

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS 1992-99]

RIN 1115-AF47

Extending the Period of Duration of Status for Certain F and J Nonimmigrant Aliens

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule amends the Immigration and Naturalization Service (Service) regulations to provide that the Commissioner may publish a notice to extend the duration of status, under specified conditions, of certain F-1 and J-1 nonimmigrant aliens who may be affected adversely because the numerical limit (cap) on H-1B nonimmigrant aliens has been reached prior to the end of a given fiscal year. This rule is a necessary stop-gap measure because a large number of F-1 and J-1 nonimmigrant aliens seek a change of nonimmigrant status to that of H-1B after completion of their studies or their program. However, many of these aliens will be unable to change their nonimmigrant status for the remainder of a given fiscal year because of the cap on H-1B petitions. This rule will allow such aliens to avoid a lapse in their status because of a circumstance that is not under their control.

DATES: *Effective date:* This interim rule is effective June 15, 1999.

Comment date: Written comments must be submitted on or before August 16, 1999.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference the INS No. 1992-99 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: John W. Brown, Adjudications Officer, Benefits Division, Immigration and Naturalization Service, 425 I Street, NW, Room 3214, Washington, DC 20536, telephone (202) 353-8177.

SUPPLEMENTARY INFORMATION:**Who Is an F-1, J-1, and H-1B Nonimmigrant Alien?**

An F-1 nonimmigrant alien is an alien having a residence in a foreign country which he or she has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who enters the United States solely for the purpose of such a course of study.

A J-1 nonimmigrant alien is an alien having a residence in a foreign country which he or she has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Director of the United States Information Agency, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training.

An H-1B nonimmigrant is an alien employed in a specialty occupation or a fashion model of distinguished merit and ability. A specialty occupation is an occupation that requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the United States.

What Is the Purpose of This Interim Rule?

This interim rule grants authority to the Commissioner to extend the duration of status, for a limited period of time, for any F-1 and J-1 nonimmigrant alien who is the beneficiary of an H-1B petition when it is determined that the H-1B cap will likely be reached before the end of a fiscal year. (See notice published elsewhere in this issue of the **Federal Register**.)

Many F-1 and J-1 nonimmigrant aliens who complete their course of study or program seek a change of nonimmigrant status to that of an H-1B nonimmigrant. During the last 3 fiscal years, the H-1B cap has been reached before the end of the fiscal year, and aliens were statutorily ineligible to change their nonimmigrant status because H-1B numbers were not available. As a result, aliens whose F and J status expired before the end of the fiscal year have been required to depart the United States and wait for H-1B numbers to again become available at the start of the new fiscal year beginning October 1. This rule will allow these F-

1 and J-1 aliens to remain in the United States in lawful status until the start of the new fiscal year. However, these aliens are not permitted to engage in employment or other activities inconsistent with the terms and conditions of their F-1 and J-1 status without Service authorization until the date the Service adjudicates and approves their change of status application. In no event, can this date be earlier than October 1 of the new fiscal year.

Are There Any Conditions That an F-1 or J-1 Alien Must Meet To Extend the Period of Duration of Status?

In order for an F-1 or J-1 nonimmigrant to obtain an extension of the period of duration of status, the following conditions must be met:

(1) The alien's employer must have filed a timely request to change the alien's nonimmigrant status to that of an H-1B nonimmigrant on Form I-129, Petition for Nonimmigrant Worker, as the term timely filed is defined in 8 CFR 248.1(b);

(2) The cap on H-1B petitions prevents the Service from changing the alien's status to H-1B during the current fiscal year;

(3) The alien must have maintained the terms of his or her current admission to the United States in accordance with 8 CFR part 248; and

(4) In the case of a J-1 nonimmigrant, the alien is not subject to the 2-year foreign residence requirement.

How Does This Regulation Affect Duration of Status for Certain F-1 and J-1 Nonimmigrant Aliens?

Under existing regulations, an F-1 student is permitted to remain in the United States for a period of 60 days after completion of his or her course of studies or period of practical training. A J-1 nonimmigrant, on the other hand, is permitted to remain in the United States for a period of 30 days after completion of his or her program.

An F-1 or J-1 nonimmigrant alien whose duration of status is extended as provided in this rule is permitted to stay in the United States after completion of his or her course of study or program in a valid F-1 or J-1 status until the Service changes the alien's nonimmigrant status.

If it appears that the cap on H-1B nonimmigrant aliens will be reached in a given fiscal year, the Commissioner may extend the period of duration of status of certain F-1 and J-1 nonimmigrant aliens for such time as is necessary for the Service to act on the petition for a change of status.

When the Commissioner has extended the duration of status of F-1 and J-1 nonimmigrant aliens, the Service will publish a notice in the **Federal Register** (see notice published elsewhere in this issue of the **Federal Register**). The notice will provide the public with the date to which duration of status has been extended.

Does This Provision Apply to the Dependents of F-1 or J-1 Nonimmigrant Aliens?

Yes, this extension of duration of status will also apply to the dependents who are F-2 or J-2 nonimmigrant aliens.

What Is the Effect of Extending Duration of Status for F-1 or J-1 Nonimmigrant Aliens?

An alien whose duration of status has been extended under this rule may remain lawfully in the United States until H-1B visa numbers become available and the Service adjudicates the change of status application. These aliens are considered to be in a valid nonimmigrant status for all purposes under the Immigration and Nationality Act as long as they continue to comply with all other terms of their status.

May an F-1 or J-1 Nonimmigrant Alien Work Before the Validity Date of the H-1B Petition?

An F or J alien whose duration of status is extended under this provision may not work during this period of time.

Good Cause Exception

This interim rule is effective on the date of publication in the **Federal Register**. The Service invites post-promulgation comments and will address any such comments in a final rule. For the following reasons, the Service finds that good cause exists for adopting this rule without the prior notice and comment period ordinarily required by 5 U.S.C. 553. The purpose of this rule is to grant the Commissioner the authority to extend the duration of status for certain F and J nonimmigrant aliens if it appears that the H-1B cap will be reached in a fiscal year. This will allow these aliens to remain in the United States in a valid nonimmigrant status until H-1B numbers become available and such time as the Service adjudicates the change of status application. Since the H-1B cap will be reached before the end of the current fiscal year, and the normal duration of status of a great many F and J nonimmigrants who have applied for a change of nonimmigrant status will expire prior to the beginning of the next

fiscal year, sufficient time does not exist for publication of a proposed rule with notice and comment.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with 5 U.S.C. 605(b), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant economic impact on a substantial number of small entities. The aliens affected by this regulation are not small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget (OMB) for review.

Executive Order 12612

The regulation adopted herein will not have substantial direct effects on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of the Federalism Assessment.

Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of E.O. 12988.

List of Subjects in 8 CFR Part 214

Administrative practice and procedures, Aliens, Employment, Reporting and Recordkeeping requirements.

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

2. Section 214.2 is amended by:

- a. Revising paragraph (f)(5)(i);
- b. Adding paragraph (f)(5)(vi);
- c. Revising paragraph (j)(1)(ii); and
- d. Adding paragraph (j)(1)(vi) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(f) * * *

(5) * * *

(i) *General.* Duration of status is defined as the time during which an F-1 student is pursuing a full course of studies at an educational institution approved by the Service for attendance by foreign students, or engaging in authorized practical training following completion of studies, plus 60 days to prepare for departure from the United States. The student is considered to be maintaining status if he or she is making normal progress toward completing a course of studies. Duration of status also includes the period designated by the Commissioner as provided in paragraph (f)(5)(vi) of this section.

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(vi) *Extension of duration of status.* The Commissioner may, by notice in the **Federal Register**, at any time she determines that the H-1B numerical limitation as described in section 214(g)(1)(A) of the Act will likely be reached prior to the end of a current fiscal year, extend for such a period of time as the Commissioner deems necessary to complete the adjudication of the H-1B application, the duration of status of any F-1 student on behalf of whom an employer has timely filed an application for change of status to H-1B. The alien, according to 8 CFR part 248, must not have violated the terms of his or her nonimmigrant stay in order to

obtain this extension of stay. An F-1 student whose duration of status has been so extended shall be considered to be maintaining lawful nonimmigrant status for all purposes under the Act, provided that the alien does not violate the terms and conditions of his or her F nonimmigrant stay. An extension made under this paragraph applies to the F-2 dependent aliens.

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(j) * * *

(1) * * *

(ii) *Admission.* The initial admission of an exchange alien, spouse, and children may not exceed the period specified on Form IAP-66, plus a period of 30 days for the purpose of travel or for the period designated by the Commissioner as provided in paragraph (j)(1)(vi) of this section. Regulations of the United States Information Agency

published at 22 CFR 514.23 give general limitations on the length of stay of the various classes of exchange visitors. A spouse or child (J-2) may not be admitted for longer than the principal exchange alien (J-1).

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(vi) *Extension of duration of status.* The Commissioner may, by notice in the **Federal Register**, at any time she determines that the H-1B numerical limitation as described in section 214(g)(1)(A) of the Act will likely be reached prior to the end of a current fiscal year, extend for such a period of time as the Commissioner deems necessary to complete the adjudication of the H-1B application, the duration of status of any J-1 alien on behalf of whom an employer has timely filed an application for change of status to H-1B. The alien, in accordance with 8 CFR

part 248, must not have violated the terms of his or her nonimmigrant stay and is not subject to the 2-year foreign residence requirement at 212(e) of the Act. any J-1 student whose duration of status has been extended shall be considered to be maintaining lawful nonimmigrant status for all purposes under the Act, provided that the alien does not violate the terms and conditions of his or her J nonimmigrant stay. An extension made under this paragraph also applies to the J-2 dependent aliens.

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Dated: June 4, 1999.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

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