

Strategies for Exchange Visitors to Avoid a Two-Year Return-Without Getting a Waiver

I. Introduction

Exchange visitors are subject to a two-year home country physical presence requirement only if (a) their program was financed by an agency of the U.S. government or their home country government, (b) their field appears on a list of skills needed in their home country, or (c) they came to the United States to receive graduate medical education or training. Waivers of the two-year return requirement are only available in four situations: (1) exceptional hardship to close U.S. family members, (2) persecution in their home country, (3) request from an interested U.S. government agency, or (4) statement of no objection from their home country (in the event that the return requirement is based on the home country skills list or financing). Obtaining a waiver can be very difficult and time consuming.

This update explores situations where we have been able to prove that a waiver is not required either because an exchange visitor who appears to be subject to the return requirement really is not or because visas can be obtained without waiving the return requirement.

NOTE: Some of the positions stated in this Update are either contrary to positions taken by the Department of State (DOS) or unaddressed by the DOS. However, these arguments are best made directly to the Immigration and Naturalization Service (USCIS), which is the agency with the ultimate authority to determine who is subject to the two-year foreign residence requirement.

II. Strategies Relating to Skills List Issues

1. An exchange visitor's country of citizenship and his or her country of last residence may be different. Only one of the countries may have a skills list that includes the alien's field. Exchange visitors may document that they last "resided" in a country that either does not have a skills list or has a list that does not contain the alien's field of knowledge, even though the skills list of the country of citizenship would render the alien subject to the foreign residence requirement. Note that country of "last residence" may be a country in which an alien did not have a "permanent residence."

2. If a country adds an exchange visitor's skill to the list after that exchange visitor's acquisition of status, he or she is not subject to the return requirement. In addition, the removal of a skill from the list following the exchange visitor's acquisition of J-1 status removes the return requirement.
3. If the exchange visitor's actual field is a field that does not appear on the skills list, but the field that is listed on the IAP-66* form is on the skills list, it may be possible to prove, through letters from the program sponsor and outside experts, that the IAP-66 is incorrect, and the skills list is not applicable.
4. Some fields are not included in the list of occupational categories among the overall skills list categories. If the specific and best job categorization does not appear on the list - even if a fairly close job classification does appear - an argument should be made to USCIS, with appropriate documentation that the exchange visitor is not subject to the return requirement.
5. If an exchange visitor spends some of his time in an occupational category that appears on the skills list but spends the majority of his time on a non-skills list activity, the skills list may not subject the visitor to the return requirement.
6. If the field of specialization in which the alien was engaged at the time the J-1 status was acquired is different from the field of specialization obtained in the United States, the original field should be used in resolving skills list issues.

III. Strategies Relating to Government Financing Issues

1. Even if an exchange visitor is paid with government funds granted to his or her institutional employer, if the funds were not specifically earmarked for the purposes of international exchange or for a specific exchange visitor, but rather were a grant to the institutional employer that the employer could have used to support anyone assisting with the research, the alien is not subject to the return requirement based on government financing.
2. Although the IAP-66 may indicate that there was government financing, if the alien can document that he or she never actually received funds, the alien is not subject to the return requirement.
3. Certain IAP-66 program codes that begin with "G" (which stands for government) may not actually involve government financing. Examples include state departments of education and the Centers for Disease Control. On the other hand, certain program designations that begin with "P" (which stands for private) may involve government financing, such as the Institute of International Education and the Asia Foundation. In some cases it may be necessary to prove

that no government funding was actually involved in the specific exchange visitor's program or that the relationship between government funds and the alien's exchange program is especially remote.

IV. Strategies Relating to Doctors

1. Doctors whose programs involve observation, consultation, teaching or research and only incidental patient care are not subject to the return requirement. "Incidental" does not necessarily mean a small percentage of time so long as the primary purpose of the exchange program is not patient care.

2. Sponsorship by ECFMG does not automatically mean that an exchange visitor is subject to the return requirement. If ECFMG sponsors a foreign doctor for a research fellowship, the return requirement does not apply unless the practice area is on the skills list or there is governmental financing.

V. Other Visa Options for Exchange Visitors With a Two-Year Return Requirement

An exchange visitor with a return requirement is barred only from (a) change of status to any other nonimmigrant status except A or G; (b) obtaining an H or L visa; or (c) applying for an immigrant visa (or K fiancée visa) or adjustment of status to permanent residence. This leaves numerous possibilities for obtaining legal status in the United States:

1. Even though the exchange visitor with a return requirement cannot change status to a nonimmigrant category such as F-1 (student), O-1 (alien of extraordinary ability) or E-1 or E-2 (treaty trader or investor), he can obtain any of those visas at a U.S. consulate. Once in the United States on, for example, an F-1 visa, an alien is arguably eligible for a change of status from F-1 to H-1B since the return requirement only prevents an alien from applying for an H or L nonimmigrant visa and since the bar to change of status only applies to an alien classified as a J nonimmigrant. Note, though, that once the change of status is approved, the alien could not leave the country and obtain an H-1B visa.

2. An exchange visitor can be granted asylum and obtain permanent residence one year later without obtaining a waiver of the two-year return requirement. Note, however, that if an exchange visitor who obtains asylum seeks to apply for permanent residence under another category, a separate persecution waiver would still be required.

VI. Conclusion

Many commonly held assumptions regarding the two-year return requirement are either untrue or unclear. In some cases, different agencies of the U.S. government disagree on key issues. Before an exchange visitor is counseled that he or she has a two-year return requirement and that a waiver is unlikely, careful consideration should be given to the above issues and to other issues that counsel may determine are applicable in particular cases.