Federal J-1 Waiver Programs

Under Section 212(e) of the Immigration and Nationality Act, any federal government agency can sponsor a J-1 visa holder for a waiver of the home residency requirement if the agency believes a waiver would be in the public interest. In practice, a handful of federal agencies grant virtually all of the public interest waiver recommendations to J-1 physicians. Most of those waivers are based on committing to work in underserved communities or veterans hospitals and for those waivers there is an additional set of rules.

This chapter focuses on reviewing the major federal programs that sponsor physician J-1 waiver recommendations. We’ll begin by reviewing the common rules applicable to most of the programs and then discuss each program individually.

**What are the common rules governing federal interested government agency waivers?**

State Department rules permit any US government agency to request a waiver of the two-year home residence and physical presence requirement for a J-1 exchange visitor if the person is “actively and substantially involved in a program or activity sponsored by or of interest to such agency.” Several agencies take advantage of this provision and have programs to sponsor doctors to work in locations they consider in their interest.

There are currently five federal programs run by four agencies (two are run by the same agency) that regularly sponsor J-1 waivers for doctors. The agencies are the Appalachian Regional Commission (ARC), the Delta Regional Authority (DRA), the Department of Veterans Affairs (VA) and the Department of Health and Human Services (HHS).

The State Department has a specific set of rules applicable to programs placing doctors in shortage areas. The three programs subject to these requirements are those run by the ARC, the DRA and HHS’ clinical physician program. The VA program and the HHS researcher program are not subject to these extra rules.

**What are the differences between the rules governing federal IGA waivers and Conrad 30 state health agency waivers?**

- Conrad 30 waivers require a no objection letter from the home country when the IMG is contractually obligated to return
- Federal shortage area waiver applications may not include non-compete provision in their employment contracts
- Conrad waivers don’t include a recruiting requirement (though states nearly always require recruiting)
- Medicare/Medicaid must be accepted in Federal applications
- Federal programs don’t have the option to approve flex applications in non-shortage areas

**What items must be included in all Federal IGA waiver applications?**

1. Written request from head of agency or designee
2. DS-2019 and IAP-66 forms
3. Copy of employment contract between IMG and the facility where he or she will be employed meeting the following requirements:
   - A term of employment of at least three years
   - Employment of not less than 40 hours per week of primary care or specialty medicine
   - The physician’s services will be performed in an HPSA or MUA (except VAs and waivers based on things other than work in underserved areas)
   - The contract will contain no non-compete clauses
4. Statement signed by head of facility that (i) the facility is located in an HHS-designated shortage area, (ii) the facility provides care to both Medicaid and Medicare eligible patients and indigent uninsured patients and (iii) the facility serves HHS-designated underserved areas (and listing the FIPS county code and census tract or block number or 9-digit zip code along with the identification numbers of the shortage area)
5. Statement signed by doctor stating the following: NAME OF EXCHANGE VISITOR) HEREBY DECLARE AND CERTIFY, UNDER PENALTY OF THE PROVISIONS OF 18 U.S.C. 1001, THAT I DO NOT NOW HAVE PENDING NOR AM I SUBMITTING DURING THE PENDENCY OF THIS REQUEST, ANOTHER REQUEST TO ANY UNITED STATES GOVERNMENT DEPARTMENT OR AGENCY OR ANY STATE DEPARTMENT OF PUBLIC HEALTH, OR EQUIVALENT, OTHER THAN ________ (INSERT NAME OF UNITED STATES GOVERNMENT AGENCY REQUESTING WAIVER) TO ACT ON MY BEHALF IN ANY MATTER RELATING TO A WAIVER OF MY TWO-YEAR HOME-COUNTRY PHYSICAL PRESENCE REQUIREMENT.
6. Documentation of unsuccessful efforts to recruit a US citizen physician for the position to be filled.

**The Federal Programs**

Prior to 1994 and the creation of the Conrad program for state health departments, there were a handful of federal agencies that provided J-1 waivers for physicians. The US Department of Agriculture provided waivers for physicians agreeing to work
in rural communities. The Department of Housing and Urban Development issued waivers for physicians agreeing to work in underserved areas in cities. The Veterans Administration had its program for doctors serving in VA hospitals. The Department of Health and Human Services (HHS) had a program that provided waivers for physicians engaged in research. And the Appalachian Regional Commission (ARC) had a program for physicians agreeing to work in communities in the counties in twelve states covered by that regional development agency. In the years since, the federal agency waiver landscape has changed. The Department of Agriculture and the Department of Housing and Urban Development have closed their programs. A new regional agency, the Delta Regional Authority, which is modeled on the ARC, created a popular J-1 program. And HHS created a second waiver program in 2002 that is narrowly tailored to certain Federally Qualified Health Centers, rural clinics and Native American tribal health facilities.

HHS Researcher Waivers

HHS Clinical Waivers

In 2002, shortly after the Department of Agriculture ended its program, HHS created a new waiver program that provided a route to a J-1 waiver for a narrow subset of the community previously served by the Department of Agriculture program. The regulation issued in 2002 was fairly broad – it states the HHS will issue J-1 waivers to primary care physicians, requires recruiting and mandates employers accept Medicare, Medicaid and indigent patients. However, HHS has issued guidelines that considerably narrow the pool of physicians eligible for waivers.

What types of facilities can file HHS clinical waivers for J-1 doctor?

1. Federally Qualified Health Centers (FQHCs) defined under Section 330 of the Public Service Act that are receiving grants under Section 330.

2. Rural health clinics defined under Section 1102 and 1871 of the Social Security Act; or

3. A Native American/Alaskan Native tribal facility as defined by the Indian Self-Determination and Education Assistance Act (P.L. 93-638).

What physician specialties will be considered for HHS clinical waivers?
HHS will only sponsor primary care doctors. Those are doctors practicing in family medicine, general internal medicine, general pediatrics, obstetrics & gynecology, or general psychiatry.

**Does a facility need to be in a shortage location?**

Yes. HHS requires applicants to be facilities that are in Health Professional Shortage Areas with a score of 07 or higher. Medically Underserved Areas and Medically Underserved Populations are not considered.

**Can an employer use HHS' National Health Service Corps program at the same time as pursuing an HHS J-1 waiver?**

Yes, but only if the NHSC position remains unfilled at the end of the NHSC Placement Cycle.

**What items must a doctor provide HHS as part of the waiver application?**

The doctor must provide the following:

- A US State Department J-1 Waiver Data Sheet (2 copies)
- Copies of DS-2019 forms for each year in J-1 status
- A physician statement (using language specified by HHS) that the doctor doesn't have other waiver applications pending.
- Current CV with social security number
- Three letters of recommendations from US residents familiar with the doctor's qualifications.
- Credentialing documents (diplomas, licenses, license applications, etc.)

**What recruiting documentation must an employer provide HHS?**

An employer must provide proof of regional and national recruiting efforts. The employer must also provide HHS names of non-foreign doctors applying for the job or who are interviewed and the reason why they were not hired.

**What are the HHS requirements for the physician's employment contract?**

The J-1 application must include a signed contract that meets the following requirements:

- Has a three-year duration
- Requires the doctor to work 40 hours per week providing outpatient primary care (see the primary care fields noted above)
- Specifies the work site or sites (including the HPSA identifier number) and all listed sites must be in HPSA locations scoring 7 or higher
- Does not include a non-compete clause or restrictive covenant
- Is signed by the head of the medical facility and the physician
- Is dated and notarized

What items are included in an HHS researcher application?

Employers are required to submit the following additional items:

- Form HHS 426- Application for Waiver of the Two-Year Foreign Residence Requirement of the Exchange Visitor Program
- Cover letter
- Attorney G-28 form
- Letter of need from medical facility on letterhead including the following:
  - Identifier number(s) of the underserved area(s) included in the application
  - Statement that the facility treats all patients regardless of ability to pay, accepts Medicare, Medicaid, and S-CHIP assignment, and uses a sliding fee scale for persons at or below 200% of the poverty income level.
  - Signature of head of the facility
- Three letters of community support for the hiring of the doctor (including contact details)
- Letter from state health department supporting or acknowledging the waiver application or documentation that the letter has been requested
- Prevailing wage documentation
- Proof of the facility’s existence (such as phone book listing)
- Rural health clinics must provide a copy of the Letter of Certification issued by the Centers for Medicare and Medicaid Services
- Attestation from the employer that it is in a shortage area (including listing ID number) and treats Medicare/Medicaid/indigent patients

Applications must be submitted in print (unbound) and on a CD in PDF format and include the State Department case number on each page.

How does HHS make decisions on its clinical waiver cases?

HHS has established an Exchange Visitor Waiver Review Board for J-1 waiver recommendation applications. The EVWRB has at least three members and two alternates. They include the Director of the Office of Global Health Affairs, Office of
the Secretary acts as the Chairman. The Director may appoint a staff member to serve when the Director is absent. The Assistant Secretary of Health of HHS is responsible for appointing the other two members and two alternates. The EVWRB may establish a workgroup from the operating divisions of HHS to consider applications for waivers based on the health care needs of underserved populations. An HHS administrator manages the day-to-day review of applications.

**HHS Researcher Waivers**

**What are the main requirements to qualify for an HHS researcher waiver?**

To qualify for an HHS researcher waiver, an applicant organization must demonstrate

- a) That the program or activity at the applicant’s institution or organization is of “high priority” and of “national or international significance” in an area of interest to HHS,
- b) The J-1 exchange visitor is playing an integral role in the program or activity and that the loss of the individual’s services would result in the discontinuance of the program or a major phase of it, and
- c) The J-1 exchange visitor has outstanding qualifications beyond those usually expected accomplishments at the graduate, postgraduate and residency levels and the applicant must have the capability to make original and significant contributions to the program.

**How do you demonstrate that being denied a waiver will result in the discontinuance of a program?**

An applicant organization must provide evidence on how the loss or unavailability of the J-1 exchange visitor’s services would adversely affect the “initiation, continuance, completion, or success” of the program or activity. Furthermore, the applicant organization must show that a suitable replacement cannot be found through recruitment or other means. The HHS program rules specifically note that the principal problem may not be one of administrative, budgetary or program inconvenience to the applicant organization.

**Does qualifying for an O-1 visa mean the J-1 waiver applicant is likely to qualify for an HHS waiver?**

Not necessarily. While demonstrating one has outstanding qualifications is an important element in an HHS researcher waiver, considerable weight is also placed on the importance of the research overall and the role of the researcher. Furthermore, unlike an O-1 visa that is reviewed by a USCIS examiner with no
expertise in the researcher's field, HHS has experts reviewing the application and will normally place greater weight on the researcher's curriculum vitae than on support letters from experts in the field (though support letters should still be submitted).

**What documentation must be included to support an HHS researcher waiver application?**

In addition to including Form HHS 426 – Application for Waiver of the Two-Year Foreign Residence Requirement of the Exchange Visitor Program HHS, requests the following:

1. A concise, scientific description of the research program that includes information on how the national or international public interest is served.
2. Evidence of how the exchange visitor is has played an essential day-to-day role in the program over time. Include information on any unique or rare technical expertise and any grant funding the exchange visitor has received.
3. Information on the other people working in the program and how the exchange visitor's expertise is related to those individuals. The goal here is to show that others in the program are relying on the exchange visitor.
4. Evidence from the last 18 months showing the institution's efforts to recruit a suitable applicant to fill the position. This should include copies of at least one advertisement in a national journal with the salary listed or a statement that the salary will be commensurate with experience. Also, include any Internet recruiting, letters to colleagues in the field and other recruiting documentation as well as a brief summary of the results of the recruiting efforts. Also, the applicant should provide documentation that the offered salary is at a fair market rate.
5. A description of what is the probable future of the program if the waiver is not granted, including evidence showing how the loss of the exchange visitor's services would seriously restrain or delay the initiation, continuation, completion, or success of the program or activity, or a major part of the program. If funding for the program will be jeopardized as a result of the loss of the J-1 visitor or if the visitor's immigration status is preventing receiving funding, that should also be explained.
6. A brief explanation of the institution's long-range plans for the visitor and how he or she will contribute to the research and the institution in the future. This may include information on promotions, tenure and other opportunities that may be in the exchange visitor's future.

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1 Thanks to Suzanne Seltzer of the Seltzer Law Firm ([http://theseltzerfirm.com/](http://theseltzerfirm.com/)) who interviewed the then administrator of the HHS researcher program and provided previously unpublished suggestions on filing HHS applications. These were summarized in the still very helpful article that is found at [http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/ISCA/hss_waiver.pdf?n=7053](http://www.nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/ISCA/hss_waiver.pdf?n=7053).
7. Information on the J-1 visitor’s qualifications, including special accomplishments, should be addressed in the employer support letter and in letters of recommendation provided from outside the sponsoring institution.
8. A curriculum vitae, bibliography and sampling of recent relevant publications
9. Copies of all IAP-66 and/or DS-2019 forms and current visa status materials
10. Any other facts considered germane.

What should be left out of the application?

The application should not include copies of grants, honors, awards, publications more than a few years old, citations, CVs of anyone other than the applicant and background information on the sponsoring institution.

Who needs to write the letters of recommendation and what do they need to include?

Unlike O-1 and EB-1 petitions where letters come from a variety of sources inside and outside the institution, HHS prefers letters only from individuals outside an applicant institution. Letters should discuss the exchange visitor’s accomplishments as they relate to the area of research that is the basis for the application as well as any other indicators that the J-1 is outstanding in the field. There is no minimum or maximum number of applications, but HHS prefers letters that do not largely repeat each other. Letters should be specifically addressed to HHS and not simply be copies of letters sent to USCIS in support of another application. Ideally, the letter writer should be someone well known in the field who is likely to be recognized by the expert reviewing the petition. Note that you should NOT include the CVs of external letter writers.

Who needs to sign the HHS Form 426?

The 426 form is signed by two individuals at the applicant institution – the principal program officer and the responsible administrative officer. The former is a person who will be familiar with the research and can provide additional information to HHS regarding the application. The latter should be a senior person at the institution who is authorized to sign on behalf of the entire institution. HHS maintains a list of authorized signatories and the responsible administrative officer should match the name on the list. Otherwise, the institution’s general counsel should notify the EVWRB of the name of the authorized signer.

What happens after the application is submitted?
Once the application is submitted, it receives an initial review from the WRB executive secretary. That review is focused on ensuring that the application contains the necessary information and documentation. The application then travels one at a time to a volunteer expert – a full-time scientist who is an expert in the particular field of research – for a technical review. If the National Institutes of Health has provided grant funding supporting the research that is the subject of the application, NIH will be part of this technical review process. Once the technical review is completed and comments have been sent back to the EVWRB, the executive secretary will send the application to two of the five members of the EVWRB. The EVWRB members are emeritus scientists, but they are not necessarily experts in the particular field of research. The EVWRB reviewers are looking at whether the application meets the overall criteria for the program. Once each EVWRB reviews the application, they individually send their comments back to the executive secretary. If the two reviewers come to a different recommendation, the executive secretary acts to break the tie. The executive secretary will then inform the institution of the positive or negative decision.

If the decision is favorable, the executive secretary sends the recommendation to the State Department Waiver Review Office for the later stages of J-1 waiver processing.

**Is clinical research eligible for an HHS researcher waiver?**

Yes. Clinical research may be considered. The EVWRB will look at the amount of time being spent on research versus patient care alone and it will also look at the J-1’s publication history to gauge the importance of the clinical research.

**What if NIH or HHS grant-funding does not support the research?**

While NIH or HHS grant funding can be important, funding from other sources – other government agencies, private sector funding or internal funding from the institution – are all considered in determining if the research is of interest to HHS and the J-1’s role in that research is critical.

**Can a researcher waiver application be appealed?**

If a case is denied and an institution believes the decision is not justified, the institution can submit a written request for more information on the application’s deficiencies. HHS will then grant an informal re-adjudication of the request on a one-time basis to those institutions that request the opportunity to cure any deficiencies in the initial application.
Appalachian Regional Commission

What is the ARC?

The Appalachian Regional Commission (ARC) was created in 1965 as a regional economic development agency designed as a partnership between the federal government and state and local governments in the 13 states and roughly 400 counties that comprise the Appalachian region of the eastern United States. The 13 state governors act in partnership with a federal co-chair appointed by the President.

The ARC considers access to comprehensive, affordable health care as vital to the social and economic growth in the Appalachian region and was one of the first government agencies in the United States to establish a J-1 waiver program.

What states and counties and independent cities are part of the ARC?

The following is a list of counties and independent cities included in the ARC.

**Alabama:** Bibb, Blount, Calhoun, Chambers, Cherokee, Chilton, Clay, Cleburne, Colbert, Coosa, Cullman, De Kalb, Elmore, Etowah, Fayette, Franklin, Hale, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Limestone, Macon, Madison, Marion, Marshall, Morgan, Pickens, Randolph, St. Clair, Shelby, Talladega, Tallapoosa, Tuscaloosa, Walker, and Winston

**Georgia:** Banks, Barrow, Bartow, Carroll, Catoosa, Chattooga, Cherokee, Dade, Dawson, Douglas, Elbert, Fannin, Floyd, Forsyth, Franklin, Gilmer, Gordon, Gwinnett, Habersham, Hall, Haralson, Hart, Heard, Jackson, Lumpkin, Madison, Murray, Paulding, Pickens, Polk, Rabun, Stephens, Towns, Union, Walker, White, and Whitfield

**Kentucky:** Adair, Bath, Bell, Boyd, Breathitt, Carter, Casey, Clark, Clay, Clinton, Cumberland, Edmonson, Elliott, Estill, Fleming, Floyd, Garrard, Green, Greenup, Harlan, Hart, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Martin, Menifee, Metcalfe, Monroe, Montgomery, Morgan, Nicholas, Owsley, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Russell, Wayne, Whitley, and Wolfe

**Maryland:** Allegany, Garrett, and Washington

**Mississippi:** Alcorn, Benton, Calhoun, Chickasaw, Choctaw, Clay, Itawamba, Kemper, Lee, Lowndes, Marshall, Monroe, Montgomery, Noxubee, Oktibbeha, Panola, Pontotoc, Prentiss, Tippah, Tishomingo, Union, Webster, Winston, and Yalobusha
New York: Allegany, Broome, Cattaraugus, Chautauqua, Chemung, Chenango, Cortland, Delaware, Otsego, Schoharie, Schuyler, Steuben, Tioga, and Tompkins


Ohio: Adams, Ashtabula, Athens, Belmont, Brown, Carroll, Clermont, Columbiana, Coshocton, Gallia, Guernsey, Harrison, Highland, Hocking, Holmes, Jackson, Jefferson, Lawrence, Mahoning, Meigs, Monroe, Morgan, Muskingum, Noble, Perry, Pike, Ross, Scioto, Trumbull, Tuscarawas, Vinton, and Washington


South Carolina: Anderson, Cherokee, Greenville, Oconee, Pickens, and Spartanburg


The following independent cities in Virginia are also within the Appalachian Region: Bristol, Buena Vista, Covington, Galax, Lexington, Martinsville, Norton, and Radford.


What types of doctors are eligible for J-1 waiver sponsorship by the ARC?
Physicians must agree to provide primary medical care. While the ARC does not specifically define "primary care" it limits waivers to applicants who have completed a residency in one of the following specialties: family practice, general pediatrics, obstetrics, general internal medicine and psychiatry.

**What role do state governors play in the process?**

While the J-1 waiver application is submitted to the ARC administrator, the state governor where the physician will work must provide a written recommendation supporting the waiver before the waiver recommendation will be issued by the ARC.

**How many hours must a physician work per week?**

Consistent with federal regulations, physicians must work 40 hours a week providing patient care at the designated ARC work site. Travel and on-call time are not included in the 40-hour minimum work requirement. Exceptions, however, are made to allow travel and on-call time for obstetrician.

**What locations qualify for ARC waivers?**

The ARC will only consider applications for waivers in Health Professional Shortage Areas in the ARC counties and cities noted above.

**What recruiting requirements apply to ARC waiver cases?**

Employer sponsors must demonstrate that they have made a “reasonable good faith effort” to recruit a US doctor for the job opportunity in the same salary range within the six months preceding the waiver application request. Acceptable recruitment includes, but is not limited to the following:

- Advertisements in newspapers and medical journals of national and statewide circulation
- Job opportunity notices placed in appropriate medical schools including all medical schools in the state

**What rules apply to the employment contract with the doctor?**

The ARC requires the items noted above that are applicable to all federal agencies granting shortage area waiver recommendations (modified to meet the ARC’s additional restrictions). These include
- A term of employment of at least three years
- Employment of not less than 40 hours per week of primary care medicine
- The physician's services will be performed in a HPSA
- The contract will contain no non-compete clauses

A significant additional requirement is a liquidated damages clause that states the following:

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 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.

Note the following regarding the ARC liquidated damages clause:

- Employers are not barred from including a separate consequential or liquidated damages clause
- The damages clause declines proportionately each month the doctor has served
- Employers can still sue and collect consequential damages and attorney fees if the doctor has breached the agreement
- Doctors can avoid the liquidated damages clause if the physician agrees to work in another licensed medical facility in a HPSA in an ARC county
- The clause can only be enforced by the employer
- Unlike the Delta Regional Authority, the other regional commission that grants J-1 waivers, the ARC liquidated damages clause may not be waived from inclusion in the agreement by mutual waiver of the employer and employee

The agreement must also incorporate a “J-1 Visa Policy Affidavit and Agreement to be signed by the physician. The affidavit and agreement generally restates the
federal waiver requirements regarding waivers and notes the liquidated damages clause and addresses future transfers by the J-1 doctor. The physician must agree that “in the event of a transfer, under the ARC liquidated damages clause a transfer notification form must be obtained by the ARC. This form must be filled out and returned to the ARC with a copy to the State Contact.” This requirement is confusing because the actual language of the liquidated damage clause quoted above, no reference is made to such a requirement. In practice, the ARC is known to be very aggressive in trying to prevent a physician from transferring to locations outside the ARC. Indeed, the J-1 Visa Policy Affidavit and Agreement actually says that if the physician fails to comply with the ARC program rules, “The Office of the ARC Federal Co-Chair will notify the USCIS and recommend deportation proceedings be instituted against me.”

Note, however, that USCIS is the sole arbiter in approving a waiver transfer. USCIS has specific rules governing J-1 transfers and if a physician complies with those rules, USCIS has the authority to approve the H-1B transfer even when the original sponsoring agency objects. Nevertheless, USCIS may consider the views of the original sponsoring agency and physicians often benefit from having the support of the sponsoring agency when it seeks an early transfer.

**What does the ARC require employers to post concerning charges for health care services?**

As noted above, all employers seeking federal waivers based on work in underserved areas must accept Medicare, Medicaid and provide care to indigent patients. The ARC expands on the indigent care requirement by requiring employers to also agree not to charge more than the usual and customary rate in the particular HPSA where services are being provided. Patients with third party insurance may be charged the full fee for service. Furthermore, indigent patients are considered those at or below 200% of the federal poverty guidelines and such patients must be provided a sliding fee scale for services.

The ARC requires employers post a notice in a conspicuous location in the patient waiting area at the practice site seeking a J-1 doctor. The notice must contain at least the following information:

*This practice has adopted the following policies for charges for health care services.*

*We will charge persons receiving health services at the usual and customary rate prevailing in this area. Health services will be provided at no charge, or at a reduced charge, to persons unable to pay for services. In addition, persons will be charged for services to the extent that payment will be made by a third party authorized or under legal obligation to pay the charges.*
We will not discriminate against any person receiving health services because of his/her inability to pay for services, or because payment for the health services will be made under Part A or B of Title XVIII (“Medicare”) or Title XIX (“Medicaid”) of the Social Security Act.

We will accept assignment under the Social Security Act for all services for which payment may be made under Part B of Title XVIII (“Medicare”) of the Act.

We have an agreement with the state agency which administers the state plan for medical assistance under Title XIX (“Medicaid”) of the Social Security Act to provide services to persons entitled to medical assistance under the plan.

If a waiver application is based on a population group HPSA designation, ARC requires the employer to provide recent documentation that the employer has served Medicare, Medicaid and medically indigent patients as well as their continuing intention to serve those individuals.

**Will the ARC sponsor waivers for physicians who have been out of status?**

The ARC notes in its rules that it will not sponsor physicians who have been “out of status” for more than 180 days since receiving his or her J-1 visa. The ARC requests copies of the DS-2019 and other immigration documents in order to verify the physician remains in a legal status.

**How does a J-1 doctor apply to use the ARC program?**

Unlike the other regional commission waiver program, the ARC does not accept applications directly from employers. Instead, the employer must submit the application to a state health office designated to accept ARC applications for counties and cities in that state. That's normally the same office as accepts Conrad 30 applications. States are permitted to add additional requirements for applications it chooses to forward to the ARC and many choose to do so. Additional requirements added by some states include

- a more restrictive definition of “primary care”
- site pre-approval
- agreeing to submit regular reports to state health authorities
- further restrictions on accepting indigent patients
- barring physicians with sub-specialty fellowship training
- additional state affidavits of compliance

**Does the ARC charge a fee for its program?**
No. However, individual states have the authority to charge a fee for accepted applications.

Delta Regional Authority

The Delta Regional Authority is a regional commission originally modeled after the ARC. However, it’s J-1 waiver program differs in many respects and is considered to be more “user friendly” than the ARC program based on its program rules as well as the cordial relationship enjoyed by the DRA administrators over the years with the health care and legal communities.

What counties are in the DRA?

Alabama

Barbour, Bullock, Butler, Choctaw, Clarke, Conecuh, Dallas, Escambia, Greene, Hale, Lowndes, Macon, Marengo, Monroe, Perry, Pickens, Russell, Sumter, Washington, Wilcox

Arkansas

Arkansas, Ashley, Baxter, Bradley, Calhoun, Chicot, Clay, Cleveland, Craighead, Crittenden, Cross, Dallas, Desha, Drew, Fulton, Grant, Greene, Independence, Izard, Jackson, Jefferson, Lawrence, Lee, Lincoln, Lonoke, Marion, Mississippi, Monroe, Ouachita, Phillips, Poinsett, Prairie, Pulaski, Randolph, Searcy, Sharp, Stone, St. Francis, Union, Van Buren, White, Woodruff

Illinois

Alexander, Franklin, Gallatin, Hamilton, Hardin, Jackson, Johnson, Massac, Perry, Pope, Pulaski, Randolph, Saline, Union, White, Williamson

Kentucky

Ballard, Caldwell, Christian, Calloway, Carlisle, Fulton, Graves, Henderson, Hickman, Hopkins, Livingston, Lyon, Marshall, McCracken, McLean, Muhlenberg, Todd, Trigg, Union, Webster
Louisiana


Mississippi


Missouri


Tennessee

Benton, Carroll, Chester, Crockett, Decatur, Dyer, Fayette, Gibson, Hardeman, Hardin, Haywood, Henderson, Henry, Lake, Lauderdale, Madison, McNairy, Obion, Shelby, Tipton, Weakley

**What are the DRA’s recruiting requirements?**

The DRA requires employers to make a good faith recruiting effort to recruit an American doctor in the same salary range for a period of 60 days before submitting the waiver application.

Recruiting must take place at three levels: national, in-state and with state medical schools. Employers cannot satisfy the national and in-state advertising requirements with general advertisements run by recruiting firms nor will Internet-
only advertisements suffice. However, online advertising can supplement other recruiting documentation submitted.

Documentation of national recruiting can include the following:

- journal advertisements (such as in JAMA or the New England Journal of Medicine)
- national newspaper advertisements (such as USA Today or the Wall Street Journal)

Documentation of in-state advertising include newspapers with major, in-state circulation, publications in the local practice area such as local newspapers or magazines and in-state medical journals or publications.

In addition to online advertising and documentation of hiring a recruiting firm, employers can supplement their recruiting documentation with evidence of targeted mailings to physician candidates.

What types of physicians may apply for DRA waivers?

Unlike the ARC and HHS clinical programs, the DRA will support both primary care and specialty medicine positions. “Primary Care” is defined to include general or family practice, general internal medicine, pediatrics, obstetrics/gynecology and psychiatry. For specialists, the following additional documentation must be included with the application:

- A letter from the employer explaining the reasons the particular specialist is needed in the area. The letter must talk about the impact the lack of the specific specialty care is having on the community, the closest location where the specialty is available if there is no one in the area, the availability of public transportation to get to a specialist and proof that the specialist’s practice would be viable in the service area.
- A description of the demographics of the community and any other evidence regarding the particular need of the community for the specialist (e.g. documentation of high diabetes rates if an endocrinologist is being recruited).
- A letter from the Chief Medical Officer of the facility where the doctor is going to see patients.
- At least two letters of support from primary care physicians and/or primary care facility representatives regarding the need for the specialty.
- Any additional evidence that would show the need for the specialist such as letters from other physicians in the specialty area or local health officers in the community.
In what types of locations can DRA physicians work?

The DRA accepts applications for waivers for doctors who agree to work in Health Professional Shortage Areas, Medically Underserved Populations/Medically Underserved Areas and, for psychiatrists, in Mental Health Professional Shortage Areas. The DRA requires these locations be in DRA counties. However, the DRA will sometimes consider applications for locations outside the DRA if the employer can demonstrate people residing in the DRA will be better served as a result of the waiver. In the past several years, a number of hospitals in DRA counties have closed forcing residents of those counties to have to go to hospitals in other counties, sometimes outside the DRA region. The DRA has recognized this need and began approving “out of jurisdiction” waivers for these and similar types of situations.

What are the contract requirements for a DRA waiver application?

DRA contracts must comply with the State Department’s restrictions on federal agency waivers based on working in shortage locations. They include:

- A term of employment of at least three years
- Employment of not less than 40 hours per week of primary care or specialty medicine
- The physician’s services will be performed in a HPSA, MUA or MHPSA and the identification number of the shortage location
- The contract will contain no non-compete clauses

Like the ARC, the DRA requires a specific liquidated damages clause in its contracts. Unlike the ARC, the clause can be deleted from the contract if a waiver is signed by both the employer and the doctor. This is a relatively recent change in policy after a number of employers expressed concern that while the provision benefits employers, it was also causing doctors to avoid the DRA program due to the perceived draconian effect of the contract clause. The DRA liquidated damages clause is the following:

*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 (NAME OF EMPLOYER) the sum of $250,000.00 if you fail to fulfill any portion of your minimum three-year contract. Should you perform any portion of the employment contract, you agree to pay a pro rata share based upon the number of months you failed to fulfill (i.e. $6,945.00 per month). In addition to liquidated damages, (NAME OF EMPLOYER) will recover from you any other*
consequential damages, and reasonable attorney fees costs and expenses, 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 Health Professional Shortage area (as defined by
the United States Public Health Service) with the Delta Regional Authority (as
defined by DRA) shall be considered the same a fulltime 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.

The parties agree in consideration of compliance with the forgoing, to
indemnify and hold harmless the Delta Regional Authority and / or any person,
firm or corporation now or hereafter acting as agent for the DRA in any
capacity, and any successors in any such capacities and successors and assigns
of DRA, from and against any loss, claim, damage and expense in connection
with, or arising out of, compliance with the waiver application set forth herein
or any other litigation.

The waiver language is the following:

(Employer) and (Physician) here by agree to waiver the Liquidated Damages
Clause required by Delta Regional Authority (DRA) as set forth in the Delta
Regional Authority J-1 Visa Waiver Program Affidavit and Agreement.

DRA takes no position with respect to the inclusion of any other clause
mandating consequential or liquidated damages being paid to the employer.

What is the DRA filing fee for a J-1 waiver application?

As of publication of this book, the fee is $3000. The fee is non-refundable if the
waiver is rejected. However, a 50% refund will be issued if the waiver application is
withdrawn within 20 calendar days after the DRA receives the application.

What items must be included in a DRA application?

1. Letter of Opinion from Legal Representation attesting to the truthfulness
   of the application and the qualification of the facility to sponsor the
doctor.
2. G-28 Notice of Entry for the attorney with the $3000 check attached.
3. Cover letter from the employer stating
   a. The facility is in a shortage area (with the shortage area number, the
      county code and the address of the facility)
   b. Patient data, including Medicare, Medicaid and Uninsured patient
      information, for the past three years
c. Details outlining the services the physician will provide patients in the service area

d. Information on the current patient to physician ratios in the practice area.

4. DRA J-1 Policy Guidelines signed by employer and physician
5. J-1 Affidavit and Agreement signed and notarized by the physician.
6. Department of State Data Sheet and Department of State Case Number (2 copies each)
7. Curriculum Vitae including Social Security Number
8. Notarized Department of State Exchange Visitor Attestation Form
9. Copy of executed employment contract with the terms noted above.
10. Proof the prevailing wage will be paid (either Department of Labor Level I or Level II wage for the position in the practice area)
11. Documentation of recruiting efforts (see above)
12. Proof of current HPSA, MUA, MUP, or MHPSA designation for the service location
13. At least three letters of community support. Two must be from practicing physicians in the area who are permanent residents or citizens of the US. If there are not two other physicians in the area, letters can come from physicians who are closest. Others may come from community leaders or elected officials.
14. Letters of recommendation from individuals who know the J-1 physician’s qualifications
15. Copies of the physician’s diplomas, licenses, board certifications and other credentials
16. Proof of the facility’s existence such as business license, occupancy permit, phonebook listing, etc.
17. Copy of the sliding fee scale
18. List of all psychiatrists, specialists or primary care physicians in the county or parish and their field of practice (for cities with fewer than 100,000 people)
19. Copy of complete passport
21. Copy of I-94
22. Personal statement from the physician stating the reasons for not wishing to fulfill the home residency requirement and the reasons for practicing in this particular field of medicine, how their expertise could impact patients in the area and the reasons for accepting this employment contract.
23. A copy of the DRA document checklist

For specialists, add the following:

24. Sponsor’s letter outlining the reasons a physician or an additional physician in the specialty area is needed in the community. The letter should also document the impact of the service not being adequately
available in the area, the closest location where the specialty is available, whether public transportation is available and evidence the specialty practice will be viable in the area.

25. Service Area Description containing information on the service area demographics and any other information the DRA may use to determine exceptional need for the specialty

26. Letter of Support from Chief Medical Officer of the facility

27. Letter of Support from at least two primary care providers in the area

28. Any additional information that would show the shortage in the specialty field

Additionally, note that the DRA requests a picture of the physician be emailed to the agency. Also, the DRA requires employers to send a completed DRA Physician Verification Form to the DRA within a few weeks of the physician beginning employment.

**What is the typical timeline for a DRA waiver adjudication?**

The DRA is known for quickly reviewing applications. They have a built in 45 day period to allow state health agencies to comment and an overall 60 day adjudication timeframe, but waiver applications are typically adjudicated within a few weeks.

**The Department of Veterans Affairs**

The Department of Veterans Affairs has a decades-old J-1 waiver program designed to allow local VA facilities to fill shortage positions with J-1 international medical graduates. The name of the department was originally the Veterans Administration (VA) before the agency was elevated to a cabinet position and most people still refer to the agency as the VA which I do so in this chapter.

**When may a VA Hospital initiate a J-1 waiver request?**

Normally, Federal agencies are barred from employing anyone other than US citizens. But there are a number of exceptions to this general rule including situations where the agency is unable to find a qualified citizen after going through extensive recruiting and that is the basis for the VA’s waiver program. The VA program rules state “VHA requests waivers only in cases of overwhelming need. Facilities are to request waivers only as a last resort, when comprehensive efforts to attract applications from US citizens and permanent residents of the US have failed to produce a qualified candidate.” Furthermore, VA facilities are required to pursue “employable non-citizen candidates” like H-1B and O-1 visa holders BEFORE they can consider filing a J-1 waiver request.
**Must the VA meet the same State Department requirements as other federal shortage area-based waivers?**

The federal rules apply, but are somewhat modified for the VA. The most obvious example of this is that the VA hospital need not be in a HPSA or MUA. Also, the requirement to treat Medicare and Medicaid patients doesn’t apply since veterans are cared for under their own separate system. However, the agency does require a three-year employment commitment and extensive recruiting documentation (more on this below) and physicians are expected to begin work on an H-1B within 90 days. Furthermore, recruiting is required in VA waiver cases.

**What are the VA’s recruiting requirements?**

The VA requires “robust recruitment” to demonstrate that it cannot locate a “minimally qualified citizen or permanent resident candidate” for a critical position. It is not enough that the J-1 is more qualified than the other candidates. The recruiting efforts must have been undertaken within the six months prior to the submission of the waiver request to the VA Health Resource Center in Topeka, Kansas.

The VA waiver process has four mandatory recruiting steps –

- a. Posting the job for 30 days at www.vacareers.va.gov
- b. Posting on the CareerBuilder and HealthECareers web sites
- c. Contacting the Healthcare Retention and Recruitment Office (HRRO) for recruitment placement assistance and potential lists of candidates
- d. Placing an electronic ad for 30 days on careermd.com

Two additional steps must be taken from the following list:

- a. Posting the position on Craigslist for the particular city where the facility is located
- b. Posting on the web site of JAMA – the Journal of the American Medical Association
- d. Posting on the Association of American Medical Colleges job board at www.aamc.org/careerconnect
- e. Posting directly to a professional association web site or professional journal web site posting page for the specialty being recruited
- f. Using a physician recruiting firm (which may require separate approval)

VA recruiters are also encouraged to recruit at medical schools and through medical societies.
Citizens and green card holders who apply or are referred by HRRO must be contacted “promptly” and pursued “actively” by the facility. This is defined to mean each candidate must be interviewed at least by telephone and qualified candidates can only be eliminated if they lack the minimal qualifications for the position. This must be documented in reports and qualification evaluations that are submitted with the waiver application.

Note also that a recruitment process must be “ongoing and comprehensive” and may not be initiated solely for the J-1 waiver process.

**Can VA J-1 waiver doctors work at other facilities?**

A number of VA hospitals are located on or adjacent to university medical centers and the VA accommodates joint appointments. The VA prefers 100% VA employment, but will allow joint appointments where a) the physician is working full-time for the VA and 5/8 of the total employment is with the VA. In these cases, the other facility will file a concurrent H-1B petition. The recruiting for joint appointments must reflect that the position is full-time and applicants will be considered for employment by both institutions. However, applications are sent initially to the VA and the other facility can review an applicant only after the VA is finished processing. And if a position requires a faculty appointment at an affiliated academic institution and that institution rejects the applicant, the VA facility must provide a detailed explanation regarding each citizen or permanent resident rejected for the faculty appointment and why the J-1 doctor does meet the faculty position requirements.

**What percentage of the physician’s time must be devoted to patient-care?**

The VA requires the position to include at least 51% patient care duties.

**Can a J-1 physician being considered for a waiver have an immigration violation?**

J-1s may not be considered if they have overstayed their status. J-1s are “duration of status” so there is not a specific date on their I-94s that they would be overstaying, but the VA presumably means that the physician has remained beyond their DS-2019 expiration date plus their 30 day grace period.

**When must the physician be available to begin work?**

While DOS regulations require a physician to begin work within 90 days of the waiver approval, the VA also requires the physician be available within six months
from the time the waiver request is received at the VA Health Resource Center in Topeka. If employment doesn’t commence within six months, the VA is expected to continue recruiting.

When is the earliest a waiver application will be accepted for a J-1 waiver position? One of the least attractive aspects of the VA waiver process is the bar on accepting applications more than six months before a physician is available to begin work. For those finishing on June 30th, this means the VA will not accept an application before January 1st. This effectively gives the physician one opportunity to apply for a waiver and if the VA application is rejected, the physician will have no time left to find another position before his or her program is completed.

**Can two VA facilities file at the same time for a J-1 waiver?**

The VA will not allow a candidate to pursue employment opportunities simultaneously at more than one VA facility. If another facility has begun processing a J-1 waiver, the second facility must await the outcome of that process.

**Will the VA sponsor J-1 waivers for physicians currently on O-1 visas for other employers?**

Not immediately. The VA will hire a physician on an O-1 visa and petition for the physician to transfer the O-1 to the local VA facility. After an initial period of three years of employment in O-1 status, a VA is authorized to first file to change the physician’s status from O-1 to H-1B in order to avoid having to annually extend the O-1 visa.² If a facility is still unable to recruit a qualified citizen or permanent resident, the facility may seek a waiver during the last six months of the initial three-year O-1 period. And the VA will not consider any time previously spent with the VA as having satisfied the physician’s three-year service obligation.

**What items must be included in a VA waiver application?**

1. Network Review and Certification of Facility Waiver Request (VA-Form 10-0422b) provided by facility.
2. Facility Director’s Request (VA Memorandum) describing the position, the appointment date, details on any joint appointment arrangement, a description of the health care needs the J-1 physician will help address, a

² Note that USCIS will often deny an O-1 to H-1B transfer based on its view that this violates INA Section 248’s bar on non-immigrant changes of status for those still subject to Section 212(e)’s home residency requirement.
description of recruiting efforts and contact information for a facility employee who can address technical questions about the application.

3. Copy of the Waiver Review Application Data Sheet
4. Copy of physician’s DS-2019 forms
5. Copy of physician’s visa
6. Copy of physician’s I-94
7. DOS Explanation for periods outside US while in J-1 status (signed and dated by physician)
8. Signed and dated DOS 3-Year Employment Agreement
9. Signed and dated DOS 18 USC 1001 statement
10. Document providing physician’s address and contact information
11. DOS Personal Statement signed and dated by physician
14. Application (VAF 10-2850), Section III signed by Chief of Staff and a supplemental page listing any gaps in the dates of training
15. Current license and VA Form 5-4682 Certification of Licensure
16. Physician’s Curriculum Vitae
17. ECFMG Certificate
18. USMLE Score Reports for Steps 1, 2 & 3
19. Evidence of required recruiting
20. Recruiting report showing
   a. Total applications received (including J-1’s waiver applicant)
   b. Total number of US citizen applications received
   c. Total number of permanent resident applications received
   d. Total current non-immigrant applications received
   e. Total citizens interviewed
   f. Total permanent residents interviewed
   g. Total non-immigrants interviewed
   h. Total citizens declined
   i. Total permanent residents declined
   j. Total non-immigrants declined
   k. Total citizens non-selected
   l. Total permanent residents non-selected
   m. Total non-immigrants non-selected
   n. Individual recruitment reports of contact for each applicant including CVs, applications, citizenship and contact information. The report of contact must provide information explaining why the candidate was not qualified (if applicable) and whether the position was offered (and the result of the offer).

21. Local facility contact information
What are the steps to procuring a VA J-1 waiver?

1. Obtain a DOS J-1 waiver number (see Chapter __ for more information on this process).
2. The local VA facility Director forwards the fully-documented waiver application and the Network Review and Certification of Facility Waiver Request signed by the Clinical Manager to the Veterans Integrated Service Network (VISN) Director.
3. VISNs review waiver requests to ensure the waiver is justified and fully documented and the loss of the J-1’s services would necessitate discontinuance of a program.
4. The VISN then submits the request through the VA Health Resource Center (HRC) to the Workforce Management and Consulting Office (WMCO) in the VHA Central Office. The HRC performs an initial review to determine compliance with J-1 waiver requirements. The WMCO conducts a final review and then forwards on to the VA Under Secretary of Health to forward to DOS’ Waiver Review Office.

The cumbersome VA process which requires four separate approvals within the VA, can take many months to approve.

What is the role of an outside immigration lawyer in the VA J-1 waiver process?

Outside lawyers may assist in the preparation of a J-1 waiver application for a physician being offered employment by a VA facility. However, the VA bars facilities from signing a G-28 form so USCIS will not communicate with the attorney or copy the attorney on any correspondence. All correspondence would go to the VA facility which would then have to notify the attorney and the physician. Furthermore, the VA will not pay attorney fees for preparation of the H-1B petition. Because the Department of Labor forbids an employee from paying such fees, this effectively bars the physician from having legal representation during this phase of the waiver application process.

What is the VA’s policy regarding physicians that fail to fulfill their obligations?

If a physician doesn’t show up or leaves before three years of service is completed, the facility Director is required to notify USCIS and the Department of Labor regarding the withdrawal of VA sponsorship for the waiver.³

³ Under immigration law, the VA, acting as an employer, is required to notify USCIS that it is withdrawing its H-1B sponsorship. The agency may play an advisory role
When is the VA required to re-recruit for the position?

One of the least attractive requirements for J-1s considering VA waivers is a requirement that the position be re-advertised whenever an H-1B extension is requested as well as when permanent residency is sought. If qualified US applicants apply, the physician may be terminated.

Department of State IGA Waivers

The US Department of State not only issues waiver recommendations based on the requests of federal and state health agencies, it can also act on its own and serve as an interested government agency. There is little in the way of a formal application process except that the physician would apply for a waiver case number and then submit in writing the request for DOS to act as an interested government agency.

The agency doesn’t have defined rules on when it will serve as an IGA, but typical examples are for a J-2 when the J-1 and J-2 have divorced and for J-2 children who are over 21. In the case of a divorce, the State Department may request documentation that the divorce was not simply done for immigration purposes. The agency has also adjudicated waivers in instances where there is a substantial hardship to the J-1 applicant, but the applicant is ineligible for a hardship waiver because there are no qualifying American relatives.

Are there other federal agencies that can grant waiver recommendations to physicians?

Any federal agency can potentially grant waivers to physicians as long as the requirements noted at the beginning of this chapter are followed. Assuming the head of the agency or his or her designee signs the waiver request letter and assuming the waiver request is not based on working in an underserved area (or the agency has followed the extra rules applicable to such waivers), then a physician may seek a waiver with that agency’s support. There are a few agencies with J-1 programs that are rarely used by doctors, but might occasionally be available. They include the Department of Defense, the Department of Interior, NASA, the National Science Foundation and the Department of Energy. Given how rarely these waivers are used by doctors, this book doesn’t discuss these or other programs that may be available.

regarding any potential transfer of the waiver to another H-1B employer if USCIS requests its view regarding the transfer.