

**Department of State Health Services
Council Agenda Memo for State Health Services Council
July 9, 2008**

Agenda Item Title: Repeal of rules and new rules concerning the recruitment of physicians to underserved areas

Agenda Number: 3g

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background: The Texas Conrad/State 30 J-1 visa waiver program is located in the Office of Title V and Family Health in the Community and Family Health Services Division. The purpose of the program is to recruit physicians to underserved areas of the state by making a recommendation for the waiver of the two-year home residence requirement for foreign physicians who trained in the U.S. on a J-1 Exchange Visitor visa. The waiver recommendation comes with a three-year service obligation for the physician to practice in an underserved area. The program is authorized by the federal government to make 30 waiver recommendations per year. The budget and source of funding for the program is a public health service fee.

Summary:

The Texas Conrad/State 30 J-1 visa waiver program rules concern the establishment of priorities for waiver recommendations, and also affect the public health service fee that is charged to applicants to the program. The repeals and new rules are necessary to avoid any possible conflict between the rules and federal law.

These proposed repeals and new rules to 25 TAC Chapter 13, Subchapter A, change the rule language to eliminate rules that are addressed in federal legislation, rule or policy, and add language concerning the annual assessment of the public health service fee.

There are two expected outcomes: (1) Texas Conrad 30 Program rules will be consistent with the federal law that governs the program; and (2) additional monies will be available to fund program administration.

Summary of Input from Stakeholder Groups:

The following stakeholders were requested to review the proposed rule text and make comments:

- The Office of Rural Community Affairs
- Texas Association of Community Health Centers
- Texas Medical Association
- Texas Organization of Rural and Community Hospitals
- Texas Association of Rural Health Clinics
- Judith Cooper, immigration attorney practicing in Houston, Texas
- Robert Aronson, immigration attorney practicing outside of Texas

Stakeholders were contacted by e-mail on Monday, April 28, 2008, and informed of the upcoming rule revision. The e-mail directed them to the Texas Primary Care Office website, where a copy of the proposed rules and the process for submitting comments was posted. Any stakeholder or member of the public could provide input via this mechanism. No stakeholder input was received by the deadline, Monday, May 5, 2008.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item #3g

Approved by Assistant Commissioner/Director: Evelyn Delgado **Date:** 5/28/08

Presenter: Connie Berry **Program:** Texas Primary Care Office **Phone No.:** 512/458-7111, ext. 2172

Approved by CCEA: Rosamaria Murillo **Date:** May 27, 2008

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 13. Health Planning and Resource Development
Subchapter A. Recruitment of Physicians to Underserved Areas [**Waiver of Visa Recommendation for Physicians**]
Repeal §§13.1 - 13.8
New §§13.1 - 13.3

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission on behalf of the Department of State Health Services (department) proposes the repeal of §§13.1 - 13.8, and new §§13.1 - 13.3, concerning the recruitment of physicians to underserved areas.

BACKGROUND AND PURPOSE

Federal law (Title 8 United States Code §§1182 and 1184) allows waiver of normal immigration requirements for foreign physicians who agree to provide certain specified types of medical services in this country. The Immigration and Naturalization Services provide these waivers based upon the recommendation of state health departments. This is called the "Conrad 30" program after the original name of the sponsor of the federal legislation and the number of exemptions provided to each state. Corresponding state law (Health and Safety Code, §12.0127) allows the department to implement the Texas Conrad 30 program in Texas. The purpose of the program is to recruit physicians to underserved areas of the state by making a recommendation for the waiver of the two-year home residence requirement for foreign physicians who trained in the United States on a J-1 Exchange Visitor visa. The waiver recommendation comes with a three-year service obligation for the physician to practice in an underserved area. The program is authorized by the federal government to make 30 waiver recommendations per year.

The repeal and new rules are necessary to avoid any possible conflict between the rule and 8 U.S. Code §1184. Changes in federal law now allow state Conrad 30 programs to recommend waivers for physicians in areas that were previously ineligible. The new rules allow the program the flexibility to make priorities for waiver recommendations on an annual basis that will be congruous with current and possible future changes in the federal law and policy. The new rules will also allow the program to increase the public health service fee as the cost of administering the program increases.

Government Code, §2001.039, requires that each state agency review and consider for re-adoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 13.1 - 13.8 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed. However, the rules are being repealed and proposed as new rules.

SECTION-BY-SECTION SUMMARY

The repeal of §§13.1 - 13.8 eliminates the definition of terms, various rules in regard to employers and employment contracts, and verification of program expectations. New §§13.1 - 13.3 provide flexibility for the department to set priorities for waiver recommendations on an annual basis; assess the public health service fee as the cost of administering the program increases; and set policy on an annual basis according to state need and potential change in federal law. New §13.1 sets out the criteria the department will follow in setting these priorities.

FISCAL NOTE

Connie Berry, Manager, Primary Care Office, has determined that for each year of the first five years the sections are in effect, there will be fiscal implications to the state as a result of enforcing or administering the sections as proposed. The effect on state government will be an increase in revenue to the state of \$15,000 the first year and between \$15,000 and \$90,000 each year for years two through five due to the range and possible increase in fees. Implementation of the proposed sections will not result in any fiscal implications for local governments.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Berry has determined that there may be an impact on small businesses and micro-businesses. The department currently receives more than 30 applications each year under this program. All waiver applications are for physicians and the current fee is \$2000. Applications not forwarded on to the federal government for review are returned along with the full fee. The proposed amendments permit the program to raise the fee to \$2500-\$5000 (\$500-\$3000 increase per application) depending on the annual costs of operating the program. The fee may be paid by the physician, employer or the immigration law firm so it is difficult to ascertain how many applicants fall into each category. Program review of past applicants indicates that 93% of application employers are large health care organizations that hope to employ the physicians accepted under the program. Per Government Code §2006.001, these organizations are too large to be small businesses (fewer than 100 employees or less than \$6 million in annual gross receipts) or micro-businesses (under 20 employees). The remaining 7% of applicants are typically individual physicians, who would qualify as micro-businesses. Per the Program review, none of the applicants would qualify as small businesses, although if a small business applied, the impact would be similar to that of a micro-business. The calculation of economic impact is that this will result in approximately two micro-businesses annually paying an additional \$500 to \$3000 per application.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

The department has considered methods of reducing this impact. The option of not charging a fee was considered and rejected because the legislature has indicated their expectation that the program continue. The legislature did not appropriate any money for the operation of the program thus the department assumes it is intended to be self-supporting. The actual impact will be controlled and mitigated by how well the department can control its cost for the operation of the program because the fees will be based upon these costs. Other changes in the rule enlarge the pool of potential applicants thus potentially achieving a better economy of scale in the operation of the program. There will be no impact on local employment.

PUBLIC BENEFIT

Ms. Berry has been determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated as a result of enforcing or administering the sections is recruitment of physicians to a wider range of eligible locations, and continued fee revenue necessary for this program to remain self-sufficient.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Connie Berry, Primary Care Office, Mail Code: 1937, Community and Family Health Services Division, Department of State Health Services, P.O. Box 149347, Austin, Texas 78714-9347, (512) 458-7518 or by email to Connie.Berry@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed repeal and new rules are authorized by Health and Safety Code, §12.0127, which requires the department to charge fees for a favorable recommendation by the Conrad 30 program; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the

department and for the administration of Health and Safety Code, Chapter 1001. Review of the rules implements Government Code, §2001.039.

The proposed repeal and new rules affect the Health and Safety Code, Chapters 12, and 1001; and Government Code, Chapter 531.

Sections for repeal.

§13.1. Definition of Terms.

§13.2. J-1 Visa Waiver Rules.

§13.3. Employer Rules.

§13.4. Site Requirements.

§13.5. Contract.

§13.6. Verification.

§13.7. Application Fee.

§13.8. Other Federal or State Requirements.

Legend: (Proposed New Rule(s))
Regular Print = Proposed new language

§13.1. Priorities for Waiver Recommendations.

(a) It is the intent of the Legislature that applications submitted under this program be prioritized by the Department of State Health Services (department) to the areas of greatest need and that the department consider relative specialty need as well, adhering to federal and state legislation (Health and Safety Code, §12.0127), therefore the Texas Conrad 30 Program will identify priorities for waiver recommendations for the coming year, and publish them on the Texas Conrad 30 website at <http://www.dshs.state.tx.us/chpr/j1info.shtm>, prior to May 1 of each year.

(b) The following criteria will be applied in prioritizing applications for waiver recommendations:

(1) regular applications may be considered and approved before some or all flexible applications are considered;

(2) some flexible applications may be approved based on considerations of the date the application is received by the department;

(3) flexible applications may be considered only if there are less than 30 regular applications;

(4) the number of flexible applications approved will be limited to no more than the number allowed by federal or state law but may be less than the number allowed by federal law;

(5) the needs of medically underserved areas will always be of importance in establishing the department's priorities; and

(6) the department will operate the program to conform to federal law as it may be amended.

§13.2. Application Fee.

The department shall collect a fee of \$2500 to \$5000 from each applicant who is granted a waiver of the two-year home residency requirement from the Bureau of Citizenship and Immigration Services. The Texas Conrad 30 Program has the option to assess the fee each year based on the cost of operating the program. The amount of the application fee will be identified on the Texas Conrad 30 Program website at <http://www.dshs.state.tx.us/chpr/j1info.shtm> by May 1 of each year. The fee shall be submitted to the department at the time of application. Part of the fees may be returned under the following circumstances:

(1) if the department recommends the waiver to the US Department of State, none of the application fee will be returned to the applicant;

(2) if the applicant withdraws the application before a recommendation is submitted by the department, 50% of the application fee will be returned to the applicant; or

(3) if at the time the application is received by the department, all 30 slots have been used for the fiscal year, 100% of the application fee will be returned to the applicant.

§13.3. Other Federal or State Requirements.

All waiver request applications must meet federal laws Title 8 United States Code §1184, and relevant provisions in Health and Safety Code, Chapter 12.

§13.1 Definition of Terms

The following words and terms when used in these sections, shall have the following meaning.

- (1) ~~Employer—A director of a health care facility where the physician will practice.~~
- (2) ~~HPSA—Health Professional Shortage Area.~~
- (3) ~~J-1 Visa Waiver—Removal of the requirement that a J-1 visa holder must return to their country of origin for two years at the end of his/her graduate medical training. The waiver allows the J-1 visa holder to remain in the United States if they agree to practice in an underserved area.~~
- (4) ~~MUA—Medically Underserved Area.~~
- (5) ~~Operational—Providing health care services to patients.~~
- (6) ~~Provider—A physician requesting a J-1 visa waiver.~~

§13.2 J-1 Visa Waiver Rules

- (a) ~~The Department of State Health Services (department) will consider a recommendation for a J-1 visa waiver in the area or areas designated by the Secretary of Health and Human Services as a HPSA or a MUA and meet shortage area requirements as identified by the program annually.~~
- (b) ~~Applications that meet federal and state requirements will be considered for recommendation on a first-come-first-served basis. The submission of a complete waiver application to the department does not ensure that the department will recommend a waiver to the United States Department of State and the Bureau of Citizenship and Immigration Services.~~
- (c) ~~The employer or the employer's representative must submit the J-1 waiver request application to the department.~~

§13.3 Employer Rules

- (a) ~~The department will not accept requests from employers who are physicians currently fulfilling their waiver obligation.~~
- (b) ~~The department will not recommend a waiver for a relative of the employer.~~

§13.4 Site Requirements

- (a) ~~The health care facility named as the site of service in the application must be operational at the time of application.~~

~~(b) A waiver request must include up to 6 letters of support from community leaders, local physicians, hospital administrators, and/or the local health department, where applicable.~~

§13.5 Contract

~~(a) The contract must include the wage to be paid over the contract period. Documentation that the wage meets the prevailing wage for the specialty for the area of practice must be included with the application packet. An example of a "prevailing wage" can be found at the United States Department of Labor web site at: <http://www.workforcesecurity.doleta.gov/foreign/wages.asp>.~~

~~(b) The contract must state that the employer and the provider agree that termination can be only for cause and not by mutual agreement.~~

~~(c) The contract must contain the following information:~~

- ~~(1) list of benefits, insurance to be provided to the provider;~~
- ~~(2) field of practice of the provider;~~
- ~~(3) practice site name, address and telephone number of the health care facility where the provider will work;~~
- ~~(4) scheduled work hours;~~
- ~~(5) amount of leave; and~~
- ~~(6) statements that amendments shall adhere to state and federal J-1 visa waiver requirements.~~

§13.6 Verification

~~(a) The Department of State and the Bureau of Citizenship and Immigration Services shall be notified if the physician fails to begin practicing within 90 days of receiving waiver, or is found to not be practicing 40 hours at the site approved for waiver.~~

~~(b) The employer and/or the J-1 physician must notify the department in writing within 10 days if the contract is breached or terminated.~~

~~(c) The department will verify the following:~~

- ~~(1) compliance with subsection (a) of this section; and~~
- ~~(2) other information that supports the program goal of improving access to health care in underserved areas.~~

§13.7 Application Fee

The department shall collect a fee of \$2000 from each applicant who is granted a waiver of the two-year home residency requirement from the Bureau of Citizenship and Immigration Services. The fee shall be submitted to the department at the time of application. Part of the fees may be returned under the following circumstances:

(1) if the department recommends the waiver, and the Bureau of Citizenship and Immigration Services denies it, \$1500 will be returned to the applicant; or

(2) if the applicant withdraws the application before a recommendation is submitted by the department, \$1700 will be returned to the applicant; or

(3) if at the time the application is received by the department, all 30 slots have been used for the fiscal year, \$2000 will be returned to the applicant.

§13.8 Other Federal or State Requirements

All waiver request applications must meet federal laws 8 USC §1182 and §1184.