



# Appalachian Regional Commission: An Interested Government Agency for Physician J-1 Waiver Recommendations

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[Section 212\(e\)](#) of the Immigration and Nationality Act (INA) <sup>1</sup> creates a two-year foreign residence requirement for foreign medical graduates who have entered the United States as exchange visitors for the purpose of engaging in graduate medical education. INA §§212(e) and [214\(l\)\(1\)\(D\)](#) give standing to interested federal agencies to recommend waivers of the foreign residence requirement.

The Appalachian Regional Commission (ARC) was one of the earliest federal agencies to establish a program for recommending §212(e) waivers for physicians. The Appalachian Region consists of 140 counties in 13 U.S. states, including all of West Virginia and parts of 12 other states: Alabama, Georgia, Kentucky, Maryland, Mississippi, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, and Virginia. ARC was created in order to promote economic development in a historically economically underdeveloped region of the country and ARC views access to healthcare as vital to economic development. As part of its mission to promote access to healthcare within the Appalachian Region, ARC will act as an interested government agency for the purpose of recommending waivers of the foreign residence requirement for J-1 physicians who pledge to work in an ARC county for three years. ARC is made up of 14 commission members: the governors of the 13 Appalachian states and a federal co-chair. The federal co-chair is appointed by the President and is subject to Senate confirmation. Appalachian Region waiver recommendations, if approved, are signed by the federal co-chair and are forwarded to the Waiver Review Division of the U.S. State Department (DOS).

## ARC J-1 Waiver Policies and Procedures

ARC's J-1 waiver policies are found at its website: [www.arc.gov/index.do?nodeId=272](http://www.arc.gov/index.do?nodeId=272). ARC is a joint state and federal commission. Therefore, in order to initiate an ARC J-1 waiver request on behalf of a physician, ARC policies require that the applicant contact the appropriate person within the state Health Department. The current list of ARC state contacts appears at: J-1 Visa Waiver State Public Contacts, [www.arc.gov/index.do?nodeId=271](http://www.arc.gov/index.do?nodeId=271). Once a J-1 physician receives a job offer at a worksite in the Appalachian Region, the physician applies for the DOS J-1 waiver number. The DOS J-1 waiver number is now applied for, exclusively, online.

Those exchange visitors who are subject to the two-year foreign residence requirement of [INA §212\(e\)](#) are able to reserve a case number and begin the paperwork for the request to the Department of State Waiver Review Division for a waiver recommendation via the DOS online system. <sup>2</sup>

The J Visa Waiver Online creates a bar-coded document that will facilitate processing by the Waiver Review Division. Those exchange visitors with case numbers can submit changes to their contact information or check the status of their file.

Although the exchange visitor may reserve a file number via the online system, it is not currently possible to “submit” the date electronically, or to pay any fees online. All documentation and fees must continue to be mailed to the DOS. The filing fee for the waiver file

number is \$215. This fee must be remitted in the **[[Page 112]]** form of a money order or bank check. The DOS does not accept personal or attorney checks.

In order to begin the online application, the exchange visitor must have the following documentation readily available:

- Any passport of the exchange visitor containing his or her U.S. visas
- Legible copies of all DS-2019 <sup>3</sup> forms
- Notice of Entry of Appearance as Attorney or Representative, <sup>4</sup> if applicable
- Names and dates of birth of any J-2 dependents and/or the Exchange Visitor's J-1 Spouse, if applicable
- I-94 Departure Record Card (if still in the United States)
- Alien Registration "A" Number, if applicable

Once the exchange visitor completes the online application, he or she has the ability to review the application for accuracy. Once the application is submitted, the online system automatically reserves a case number and generates the document packet and bar-coded cover sheet.

The exchange visitor should download the document packet and the bar-coded sheet. The first page of the document packet provides the list of documents and the fee which should be mailed to the DOS at the address provided in the packet. The mailing address is:

U. S. Department of State  
Waiver Review Division  
P. O. Box 952137; St. Louis MO 63195-2137

Then the ARC J-1 waiver application is submitted to the state Health Department in the state where the physician will work.

The offered position must lie within one of the ARC counties and it must lie within a federally designated Health Professional Shortage Area (HPSA). ARC does not recommend waivers for worksites that lie solely within a Medically Underserved Area (MUA) (some HPSAs and MUAs overlap).

ARC does not provide J-1 waiver recommendations for sub-specialty physicians, but will only recommend J-1 waivers for primary care positions. Primary care practice areas are defined by ARC as internal medicine, pediatrics, obstetrics, family practice and psychiatry.

In order to obtain an ARC J-1 waiver recommendation, a sponsoring employer must demonstrate the following (excerpted in part from the ARC's J-1 Waiver Policy):

- The waiver application must be accompanied by a physician employment contract in which: "The physician must agree to provide primary medical care for at least forty (40) hours a week at a site in a Health Professional Shortage Area, as designated by the United States Public Health Service, within the legislatively defined Appalachian Regional Commission service area for a minimum of three years or longer, as a specific state policy may require. Travel or on-call time may not be included in the 40 hours required by this paragraph. However, in appropriate cases the state may make exceptions to allow travel or on-call time for obstetricians."
- "The sponsor must demonstrate that it has made a reasonable good faith effort to recruit a U.S. doctor for the job opportunity in the same salary range without success during the six months immediately preceding the request for waiver. The sponsor shall demonstrate, with

such supporting documentation as the federal co-chair may require, that it has undertaken such recruitment through a reasonable number of appropriate sources including, but not limited to, advertisements in newspapers and medical journals of national and statewide circulation most likely to bring responses from able, willing, qualified, and available U.S. doctors, and job opportunity notices placed in appropriate medical schools, including all medical schools in the state in which the hospital or clinic is located.”

*Practice Pointer:* It is important to know that ARC will not issue a waiver recommendation based on evidence of recruitment activity which occurred after the signing of an employment agreement between the foreign physician and the sponsoring employer.

- “The employment contract between the physician and the sponsor may not contain a restrictive covenant or non-compete clause which prevents or discourages the physician from continuing to practice in any HPSA after the period of obligation under this policy has expired.”
- “The physician, prior to employment, must be licensed by the state where he or she will practice and must have completed a residency in one of the following specialties: family practice, general pediatrics, obstetrics, general internal medicine, or psychiatry.”

*Practice Pointer:* If, at the time the waiver application is filed, the physician does not hold a license in the state where he or she will practice, then the applicant should include evidence that the license application process has commenced. ARC will issue waiver recommendations for physicians who have engaged in sub-specialty training. However, the employment agreement must clearly demonstrate, and the employer and foreign physician must clearly pledge in the waiver affidavits, that the physician will practice full time as a primary care physician. It is important to know that ARC closely monitors compliance with its program and employs on-site, unannounced inspections to monitor compliance.

- “The physician must not have been ‘out of status’ (as defined by U.S. Citizenship and Immigration Services (USCIS)) for more than 180 days since receiving a visa under 8 USC 1182(j) of the Immigration and Nationality Act, as amended. The physician shall provide the federal co-chair all copies of his or her Certificates of Eligibility for Exchange Visitor (J-1) Status, forms IAP-66, and every other document needed to verify status.”

*Practice Pointer:* ARC has an informed understanding of the concept of J-1 duration of status and unlawful presence, as defined in the USCIS regulations, such that ARC has in the past accepted waiver applications from J-1 physicians who have remained in the United States beyond the expiration date of their DS-2019. Nonetheless, it is certainly preferred practice to file a waiver application before the DS-2019 expiration date.

### **J-1 Waiver Affidavit and Agreement**

As part of the waiver application package, ARC requires that each applicant physician must sign a J-1 Waiver Affidavit and Agreement. The principle features of the affidavit and agreement are:

- The physician must agree to provide primary medical care services to patients, including the indigent, for a minimum of 40 hours per week within a USPHS-designated HPSA located in the ARC jurisdiction. Such service must commence not later than 90 days after the physician receives approval by USCIS of the waiver request and must continue for a minimum of three years or longer, as a specific state policy may require.<sup>5</sup>

- The physician must agree to enter into a contract containing the ARC Liquidated Damages Clause.
- The physician must agree to incorporate the provisions of the affidavit and agreement into the employment agreement.
- The physician must verify that he or she does not have any other pending waiver application.

### **The ARC Liquidated Damages Clause**

ARC requires that each employer and physician requesting an ARC J-1 waiver recommendation include the ARC Liquidated Damages Clause in the employment agreement. ARC requires that the following language appear verbatim in the employment agreement:

Any breach or non-fulfillment of conditions will be considered a substantial breach of this agreement by you. If there is such a breach, (NAME OF EMPLOYER) may, at its option, terminate this agreement immediately. In addition, it is agreed that (NAME OF EMPLOYER) will be substantially damaged by your failure to remain at (NAME OF EMPLOYER) in the practice of medicine for a minimum of three years and that, considering that precise damages are difficult to calculate, you will agree to pay to (NAME OF EMPLOYER) the sum of \$250,000.00 for failure to fulfill your minimum three-year contract. In addition to liquidated damages, (NAME OF EMPLOYER) will recover from you any other consequential damages, and reasonable attorney's fees, due to the failure to provide services to (NAME OF EMPLOYER) for a minimum of three years, EXCEPT THAT, the full-time practice of medicine at another licensed medical facility, in a Health Professional Shortage area (as defined by the United States Public Health Service) within the Appalachian Region (as defined by **[[Page 114]]** ARC) shall be considered the same as full-time practice of medicine at (NAME OF EMPLOYER) for purpose of this paragraph. In the event of a dispute under this paragraph, either party may submit this matter to binding arbitration.

Presumably the purpose of the liquidated damages clause, is to ensure that the physician, once approved for a J-1 waiver, will have an incentive to remain the entire three years with the original sponsoring employer or, failing that, will at least be encouraged to remain in the Appalachian Region. It should be noted that ARC's liquidated damages clause actually preceded the enactment of INA §214(l), wherein Congress gave the Attorney General (now the Department of Homeland Security, with delegation of powers to USCIS) the discretion to approve a change of employers and locations for a physician who is able to demonstrate an extenuating circumstance, which creates a hardship.

In many cases, ARC's liquidated damages clause creates a chilling effect on the recruitment of physicians to the ARC, since most physicians do not want to create the contingency that they might be sued for \$250,000 if they leave the original employer before the end of the three-year period and relocate outside the ARC. So, the ARC liquidated damages clause presents several issues which the immigration practitioner should be aware of or should discuss with a physician client:

- Is the ARC liquidated damages clause enforceable if an extenuating circumstance case is filed under [INA §214\(l\)](#) and USCIS approves a change of employers outside the ARC area?

*Practice Pointer:* It is arguable that an extenuating circumstance transfer approved by USCIS, pursuant to the discretion granted by Congress in INA §214(l), likely would pre-empt or serve as a defense to the enforcement of ARC's liquidated damages clause. However, no court has passed on

this question, and any attorney advising a physician should advise that it cannot be expected that the ARC liquidated damages clause will not be invoked in a suit by the original waiver-sponsoring employer. So, the ARC liquidated damages clause cannot be ignored or taken lightly and it continues to have a chilling effect on the recruitment of physicians to the Appalachian Region.

- Who has standing to sue to enforce the ARC liquidated damages clause? Since the clause appears in the employment contract between the original sponsoring employer and the physician, it is presumed that the employer is the only party that would have standing to file suit to enforce the clause. ARC takes no stand concerning the enforcement of the liquidated damages clause. However, ARC does notify USCIS when it believes that a physician has not complied with the three-year service requirement.
- Is the ARC liquidated damages clause enforceable against a physician who abandons the original job before completion of the three-year period and merely departs the United States or returns to his or her home country? ARC takes the position that a physician who abandons the ARC service area before completion of the three-year service requirement and departs the United States has not violated the liquidated damages clause, since the physician has essentially given up the benefit of the J-1 waiver.

ARC reports that the number of applications it receives for J-1 waivers has declined in recent years. This is probably attributable to the expansion of the Conrad State 30 programs, with its flex spots for worksites outside of shortage areas. To some extent it may be attributable to the chilling effect of the ARC liquidated damages clause. Nonetheless, an ARC J-1 waiver recommendation is still a viable and useful immigration option for J-1 physicians who are offered positions in qualifying ARC locations. **[[Page 115]]**