



# Questions & Answers

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## **USCIS FINALIZES CHANGES TO IMPROVE THE H-2A TEMPORARY AGRICULTURAL WORKER PROGRAM**

*Changes Will Assist Employers of Temporary Agricultural Workers*

U.S. Citizenship and Immigration Services (USCIS) announced today changes to the H-2A regulations that will streamline the hiring process of temporary and seasonal agricultural workers. This final rule will facilitate the H-2A process for employers by removing certain limitations and will further encourage lawful employment. These changes stem from the commitment made by President Bush's Administration in August 2007, after Congress failed to pass comprehensive immigration reform. This final rule supplements the extensive reforms of the H-2A program that are included in the Department of Labor's final rule, also being published today.

When U.S. employers have a shortage of available U.S. workers to fill temporary or seasonal agricultural jobs, they may file an H-2A petition with U.S. Citizenship and Immigration Services (USCIS) for permission to employ foreign workers to perform that work in the United States. Once the petition is approved, these workers, if they are eligible for admission, may enter the United States in H-2A nonimmigrant status.

### **Questions & Answers**

#### **Q: What is the H-2A classification?**

A: The H-2A program allows U.S. employers to bring foreign nationals to the United States to fill temporary agricultural jobs for which U.S. workers are not available. The H-2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States on a temporary basis. Employment of a seasonal nature is employment that is tied to a certain time of year by an event or pattern, such as a growing season, and requires labor levels far above those necessary for ongoing operations. Under the regulations being modified by this rule, employment is of a temporary nature if the employer's need for the worker will, except in extraordinary circumstances, last no longer than a year.

#### **Q: What is the process for obtaining H-2A status?**

A: Prospective employers of H-2A workers must first obtain certification from the U.S. Department of Labor (DOL) that (1) there are not sufficient U.S. workers who are able, willing, qualified, and available to do the work; and (2) the employment of H-2A aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers. H-2A workers can remain with an employer only for the period certified by DOL.

Once the employer has obtained an approved temporary labor certification application from DOL, the employer may file a Form I-129, "Petition for a Nonimmigrant Worker," with USCIS. Once the petition is approved, a worker may apply for an H-2A visa at a U.S. embassy or consulate abroad or, if the worker is already in lawful nonimmigrant status in the United States, apply for a change of nonimmigrant status to H-2A or an extension of H-2A nonimmigrant stay.

Such workers may extend their H-2A stay through DOL-certified work with another employer, but in no event may an H-2A worker reside in the U.S. for an uninterrupted period of more than three years in H-2A status.

**Q: What modifications are included in the final rule?**

A: The final rule will:

- Require petitioners to provide notification to USCIS in the following instances: (a) where an H-2A worker fails to report to work within five work days of the employment start date on the H-2A petition or within five work days of the start date established by the employer, whichever is later; (b) where the agricultural labor or services for which H-2A workers were hired is completed more than 30 days earlier than the end date stated on the H-2A petition; or (c) where the H-2A worker absconds from the worksite or is terminated prior to the completion of the agricultural labor or services for which he or she was hired;
- Retain the current liquidated damages provision and require petitioners who fail to comply with the notification requirements to pay liquidated damages in the amount of \$10;
- Extend the time period for petitioners to respond to a notice of noncompliance regarding the notification requirement.
- Allow petitioners to file a petition, using a copy of the previously approved temporary labor certification, to replace an H-2A worker who fails to report to work or who absconds;
- Remove the separate attestation requirement regarding the employer's knowledge of job recruitment services and fees contained in the proposed rule and amend the Form I-129, "Petition for Nonimmigrant Worker," to include the attestation provisions;
- Authorize the denial or revocation of H-2A petitions where the petitioner knows or should reasonably know that the H-2A worker has paid or agreed to pay certain prohibited fees as a condition of obtaining H-2A employment;
- Offer H-2A petitioners means to avoid denial or revocation of the H-2A petition based on a determination regarding certain prohibited fees;
- Require H-2A employers whose petitions have been denied or revoked based on the payment of certain prohibited fees to demonstrate, as a condition of approval of H-2A petitions filed within one year of the denial or revocation, that the H-2A workers have been reimbursed or the H-2A workers cannot be located despite the petitioner's reasonable efforts;
- Allow H-2A workers to legally remain in the United States for an additional 30-day period if a petition is revoked based on the revocation of temporary labor certification;
- Clarify that USCIS will deny H-2A nonimmigrant status based on a finding that the worker violated any condition of H-2A status within the past 5 years unless the violation occurred through no fault of the worker. The "no fault" clause relating to the worker's status violation was not included in the proposed rule;
- Relax the current limitations on the ability of U.S. employers to petition for multiple, unnamed H-2A agricultural workers. This provision is to allow H-2A petitions to include unnamed beneficiaries for those aliens who are outside the United States, regardless of the number of beneficiaries on the petition or whether the temporary labor certification named beneficiaries.  
Note: *Beneficiaries of an H-2A petition who are in the United States* (and who are applying for a

change of nonimmigrant status to H-2A or an extension of their H-2A stay) must be named in the petition;

- Eliminate the requirement that aliens petitioned for by a U.S. employer all be processed by the same embassy or consulate or, where a visa is not required, apply for admission at the same port of entry;
- Extend from 10 days to 30 days the amount of time an H-2A worker may remain in the United States after the end of employment;
- Reduce from 6 months to 3 months the amount of time an H-2A worker who has spent three years in the United States must reside and be physically present outside the United States before he or she is eligible to re-obtain H-2A status;
- Allow H-2A workers who are changing employers to begin work with the new H-2A petitioning employer upon the filing of a new H-2A petition, provided that the new employer is a registered user of USCIS' [E-Verify program](#);
- Eliminate the ability of employers to file an H-2A petition without an approved temporary labor certification;
- Permit the approval of H-2A petitions only for nationals of certain countries designated as important to the operation of the program and appearing on a list to be published annually in the *Federal Register*. The initial list of participating countries to be published simultaneously with this Final Rule includes Mexico, Jamaica, and 26 others. DHS may allow on a case-by-case basis a worker from a country not on the list to be eligible for the H-2A program if such participation is in the U.S. interest; and
- Establish a land-border exit system pilot program under which H-2A workers admitted through a port of entry participating in the program must also depart through a port of entry participating in the program and present, upon departure, designated biographical information, possibly including biometric identifiers.

**Q: How will the final rule increase protection of the rights of U.S. and alien workers?**

A: The rule will no longer allow U.S. employers to file an H-2A petition without an approved temporary labor certification from the Department of Labor.

As noted above, if an H-2A worker was charged a fee by the petitioner in connection with the employment, or if a labor recruiter, with the knowledge of the petitioner, demanded a payment from a worker as a condition of selection for the petitioner's H-2A workforce, the rule will provide USCIS the authority to deny or revoke the petition. As a precondition to approval of any subsequent H-2A petitions filed within one year of the denial or revocation, the employer would have to show that it reimbursed the alien for such fees or that the H-2A worker cannot be located despite the petitioner's reasonable efforts to do so.

**Q: How will the final rule strengthen enforcement and ensure the integrity of the H-2A program?**

A: The rule will allow H-2A workers who are changing employers to begin work with the new petitioning employer before the change of employer petition is approved by USCIS, but only if the new employer is a registered user of USCIS' [E-Verify program](#). This provision will create an incentive for agricultural employers to enroll in the E-Verify program, thereby reducing opportunities for aliens without

employment authorization to work in the agricultural sector and helping protect the integrity of the H-2A program.

The Final Rule will permit the approval of H-2A petitions only for nationals of certain countries designated as important to the operation of the program and appearing on a list to be published annually in the *Federal Register*. In adding new countries to the list in order to allow the participation of their nationals in the program, DHS will consider a variety of factors, including a country's cooperation with respect to the issuance of travel documents for individuals subject to a final order of removal.

The rule updates and strengthens the existing requirement that employers notify USCIS when an H-2A worker fails to show up for work on time, completes the work early, is terminated, or absconds from the worksite.

The rule will establish a land-border exit system pilot program under which H-2A workers admitted through a port of entry participating in the program must also depart through a port of entry participating in the program and present, upon departure, designated biographical information, possibly including biometric identifiers.

**Q: When will the final rule become effective?**

A: The rule will go into effect 30 days after it has been published in the Federal Register. Existing H-2A regulations and policies will remain in effect until the effective date of the final rule.

**Q: Where can I locate information regarding the current proposed rule addressing the H-2A program?**

A: The rule is available for viewing on the Federal Register and at [www.uscis.gov](http://www.uscis.gov).