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The State Department has published a revised Exchange Visitor Skills List in the April 30 issue of the Federal Register. The Skills List serves as the basis for making some J-1 visa holders subject to a two year home country residence requirement. J-1 Exchange Visitors whose skills or fields of specialized knowledge appear on the Skills List will not be eligible to change to H or L temporary visa status or permanent residence until the two year foreign residence requirement is satisfied or waived. The new list takes effect on June 28.

## State Department Publishes New Exchange Visitor Skills List

By Debra Baker, Jorge R. Lopez, Ian R. MacDonald and David C. Whitlock

On April 30, the Department of State published a new Exchange Visitor Skills List in the Federal Register. The new Skills List will be effective on June 28, 2009. Foreign nationals who obtain J-1 (Exchange Visitor) status on or after that date may be impacted.

The Exchange Visitor program was created by the Fulbright Hays Act in 1961 as a means of fostering international educational and cultural exchange. To that end, certain Exchange Visitors are subject to a statutory requirement that they return to their native country for at least two full years before being eligible for H or L nonimmigrant status or permanent residence. This rule, commonly known as the “Two Year Home Country Residence” rule, applies in four circumstances: (1) the Exchange Visitor’s stay in the U.S. is funded in whole or in part by the native country; (2) the Exchange Visitor’s stay in the U.S. is funded in whole or in part by a U.S. government entity; (3) the Exchange Visitor is coming to the U.S. to obtain graduate medical education; or (4) the Exchange Visitor is engaged in one or more of the skills or fields of specialized knowledge listed on the Exchange Visitor Skills List. As a result, the Skills List is very important in determining whether or not an Exchange Visitor will be allowed to stay in the United States upon completion of the J-1 program.

The State Department develops the Skills List by formulating a comprehensive, master list of skills and fields of knowledge. This list is then forwarded to every country around the globe so that each country can indicate skills or fields where native personnel are needed or required. The Skills List was first published in 1972, and was revised only two times previously, in 1984 and 1997. Exchange Visitors who enter the U.S. in, or acquire, J-1 status prior to June 28, 2009 will be subject to the 1997 Skills List. Those who enter on or after June 28 will be subject to the new Skills List.

There are numerous kinds of exchange visitor programs, including academic and vocational programs. There are separate J-1 categories for students, research scholars, distinguished lecturers, visiting professors, practical trainees, interns, au pairs, and summer work/travel participants. If an individual Exchange Visitor is subject to the Two

Year Home Country Residence requirement, this is normally reflected on the individual's J-1 visa stamp and Arrival/Departure (I-94) card.

Employers seeking to sponsor J-1 foreign nationals for H-1 status need to know whether or not the individual's skill or field of knowledge is listed on the Skills List, as that may render the individual ineligible for H-1 status or permanent residence. With sufficient planning in advance, it is often possible to obtain a waiver of the Two Year Home Country Residence rule. Waivers can be granted upon the request of an interested U.S. government agency, a showing of extraordinary hardship, a showing of likely persecution in the home country, or the home country government's confirmation that it has no objection to the granting of a waiver. This last waiver, known as the "No Objection" waiver, is the most common and easiest to obtain.

Employers with questions about the Exchange Visitor Skills List or its impact upon H-1 eligibility are welcome to contact experienced legal counsel.

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