

J-1 Waiver through Medical & Health Related Research: The HHS Waiver Process¹

□ Introduction

Foreign nationals entering the U.S. may be subject to a two year home residency requirement if they either received U.S. or home country government financing, their field is on the “Exchange Visitor Skills List,” or they came to the U.S. to undergo ECFMG sponsored clinical medical training. Those subject to the two year home residency requirement may neither change their status to an H-1B (specialty occupation) nor adjust their status to permanent residency (green card). In effect, this means that upon completion of their program, they may no longer remain in the United States, barring special circumstances.

However, the Immigration and Nationality Act (INA) provides for a waiver of the two-year foreign residency requirement upon the “favorable recommendation of a United States Government Agency.” Also known as a waiver through an “interested government agency (IGA),” such a recommendation requires a showing that the individual’s continued presence is in the interest of that agency. For those who perform basic science or clinical research, the agency most interested would be the Department of Health and Human Services (HHS).

This handout will help prospective candidates for HHS waivers evaluate whether or not they are likely to be successful if they pursue a waiver application with HHS.

□ HHS Versus USCIS Standards

While an application for a waiver through HHS may be made while still in J status, because of the extremely stringent standards of the HHS waiver, the long application preparation time, and the long backlog for application processing, many applicants will find it necessary to obtain O-1 status to continue their research before their waiver application is approved. Eligibility for the O-1 or similar immigrant petitions submitted to U.S. Citizenship and Immigration Services (USCIS) does not necessarily translate into a successful HHS waiver. USCIS petitions and the HHS waiver application have a completely different set of standards, and are reviewed by very different audiences. USCIS petitions focus on an individual’s reputation and past contributions to the field, whereas the HHS waiver process focuses on whether a researcher *either* has skills essential to a particular research project *or* has a level of skill from which HHS can conclude that the researcher will become a significant research contributor in his or her

¹ This information is based on discussions with Joyce Jones of the Exchange Visitor Waiver Review Board at the Department of Health & Human Services (HHS). This article is limited to a discussion of waivers through HHS. Other options for waivers may include: State Health Agency recommendation, other Interested Government Agency recommendations, hardship to a U.S. Citizen or Permanent Resident spouse or child, fear of persecution in the home country, or a statement of no objection from the home country. **DISCLAIMER:** Please be aware that information in this Update is general information only and not advice on any particular situation. We cannot advise you about your situation without an in-depth consultation. In addition, we are not your lawyers and do not represent you until you retain us and we have a written fee agreement with you.

own right. Waivers submitted to HHS are given technical review by relevant experts in the field and undergo a rigid peer-review, thus, documents are required to have a sophisticated level of scientific and technical information compared to USCIS petitions, which are reviewed by a lay adjudicator.

HHS Requirements

Documentation included with an HHS waiver application will vary from case to case. However, there are several requirements that must be met for the application to be accepted for review. These include the following:

Institutional Sponsorship. HHS will only consider waiver applications supported by an institutional sponsor. Individuals may not self-petition for the HHS waiver. The waiver application requires two signatures: one from the principal investigator responsible for scientific leadership of the project, and one from an administrator authorized to sign on behalf of the institution as a whole. HHS will check with the institution to make sure the appropriate person has authorized the application.

Sponsoring Institution's Support Letter. HHS has very specific criteria that it wants addressed in a waiver application. These points include details regarding the research being conducted at the sponsoring institution; discussion of key skills the foreign national has and why they are essential to the research; evidence of recruitment efforts (to show that the foreign national's skills are not otherwise available); and what the institution's long-term plans for the foreign national are (HHS is less likely to support a scholar who is only doing a short-term postdoctoral position than one who has a long-term staff position).

HHS Grant Funding. It is *not* required that the foreign national be working on NIH-funded research; however, it can be helpful in documenting the importance of the research being conducted.

Clinical Researchers. HHS does not limit its sponsorship to "bench" researchers, but will consider for waivers clinicians who are conducting research. To ensure that the individual is making substantive research contributions, however, a clinician should be prepared to document that he or she spends at least 30 hours per week on a research program.

External Letters of Support. HHS requires external letters of recommendation, meaning from scientists outside the sponsoring institution, to further evidence the foreign national's scientific achievements and ability to conduct the research that serves as the basis for the waiver.

The Waiver Process

Applications are submitted directly to the Exchange Visitor Review Board at HHS. Applications received by HHS are first administratively reviewed by the Administrator of the Board to ensure that the requisite information is included. Once it is determined that the application is complete, a "receipt" letter is sent either to the institution or to the attorney of record. It is at that point that the scientific review commences. Because the application must first be administratively reviewed and prepared for the scientific review, it may be several months following submission before a formal "receipt" is issued. The scientific review is a two step process: a "Technical Review" by experts within the appropriate HHS Institute most interested in the research program, and then a decision by a Board of two senior HHS officials and the Board Administrator.

Waiting for Results

If HHS determines that the application has met its stringent standards, it will issue a recommendation to the Waiver Review Branch of the United States Department of State (DOS). The DOS then makes its recommendation to the United States Citizenship and Immigration Services (USCIS), which will ultimately issue the waiver.

The amount of time it takes for HHS to process the waiver continually fluctuates according to its own backlog and workload. A waiver application may take between six and twelve months to be adjudicated by HHS, and if approved, it may take another twelve to twenty weeks for approval from DOS and USCIS.

After Waiver Approval

Unlike other waivers, the HHS waiver process does not require the person to remain with the sponsoring employer for three years (or any other specific length of time). Recipients of an HHS waiver should be cautious, however, about accepting a position outside of the institution that sponsored their waiver until they receive permanent residence.

Issuance of the approved I-612 on the basis of an IGA request from HHS simply waives the two-year home residency requirement. It does not, in and of itself, grant work authorization, nor permission to remain in the United States. Recipients of a J-1 waiver through a favorable recommendation of HHS may apply for an H-1B nonimmigrant visa, for adjustment of status to permanent resident, or any other appropriate visa.