

H-2B Nonagricultural Temporary Worker Final Rule

Department of Homeland Security
U.S. Citizenship and Immigration Services



U.S. Citizenship
and Immigration
Services

Notice of Proposed Rulemaking

- Published on August 20, 2008 (73 FR 49109)
- Public comment period closed on September 19, 2008
- 119 comments received



Final Rule

- Federal Register publication date: December 19, 2008
- Effective date: January 18, 2009



Unnamed beneficiaries

- Beneficiaries outside the U.S. do not have to be named
- Beneficiaries in the U.S. (applying for a change of status or an extension of stay) must be named
- USCIS reserves the authority to require the petitioner to name beneficiaries where the name is needed to establish eligibility for H-2B status
- Exception: will be explained in the eligible countries provision



Post H-2B waiting period

- H-2B worker's stay: Limited by the term of an approved petition not to exceed the period of approved labor certification (plus 10 days)
- H-2B's maximum period of stay: Up to 3 years, including extensions
- An H-2B worker who has reached the 3-year maximum period of stay: Must wait outside the United States for 3 months before seeking extension, change of status, or admission under H or L status



Eligible countries

- DHS will designate, with the concurrence of the Secretary of State, countries whose nationals are eligible to participate in the H-2B program.
- DHS expects to publish the list of eligible countries each year in a notice in the Federal Register.
- Designation of countries will be valid for one year from publication.
- All H-2B petitions must state the nationality of all beneficiaries.
- All H-2B petitions on behalf of workers who are not from a country that has been designated as an eligible country must name all the workers in the petition and meet the additional requirements.
- H-2B petitions for workers from designated participating countries and non-designated countries should be filed separately.



Additional requirements for beneficiaries who are not from a country on the list of eligible countries

- Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers from a country currently on the list;
- Evidence that the beneficiary has been admitted to the United States previously in the H-2B status and has complied with the terms of the H-2B status;
- Consideration of the potential for abuse, fraud, or other harm to the integrity of the H-2B program through the potential admission of a beneficiary from a country not currently on the list; and
- Consideration of such other factors as may serve the U.S. interest



Consideration of denied labor certification / lack of approved labor certification

- All H-2B petitions must be accompanied by an approved labor certification



Employment start date

- Petitioners are prohibited from requesting an employment start date on the Form I-129 that is different from the date of need listed on the approved labor certification
- Beginning with FY 2010 filing
- Exception: Petitioners may request a different start date when filing an amended petition to substitute beneficiaries who were previously approved for consular processing but not admitted with aliens who are currently in the US (the period of employment must be within the same half of the fiscal year as the original petition)



Petition filing period

- An H-2B petition may not be filed more than 120 days before the date of the actual need for the H-2B worker's labor/services identified on the labor certification



Payment of fees by beneficiaries to obtain H-2B employment

An H-2B petition will be denied or revoked if USCIS determines that:

- the petitioner has collected or entered into an agreement to collect a fee from the beneficiary as a condition of the beneficiary obtaining the H-2B employment, or
- the petitioner knows or reasonably should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition or requirement of obtaining an H-2B job offer



Payment of fees by beneficiaries to obtain H-2B employment

- Eligibility requirement questions will be included on the “Petition for a Nonimmigrant Worker,” Form I-129
- Prohibited fees do not include:
 - the lower of the fair market value of or actual costs for transportation to the United States, if permitted by applicable law
 - payment of any government-specified fees such as fees required by a foreign government for issuance of passports and by the U.S. Department of State for the issuance of visas



Payment of fees by beneficiaries to obtain H-2B employment

A petition will not be denied or revoked if the petitioner demonstrates that:

- Prior to the filing of the petition, the alien beneficiary has been reimbursed for the prohibited paid fees;
- Where the prohibited fees have not yet been paid, that the agreement to pay has been terminated; or
- Where the prohibition on collecting or agreeing to collect a fee is violated by a recruiter or agent after the filing of the petition without knowledge of the petitioner, the petitioner notifies USCIS about the prohibited payment or agreement to make such payments within 2 work days of learning about such prohibited payment or agreement



Notification to USCIS: Payment of fees by beneficiaries to obtain H-2B employment

- The USCIS receipt number of the H-2B petition;
- The petitioner's name, address, and telephone number;
- The employer's name, address, and telephone number, if different from that of the petitioner; and
- The name and address of the facilitator, recruiter, or placement service to which alien beneficiaries paid or agreed to pay the prohibited fees



Notification to USCIS: Payment of fees by beneficiaries to obtain H-2B employment

If the petition was approved by California Service Center,

- By mail: Must be postmarked before the end of the 2 work day reporting window

California Service Center

Attn: H2B Fee

P.O. Box 10695

Laguna Niguel, CA 92607-1095

- By email: CSC.H2BFee@dhs.gov



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Notification to USCIS: Payment of fees by beneficiaries to obtain H-2B employment

If the petition was approved by Vermont Service Center,

- By mail: Must be postmarked before the end of the 2 work day reporting window

Vermont Service Center

Attn: BCU ACD

75 Lower Welden St.

St. Albans, VT 05479

- By email: VSC.H2BPROPLACEMENT@dhs.gov



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Payment of fees by beneficiaries to obtain H-2B employment

- If a petition was denied or revoked within the previous year based on payment of prohibited fees by the worker, a petitioner must demonstrate that:
 - The petitioner reimbursed the alien beneficiary for such fees, or
 - The H-2B worker cannot be located despite the petitioner's reasonable efforts



Notification to USCIS: Employment-related

Petitioner must notify USCIS within 2 work days:

- Where an H-2B worker fails to report to work within 5 work days of the employment start date on the H-2B petition;
- Where the temporary labor or services for which H-2B workers were hired is completed more than 30 days earlier;
- Where the H-2B worker does not report for work for a period of 5 consecutive work days without the consent of the petitioner or is terminated prior to the completion of the temporary labor or services for which he/she was hired.

Petitioner must retain evidence of the notification for one year



Notification to USCIS: Employment-related

- The reason for the notification;
- The reason for late notification, if applicable;
- The USCIS receipt number of the approved H-2B petition;
- The petitioner's name, address, telephone number, and employer identification number (EIN);
- The employer's name, address, and telephone number, if it is different from that of the petitioner;
- The name of the H-2B worker in question;
- The date and place of birth of the H-2B worker in question; and
- The last known physical address and telephone number of the H-2B worker in question.



Work day

The period between the time on any particular day when such employee commences his or her principal activity and the time on that day at which he or she ceases such principal activity or activities



Notification to USCIS: Employment-related

If the petition was approved by California Service Center,

- By mail: Must be postmarked before the end of the 2 work day reporting window

California Service Center

Attn: Div X/BCU ACD

P.O. Box 30050

Laguna Niguel, CA 92607-3004

- By email: CSC-X.H-2BAbs@dhs.gov



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Notification to USCIS: Employment-related

If the petition was approved by Vermont Service Center,

- By mail: Must be postmarked before the end of the 2 work day reporting window

Vermont Service Center

Attn: BCU ACD

63 Lower Welden St.

St. Albans, VT 05479

- By email: VSC.H-2BABS@dhs.gov



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Temporary Worker Visa Exit Program

- Customs and Border Protection (CBP) is establishing a pilot exit program, which will commence on August 1, 2009
- An H-2B alien worker admitted through a port of entry participating in the pilot program must depart through a participating port of entry
- CBP has published a Notice in the Federal Register:
 - Designating San Luis, AZ, and Douglas, AZ, as ports of entry participating in the program; and
 - Establishing which biographical and biometric information must be submitted upon the worker's final departure.



Temporary need

- Generally, limited to one year or less
- Temporary services or labor may include a specific one-time event of up to three years



Interruption in accrual towards 3-year maximum period of stay

The following absence will be considered interruptive of accrual of time towards the 3-year limit

- If the accumulated stay is 18 months or less: 45 days
- If the accumulated stay is longer than 18 months: 2 months



Substitution

- Beneficiaries of H-2B petitions that are approved for consular processing who have not been admitted may be substituted with aliens who are currently in the United States
 - The employer must demonstrate that the total number of beneficiaries will not exceed the number of beneficiaries certified in the original labor certification
 - The employer is required to file an amended petition which must retain a period of employment within the same half of the fiscal year as the original petition
- Beneficiaries who were admitted may not be substituted without a new petition accompanied by a newly approved labor certification



Employer sanctions

- Delegate to the Department of Labor the statutory authority to impose certain administrative remedies and/or penalties where a substantial failure to meet any of the conditions of the H-2B petition or a willful misrepresentations of a material fact in such petition is found

