AMERICAN IMMIGRATION LAWYERS ASSOCIATION

January 28, 2019

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
Chief, Regulatory Coordination Division
20 Massachusetts Avenue, NW
Washington, DC 20529-2140

Submitted via www.regulations.gov
Docket ID No. USCIS-2008-0012

Re: OMB Control Number 1615-0030
USCIS Agency Information Collection Activities; Extension, Without Change, of a Currently Approved Collection: I-612, Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) submits the following comments in response to the above-referenced 60-day notice and request for comments on Form I-612, Application for Waiver of the Foreign Residence Requirement of Section 212(e) of the Immigration and Nationality Act (INA), published in the Federal Register on November 27, 2018.[1]

AILA is a voluntary bar association of more than 15,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws. We appreciate the opportunity to comment on the Form I-612 and its instructions and believe that our members' collective expertise and experience makes us particularly well-qualified to offer views on this matter.

Immigration Status Information Is Irrelevant to the Request for a Waiver of the Foreign Residence Requirement

Form I-612 is used to request a waiver of the two-year home residency requirement of INA §212(e). This benefit does not confer status on the applicant, whether immigrant or

[1] 83 Fed. Reg. 60885 (Nov. 27, 2018).

nonimmigrant. It merely waives the requirement to return to the home country for two years before the applicant is permitted to acquire an H or L nonimmigrant visa or status as a Lawful Permanent Resident (LPR). Applicants who obtain a waiver must subsequently request additional benefits from USCIS if they are to acquire an H or L visa or LPR status.

Information related to the applicant's current immigration status is requested several times throughout the Form I-612. In particular, in Part 4 of Form I-612, questions 4, 5, and 6 request the date of last entry to the United States as a J-1 participant, the port-of-entry of last arrival in the United States as a participant in a designated exchange program, and if abroad, the date of most recent departure from the United States. Since the immigration benefit sought does not confer immigrant or nonimmigrant status, and since physical presence in the United States is not a prerequisite to obtain an I-612 approval, information about an applicant's immigration status is unnecessary and irrelevant to an adjudication of a §212(e) waiver. Accordingly, AILA believes that it is inappropriate for USCIS to request evidence of the applicant's status in the United States through submission of an I-94 arrival/departure record or via information about the port-of-entry of the applicant's last admission. Similarly, on page 5 of the form's instructions, Form I-94 Arrival-Departure Record is listed as the fourth piece of required evidence. The information contained on an individual's I-94 record is irrelevant to the benefit being sought through Form I-612, and therefore USCIS should not require such evidence to be submitted as part of the I-612 application.

AILA further requests that the following language from the "Applicant's Declaration and Certification" on page 5 of the Form I-612 be stricken—

> "I furthermore authorize release of information contained in this application, in supporting documents, and in my USCIS records, to other entities and persons where necessary for the administration and enforcement of immigration law."

The ability to request an immigration benefit, such as a J-1 waiver, which does not confer a lawful nonimmigrant or immigrant status upon the applicant, should not be made contingent upon the applicant's consent to the release of information to other entities and persons "where necessary for the administration and enforcement of U.S. immigration law."

The combination of USCIS's request for an applicant's I-94 information and the requirement that the applicant authorize a release of his or her status information on page 5 of Form I-612 is particularly concerning in light of the August 9, 2018 USCIS Policy Memorandum, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (hereinafter "Policy Memo").[2] The Policy

[2] U.S. CITIZENSHIP & IMMIGRATION SERV., DEPT. OF HOMELAND SECURITY, PM-602-1060.1, ACCRUAL OF UNLAWFUL PRESENCE AND F, J, AND M NONIMMIGRANTS, (August 9, 2018), *available at* https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf.

Memo is an abrupt departure from the agency's prior interpretation of the unlawful presence provisions that originated in the 1996 Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[3] While the agency has long interpreted that unlawful presence starts to accrue for F, J and M nonimmigrants who enter for duration of status (D/S) on the date that an adverse status determination is made by either the agency or an Immigration Judge, the new interpretation outlined in the agency's August 9, 2018 Policy Memo would have unlawful presence start to accrue immediately from the date of a status violation. As the consequence of prolonged unlawful presence is severe (i.e., either a three or ten year bar to returning to the United States), and the fact that innocent and unknowing violations might inadvertently trigger the bar (raising due process concerns), there is tremendous opposition to this policy shift within the immigration community. A lawsuit challenging this agency's position is currently pending in the United States District Court for the Middle District of North Carolina.[4]

AILA is concerned that some former exchange visitors, otherwise eligible for a §212(e) waiver and immigrant or nonimmigrant relief, might be dissuaded from requesting a waiver, for fear that they might be put into removal proceedings. We would like to emphasize that the population that applies for hardship or persecution waivers is inherently vulnerable, as they are at risk of persecution to themselves or of exceptional hardship to their U.S. citizen or lawful permanent resident spouse or children. For all of the reasons outlined above, requests for an applicant's I-94 information and the requirement that the applicant authorize a release of his or her status information should be stricken from the Form I-612 and its instructions.

Miscellaneous Comments on Form I-612 Instructions

AILA commends USCIS for including a note on the top of page 2 of the instructions explaining that, "The two-year foreign residence requirement cannot be waived unless a favorable recommendation is made by the Department of State's Waiver Review Division (formerly the U.S. Information Agency) to the Secretary, U.S. Department of Homeland Security (DHS)." However, we are concerned that lay persons may not understand how the Waiver Review Division (WRD) fits into the process or whether they need to independently request a WRD recommendation themselves. It would be helpful for USCIS to further explain in the form instructions that USCIS will make the recommendation request of WRD, receive the recommendation (if any) directly from WRD, and that the applicant will not be directly involved in this process.

AILA recommends that USCIS make a minor change to the second "Note" that currently appears in the middle of page 2 of the Instructions. Currently, the Note states:

[3] Division C of Pub.L. 104-208, 110 Stat. 3009-546, Sept. 30, 1996
[4] Guilford College v. Kirstjen Nielsen, Civil Action No.: 18-891 (M.D.N.C. filed Oct. 23, 2018), *available at* https://nfap.com/wp-content/uploads/2018/11/Lawsuit-v-DHS.October-23-2018.pdf.

> "NOTE: Foreign medical physicians who acquired J-1 exchange visitor visa status on or after January 10, 1977, for the purpose of receiving graduate medical education or training, cannot receive a No Objection Waiver."

AILA recommends changing the language in the Note to the following:

> "NOTE: Foreign medical physicians who acquired J-1 exchange visitor status on or after January 10, 1977, for the purpose of receiving graduate medical education or training, ***cannot be granted a waiver based solely upon a No Objection letter***." (emphasis added).

While it is true that J-1 physicians cannot receive a waiver of §212(e) merely by obtaining a No Objection Letter from their home country government, if they received government funding from their home country in furtherance of their J-1 exchange visitor program, they are required to obtain a No Objection Letter in addition to a Conrad 30 or IGA waiver before a §212(e) waiver can be granted. By stating that they "cannot receive a No Objection Waiver," they may erroneously conclude that they are not required to obtain a No Objection Letter, when they may, in fact, be required to do so.

Under "Translations" on page 3 of the Instructions, AILA suggests changing the language to

> "If you submit a document ***in a language other than English*** . . . DHS recommends the certification contain ***the date, the translator's printed name and the translator's contact information***." (emphasis added).

AILA urges USCIS to strike "I-94 Arrival and Departure Record" from the "What Evidence You Must Submit", section on page 4. As discussed above, this document is not relevant to the I-612 adjudication, however, copies of the passport biographic pages which obtained a J-1 visa, and copies of all previous J-1 visas issued would be relevant in reviewing a Form I-612 filing.

AILA is perplexed as to why USCIS does not include, as required evidence, copies of all Forms IAP-66/DS-2019 that were issued, as this is the fundamental form upon which J-1 status is based. The form is also ultimately instructive in terms of whether the two-year home residency requirement attaches. Information available in these forms is requested on page 3, part 4 of the Form I-612 entitled "Additional Information About You." We believe this information would be better solicited through the IAP-66/DS-2019, and therefore recommend that the section of the form be stricken and replaced with a section in the instructions requesting the forms as required evidence. This will reduce redundancy and shorten the form. Additionally, Form IAP-66 numbers and/or SEVIS numbers from Form DS-2019 are centrally relevant to the I-612 adjudication and should be requested here.

Lastly, AILA recommends that USCIS remove the "Important Advisory" on page 2 of the Form I-612 and instead include this information in the form instructions under "What Evidence You Must Submit." As this advisory is actually a request for documentary evidence, it is better placed within the form's instructions.

Ultra Vires Application of INA §212(e) to J-2 Dependents

Consistent with AILA's 2014 comments, AILA disagrees with the assertion that J-2 dependents could be subject to the two-year home residency requirement and could be required to obtain a waiver of that requirement in order to access H or L nonimmigrant status or permanent residency.[5]

The two year home residency requirement of INA §212(e), by its plain wording, applies only to a

> "***person*** admitted under section 101(a)(15)(J) or acquiring such status after admission (i) ***whose participation in the program*** for which he came to the United States 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 nationality or last residence; (ii) who at the time of admission or acquisition of status under Section 101(a)(15)(J) ***was a national or resident of a country*** which the Director of the United States Information Agency pursuant to regulations prescribed by him, had ***designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged***, or (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) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of at least two years following departure from the United States . . . ." (emphasis added).

By the wording of the statute itself, only the J-1 exchange visitor that participates in a program that is in a skills shortage field, is subject to government funding or involves a clinical medical residency or fellowship program. Therefore, it would stand to reason that only this individual would be subject to the two-year home residency requirement. J-2 dependents are not, by law, exchange visitors. Rather, they are dependents who accompany the J-1 exchange visitor while he or she is in the United States undertaking a cultural exchange program. Unless they have their own independent J-1 nonimmigrant status, J-2 dependents are not participants in any exchange program. They were not the direct recipient of government funding, his/her field may not be a

[5] AILA Comments on USCIS Proposed Changes to Form I-612, AILA Doc. No. 14111340 (dated 11/10/14), *available at* https://www.aila.org/infonet/comments-on-uscis-proposed-changes-to-form-i-612.

skills shortage field, and he/she did not benefit from the opportunity of undergoing clinical medical education or training in the United States. They therefore cannot be subject to §212(e) per the statute above. Therefore, extending the two-year home residency requirement to J-2 dependents is not only unfair to the dependent spouse and/or children who did not participate in the exchange program, but more importantly, is *ultra vires* of the statute.

Perhaps even more egregious is the result on J-2 children, who, as minors, accompanied a J-1 exchange visitor parent to the United States. Minor children do not have the capacity to make informed choices and should not be bound to requirements that flow from the decisions of their parents. If, subsequent to completion of the exchange program, the J-1 parent did not return the family to the home country or instead acquired citizenship in a third country, that would create difficulty, if not impossibility for the child to comply with the so called requirement. For these reasons, the drafters of §212(e) wisely attached the two-year home residency requirement solely to the J-1 exchange visitor participant and not to his/her accompanying dependents.

Despite this clear statutory language, the State Department WRD has long held the view that J-2 dependent spouses and children are subject to the two-year home residency requirement when the J-1 principal exchange visitor is subject to that requirement.

The J-1 exchange visitor program was borne out of the Fulbright Hayes Act of 1961, also known as the Mutual Educational and Cultural Exchange Act of 1961, with the purpose of promoting cultural exchange between the United States and other countries.[6] Early regulations were ambiguous about the application of the two-year home residency requirement to the J-2 spouse, indicating on the one hand, that "(t)he alien's spouse, ***if also subject to the foreign residence requirement***, may be included in the [J-1 exchange visitor's] application . . . " qualified by a provision that ". . . the spouse has not been a participant in the exchange visitor program."[7] To the extent that this regulatory language acknowledges the possibility that the J-2 spouse might not be subject to INA §212(e) in circumstances in which the J-1 exchange visitor is subject, it is consistent with the plain language of the statute. The stipulation that the spouse cannot be included in the J-1 principal exchange visitor's waiver request when he/she is also a participant in his/her own exchange visitor program, is consistent with the requirement that each J-1 exchange visitor either comply independently with the two-year home residency requirement or obtain an independent waiver of the same.

On January 1, 2017, USCIS added 8 C.F.R. §212.7(c)(4)[8], which unequivocally states USCIS's position that:

[6] 22 U.S.C. Chapter 33, §§2451-2464.
[7] 29 Fed. Reg. 12584 (Sep. 4, 1964).
[8] 8 C.F.R. §212.7(c)(4).

> "(a) spouse or child admitted to the United States or accorded status under section 101(a)(15)(J) of the Act to accompany or follow to join an exchange visitor who is subject to the foreign residence requirement of section 212(e) of the Act is also subject to that requirement."

As illustrated above, this interpretation is legally incorrect and *ultra vires.* Numerous aspects of the Form I-612 and its instructions rely on this incorrect conclusion that J-2 dependents may be subject to INA §212(e). We therefore urge that USCIS strike items 7.a, 7.b, and 7.c from Part 4 "Additional Information About You" of the Form I-612. For similar reasons, AILA urges DHS to strike the language from Part 3 of the form requesting the applicant "List all J-1 dependents that are included in this application." We do not object to requesting information regarding U.S. citizen or U.S. permanent resident spouses or children to the extent that it is relevant to a hardship waiver request. In such a case, however, the fields in the Sections "Information About Spouse" on page 2 and "Information About Children" on page 3 should be merged with the family information requested on page 4 of the form.

For similar reasons, AILA urges USCIS to completely strike the first "Note" that appears on page 1 of the Form I-612 instructions in the section entitled "What is the Purpose of This Application?"; to also strike the following verbiage from the first sentence under the section "Who May File Form I-612" (i.e., "spouses (J-2) who are no longer married to the exchange visitors; or sons and daughters of the J-1 and/or J-2, who married and who are 21 years of age or older . . . ."); and to strike the section on page 1 of the form instructions entitled "Dependent of Applicant (Spouse of Unmarried Minor Children)", as these sections are based on the incorrect premise that J-2 dependents are subject to the two-year foreign residence requirement.

Conclusion

We appreciate the opportunity to comment on the Form I-612 and its instructions. We urge USCIS to carefully consider the concerns raised by AILA in this comment, and look forward to a continuing dialogue with USCIS on these issues.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION