, because USCIS ultimately makes the determination of whether INA § 212(e) applies, not the Department of State.<sup>68</sup>

Lawyers should also ask the following questions in determining whether a client is subject to the two-year foreign residence requirement:

1. Which Skills List applies?
2. What is the country of residence?
3. Is the particular skill on the Skills List?
4. What is the source and purpose of the government funding?
5. Is the J-1 physician involved in patient care?<sup>69</sup>

### *Delay the Return Requirement*

Even though an exchange visitor subject to the two-year foreign residence requirement cannot change status, he/she can depart and apply for B, E, F, or O visa status at a consulate abroad.<sup>70</sup>

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<sup>65</sup> *Id.* See also <http://travel.state.gov/content/visas/english/study-exchange/student/residency-waiver/ds-3035-faqs.html> (last visited Sept. 30, 2014).

<sup>66</sup> J Visa Guidebook, *supra* note 53, at § 6.2.1.

<sup>67</sup> *Id.* Note that the WRD tends to err on the side of finding people subject even when there are good arguments that the individual is not subject.

<sup>68</sup> *Id.* See also Raymond Momboisse, INS General Counsel, Legal Opinion Regarding the Respective Roles of INS and USIA in Administering INA Section 212(e) (Mar. 27, 1989). This policy memorandum shows that the USCIS, and not the Department of State Waiver Review Division (WRD), has the authority to determine whether an alien is subject to Section 212(e). The INS General Counsel found that the only function of the USIA (the WRD's predecessor agency) in administering Section 212(e) is to determine which skills should be included on the Skills List, and whether to recommend approval of a waiver of the two-year foreign residence requirement.

<sup>69</sup> J Visa Guidebook, *supra* note 53, at § 6.2.2–6.2.6.

<sup>70</sup> *Id.*

### *Fulfillment*

INA § 212(e) requires the exchange visitor to return to the country of last residence or nationality.<sup>71</sup> Fulfillment requires residence and physical presence.<sup>72</sup> The total period of residence must be a total of two years, although this can be in the aggregate.<sup>73</sup> Substantial fulfillment of the two-year foreign residence requirement is considered a positive equity in any waiver application.

### *No Objection Waivers*

The two-year foreign residence requirement may be waived if the exchange visitor's home country issues a no objection statement.<sup>74</sup> The home country transmits the no objection statement through diplomatic channels to the State Department Waiver Review Division. Each country has its own rules and requirements for issuing such a statement.<sup>75</sup> Some countries will not issue a no objection statement. No objection waiver applications are a good option for exchange visitors who are subject based on the Skills List or purely foreign government funding. Physicians participating in graduate medical education are not eligible for this kind of waiver application.<sup>76</sup> Similarly, a no objection waiver application will likely not overcome the special problems associated with U.S. government-funded programs, although these can sometimes be won.

### *Hardship Waivers*

To qualify for this kind of waiver, the applicant must have a qualifying relative or relatives. A qualifying relative is a U.S. citizen or permanent resident spouse and/or a U.S. citizen or permanent resident child or children.<sup>77</sup> Exceptional hardship means something unusual in terms of probability of occurrence and unusual in terms of gravity of harm.<sup>78</sup> The only hardship that is supposed to count is that of the qualifying relative or relatives. However, one can show that physical harm to the applicant could lead to a lifetime of misery and suffering for the qualifying relatives.<sup>79</sup> Finally, one must demonstrate exceptional hardship to the qualifying

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<sup>71</sup> INA § 212(e).

<sup>72</sup> *Id.*

<sup>73</sup> J Visa Guidebook, *supra* note 53, at § 6.2.8.

<sup>74</sup> *Id.* at § 6.4.

<sup>75</sup> *Id.*

<sup>76</sup> INA § 212(e).

<sup>77</sup> *Id.*

<sup>78</sup> Bruce A. Hake & David L. Banks, *The Hake Hardship Scale: A Quantitative System for Assessment of Hardship in Immigration Cases Based on a Statistical Analysis of AAO Decisions*, 10 Bender's Immigr. Bull. 403 (Mar. 1, 2005).

<sup>79</sup> *Id.*

relatives in all travel alternatives.<sup>80</sup> Hardship waivers are adjudicated based on the totality of the circumstances.<sup>81</sup>

*Hardship waiver procedure.* The USCIS has centralized processing of all hardship waiver applications at the California Service Center (CSC).<sup>82</sup> If the CSC finds that the applicant has met his/her burden of proof, the CSC will seek the recommendation of the State Department Waiver Review Division (WRD).<sup>83</sup> If the CSC finds that the applicant did not meet his/her burden of proof, the application will be denied. The applicant will have 30 days from the date of denial (33 if notice is received by mail) to file an appeal with the USCIS Administrative Appeals Office (AAO).<sup>84</sup> If the case arrives at the WRD, and it issues a favorable recommendation, the WRD transmits the case back to the CSC, which issues an approval notice, granting the waiver. If the WRD issues a not favorable recommendation, it transmits the case back to the CSC, which issues a denial notice. There is no administrative appeal of a denial founded on a not favorable recommendation by the State Department.<sup>85</sup> However, such a denial is reviewable in federal court.<sup>86</sup>

### *Persecution Waivers*

To qualify for this kind of waiver, the applicant must demonstrate that he/she cannot return to his/her country of nationality or last residence because he/she would be subject to persecution on account of race, religion, and/or political opinion.<sup>87</sup> The basis or bases must be strong and provable through documentary and testimonial evidence. Persecution in the J-1 context has been likened to the “well-founded fear of persecution” standard in asylum.<sup>88</sup>

*Persecution waiver procedure.* The procedure in I-612 persecution waiver applications mirrors that of I-612 hardship waiver applications.

### *Interested Government Agency Waivers*

An interested government agency (IGA) can be any U.S. government agency that is willing to show that the exchange visitor’s departure would be detrimental to the program or activity that is of interest to the agency.<sup>89</sup> For J-1 physicians, an IGA may also be a state

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<sup>80</sup> INA § 212(e).

<sup>81</sup> See *Toumert v. United States*, No. 5:91 cv 1196 (N.D. Ohio Nov. 19, 1991); *Slyper v. Attorney General*, 576 F. Supp. 559, 560 (D.D.C. 1983), *rev’d on other grounds*, 827 F.2d 821 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 941 (1988).

<sup>82</sup> J Visa Guidebook, *supra* note 53, at § 6.5.1.

<sup>83</sup> INA § 212(e).

<sup>84</sup> J Visa Guidebook, *supra* note 53, at § 6.5.2.

<sup>85</sup> Schmitt & Hake, *supra* note 48, at 1388.

<sup>86</sup> *Id.*

<sup>87</sup> INA § 212(e).

<sup>88</sup> J Visa Guidebook, *supra* note 53, at § 6.6.1.

<sup>89</sup> *Id.* at § 6.7.

department of health.<sup>90</sup> The applicant does not have to be a current or prospective employee of the sponsoring agency.<sup>91</sup>

*IGA process generally.* This paper will only describe the process for IGA waiver applications generally. The exchange visitor must apply directly to the federal agency whose program is involved and follow the procedures of that agency.<sup>92</sup> The WRD will only recommend a waiver upon the request of the IGA.<sup>93</sup> In general, IGAs must request the following:

- Identify the exchange visitor's sponsor by name and program number;
- Provide the WRD case number, generated when the DS-3035 is created;
- Name the place of intended residence of the exchange visitor; and
- State the reasons for requesting the waiver.<sup>94</sup>

The exchange visitor also needs to do the following: (1) establish a nexus between the IGA and intended employment of the exchange visitor; (2) show that the grant of a waiver would serve the public interest; and (3) explain why the case merits a favorable decision.<sup>95</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at § 6.7.1.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*