seek classification as J-1 nonimmigrant aliens. This opinion was based on the Service's examination of the relevant legislation, including the Health

Professionals Education Assistance Act of 1976 (HPEAA), Pub. L. 94-484 and MTINA. The Service took note that the HPEAA established the J-1 classification as the sole vehicle, with certain limited exceptions, for graduates of medical schools to obtain graduate medical education or training in the United States, including medical residencies. See sections 101(a)(15)(J) and 212(j)(1) of the Act; see also pre-IMMACT (Immigration and Nationality Act of 1990) section 101(a)(15)(H)(i) of the Act. The Service further noted that, by amending sections 101(a)(15)(H)(i)(b) and 212(j)(2) of the Act, MTINA provided an avenue for foreign medical graduates to enter the United States in H–1B status to perform services in the medical professions. The Service opined, however, that MTINA did not alter the HPEAA's requirement, as set forth in section 212(j)(1) of the Act, that a graduate of a foreign medical school seeking education or training do so only as a J-1 nonimmigrant alien. In support of this position, the Service expressed its belief that Congress would not have placed in juxtaposition two such clearly different statutory provisions as section 212(j)(1) and section 212(j)(2) of the Act had it intended for the H-1B and J-1 classifications to overlap with respect to foreign medical graduates seeking graduate medical education or training.

After a careful review of the comments received in response to the proposed rule and a further review of the relevant legislative history, the Service has opted to withdraw this portion of the proposed rule. The Service is now of the opinion that the statute can be reasonably interpreted either to provide that as proposed by the Service, the H-1B classification is not available for graduates of foreign medical schools to take medical residencies or, as is the current practice, the H-1B classification is available for graduates of foreign medical schools for medical residencies.

The Service has elected to adopt the second interpretation and continue its current practice of allowing graduates of foreign medical schools to take residencies under the H-1B classification. In so doing, the Service notes first that nothing in the statute or the relevant legislative history specifically precludes H-1B classification for aliens seeking graduate medical training, and second, under the language of section 214(i) of the Act, a graduate medical education program, such as a residency, could in some cases

meet the definition of "specialty occupation" for H–1B purposes. See also 8 CFR 214.2(h)(4)(i). In addition, we note, as did some commenters, that a medical residency can reasonably be considered to be either a training program or a specialty occupation. This position is consistent with that taken by the Service in Matter of Bronx Municipal Hospital Center, 12 I&N Dec. 768 (1968), where the Regional Commissioner held that a medical residency is primarily clinical in nature and, therefore, does not qualify as an H-3 training program.

In deciding to withdraw this portion of the rule, the Service also found persuasive the comments submitted by a number of large urban medical facilities indicating that they would be unable to recruit qualified individuals to pursue residencies under the J-1 program. These commenters indicated that they have relied heavily on the use of the H-1B program to staff their residency programs and that the requirement that these aliens use the J-1 program would result in a curtailment of medical services which could otherwise be provided to the surrounding community.

Finally, the Service was also impressed by the sheer number of comments received in opposition to the rule. While three major organizations involved in the medical health field supported the Service's proposed rule, over 300 other commenters expressed the opinion that graduates of foreign medical schools should be permitted to pursue medical residencies as H-1B nonimmigrant aliens. The three commenters based their opinion on the belief that medical residencies should be characterized as training programs as opposed to temporary employment as a specialty occupation. However, as indicated above, the Service is of the opinion that a medical residency can be considered either a training program or a specialty occupation. See Bronx Municipal Hospital Center, supra.

As a result of the Service's withdrawal of this portion of the proposed rule, graduates of foreign medical schools will continue to be permitted to pursue a medical residency under the H-1B classification provided, of course, that all regulatory and statutory requirements for the classification are met. In addition, graduates of foreign medical schools will also continue to be eligible to pursue medical residencies under the J-1 nonimmigrant classification.

Prospective petitioners for H-1B nonimmigrant aliens seeking to pursue medical residencies should be aware of the obligations which are assumed

when an H-1B petition is filed. These obligations include both the requirement that the prospective employer pay the alien's return transportation if the alien is dismissed before the expiration of the validity of the petition and compliance with section 212(n) of the Act.

This rule will have no adverse effect on family well-being.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (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. This regulation merely modifies certain filing procedures for H petitions.

Executive Order 12866

This rule is not 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, and the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 12612

The regulation proposed 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 a Federalism Assessment.

List of Subjects in 8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Organization and functions (Government agencies).

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 (h)(2)(ii); and by
- b. Revising paragraph (h)(13)(iv), to read as follows: