9 FAM 41.53 NOTES

(CT:VISA-1884; 09-14-2012)
(Office of Origin: CA/VO/L/R)

9 FAM 41.53 N1 INTRODUCTION

(CT:VISA-1755; 10-26-2011)

a. The Immigration and Nationality Act of 1952 (Public Law 82-414 of June 27, 1952) created the H nonimmigrant visa classification at section 101(a)(15)(H) for temporary workers and trainees. Section 101(a)(15)(H) has been amended numerous times, most recently by The American Recovery and Reinvestment Act ("stimulus bill"), Public Law 111-5 of 2009, which contains the Employ American Workers Act of 2008 (EAWA), Public Law 110-343.

b. The American Recovery and Reinvestment Act (ARRA or the "Stimulus Bill"), Public Law 111-5 of 2009, contains the Employ American Workers Act of 2008 ("EAWA"). Section 1611 of ARRA places restrictions on hiring H-1B specialty occupation workers if the employer has received funds through the Troubled Asset Relief Program (TARP), Public Law 110-343, or under section 13 of the Federal Reserve Act (12 U.S.C. 342 et seq.). An employer that has been a recipient of such funding is subject to the requirements that apply to H-1B dependent employers.

   (1) EAWA affects the current LCA process administered by the Department of Labor (DOL) and the United States Citizenship and Immigration Services (USCIS) petition process for companies seeking H-1B workers. Employers subject to EAWA need to make statements regarding recruitment and hiring of U.S. workers. EAWA applies to:

      (a) Any "hire" taking place on or after February 17, 2009, and before February 17, 2011. EAWA defines "hire" as "to permit a new employee to commence a period of employment";

      (b) Any LCA or petition filed on or after February 17, 2009, involving any employment by a new employer, including concurrent employment and regardless of whether the beneficiary is already in H-1B status; and

      (c) New employment (i.e., hires) based on a petition approved before February 17, 2009, if the H-1B employee had not actually commenced employment before that date.

(2) EAWA does not apply to:

   (a) A petition to extend the H-1B status of a current employee with the

same employer; or

(b) A petition seeking to change the status of a current United States work-authorized employee to H-1B status with the same employer.

9 FAM 41.53 N2 SIGNIFICANCE OF APPROVED PETITION

9 FAM 41.53 N2.1 Department of Homeland Security (DHS) Responsible for Adjudicating H Petitions

(CT:VISA-1539; 09-24-2010)

By mandating a preliminary petition process, Congress placed responsibility and authority with Department of Homeland Security (DHS) to determine whether the alien meets the required qualifications for "H" status. Because DHS regulations governing adjudication of H petitions are complex, you should rely on the expertise of DHS in this area.

9 FAM 41.53 N2.2 Approved Petition Is Prima Facie Evidence of Entitlement to H Classification

(CT:VISA-1539; 09-24-2010)

a. An approved Form I-129, Petition for a Nonimmigrant Worker, or evidence that the H petition has been approved (an acceptable Form I-797, Notice of Action (see 9 FAM 41.53 N8.1 below), or telegraphic e-mail, or telephonic notification from Department of Homeland Security (DHS) or the Department is, in itself, to be considered by you as prima facie evidence that the requirements for H classification which are examined in the petition process have been met. You do not have the authority to question the approval of H petitions without specific evidence, unavailable to DHS at the time of petition approval, that the beneficiary may not be entitled to status. The large majority of approved H petitions are valid, and involve bona fide establishments, relationships, and individual qualifications that conform to the DHS regulations in effect at the time the H petition was filed.

b. On the other hand, the approval of a petition by DHS does not relieve the alien of the burden of establishing visa eligibility in the course of which questions may arise as to his or her eligibility to H classification. If information develops during the visa interview (e.g., evidence which was not available to DHS) that gives you reason to believe that the beneficiary may not be entitled to status, you may request any additional evidence which bears a reasonable relationship to this issue. Disagreement with DHS interpretation of the law or the facts, however, is not sufficient reason to ask DHS to reconsider its approval of the

petition.

c. The Department of Homeland Security (DHS) may deny or revoke an approved H-2A or H-2B petition if it is discovered that the petitioner collected or entered into an agreement to collect a fee from the beneficiary as a condition of the beneficiary obtaining employment or if the petitioner knows or reasonably should have known that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition or requirement of obtaining employment. 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 laws) or the payment of any government-specified fees such as fees required by a foreign government for the issuance of a passport and the visa issuance fees. If you suspect that the alien-beneficiary has paid a prohibited fee and he or she has not been reimbursed or the agreement to pay the fee has not been terminated, you should return the petition to DHS for reconsideration following current procedures outlined below in 9 FAM 41.53 N2.3 after consulting with your liaison in the Advisory Opinions Division of the Visa Office (CA/VO/L/A).

9 FAM 41.53 N2.3 Referring Approved H Petition to Department of Homeland Security (DHS) for Reconsideration

(CT:VISA-1539; 09-24-2010)

You should consider all approved H petitions in light of these Notes, process those applications that appear to be legitimate, identify those applications which require local investigation, and identify those petitions that require referral to the approving U.S. Citizenship and Immigration Services (USCIS) office for reconsideration. Refer petitions to USCIS for reconsideration sparingly, to avoid inconveniencing bona fide petitioners and beneficiaries and causing duplication of effort by USCIS. You must have specific evidence of a requirement for automatic revocation, misrepresentation in the petition process, lack of qualification on the part of the beneficiary, or of other previously unknown facts, which might alter USCIS's finding before requesting review of an approved Form I-129, Petition for a Nonimmigrant Worker. When seeking reconsideration, you must, under cover of Form DS-3099, NIV Petition Revocation Request Cover Sheet-Kentucky Consular Center, forward the petition, all pertinent documentation, and a written memorandum of the evidence supporting the request for reconsideration to the Kentucky Consular Center (KCC), which will then forward the request to the approving USCIS office. KCC will scan the request and all supporting documents into PIMS, will maintain a copy of the request and all supporting documentation, and will track all consular revocation requests. You are no longer required to maintain a copy of all documents, although scanning the revocation request and supporting documents into the case file is recommended.

9 FAM 41.53 N2.4 Effect of Revocation of Department of Labor (DOL) Labor Certifications for H-2A Beneficiaries

(CT:VISA-1539; 09-24-2010)

a. The approval of an employer's H-2A petition is immediately and automatically revoked if the Department of Labor (DOL) revokes the underlying labor certification upon which the petition is based.

b. The alien beneficiary's stay is authorized for a 30-day period following the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The alien will not accrue any period of unlawful presence under Section 212(A)(9) of the Act for that 30-day period.

c. The previously approved H-2A petition should be returned to the approving USCIS office through the Kentucky Consular Center (KCC) under cover of a Form DS-3099 with a written memorandum detailing the Department of Labor's action.

9 FAM 41.53 N3 ISSUE OF TEMPORARINESS OF STAY

9 FAM 41.53 N3.1 H-1B Nonimmigrants Excluded From 214(B) Intending Immigrant Presumption

(CT:VISA-1755; 10-26-2011)

H-1B aliens are specifically excluded from the intending immigrant presumption of section 214(b) of the INA and are not required to have a residence abroad which they have no intention of abandoning. In addition, INA 214(h) provides that the fact that an alien has sought permanent residence in the United States or will be seeking such status in the future does not preclude him or her from obtaining an H-1B nonimmigrant visa (NIV) or otherwise obtaining or maintaining that status. The alien may legitimately come to the United States as a nonimmigrant under the H-1B classification and depart voluntarily at the end of his or her authorized stay, and, at the same time, lawfully seek to become a permanent resident of the United States. Consequently, your evaluation of an applicant's eligibility for an H-1B visa must not focus on the issue of temporariness of stay or immigrant intent.

9 FAM 41.53 N3.2 H-2A, H-2B, and H-3 Nonimmigrants Subject to INA 214(b)

(CT:VISA-1539; 09-24-2010)

Under INA 214(b), an applicant classifiable as an H-2A, H-2B, or H-3 alien must have a residence abroad and no intent to abandon that residence.

9 FAM 41.53 N4 DESCRIPTION OF H CLASSIFICATIONS AND PREREQUISITES FOR FILING H PETITIONS

9 FAM 41.53 N4.1 General Licensure Requirement for H Nonimmigrant

(CT:VISA-1635; 03-31-2011)

The requirements for classification as an H-1B nonimmigrant professional may or may not include a license because States have different rules in this area. If a State permits aliens to enter the United States as a visitor to take a licensing exam, then USCIS will generally require a license before they will approve the H-1B petition. However, some States do not permit aliens to take licensing exams until they enter the United States in H-1B status and obtain a social security number. Therefore, a visa should not be denied based solely on the fact that the applicant does not already hold a license to practice in the United States.

9 FAM 41.53 N4.2 H-1B Nonimmigrants

(TL:VISA-206; 05-22-2000)

The H-1B classification applies to an alien who is coming temporarily to the United States to perform services in one of the categories described below.

9 FAM 41.53 N4.2-1 Aliens in Specialty Occupations

(TL:VISA-615; 04-28-2004)

a. Aliens who are qualified to perform services in a specialty occupation as described in INA 214(i)(1) and (2) (other than agricultural workers, or aliens qualifying under INA 101(a)(15)(O) or (P)) are classifiable as H-1B nonimmigrants. A specialty occupation requires the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) for entry into the occupation. An alien seeking to work in a specialty occupation must have completed such a degree or have experience in the specialty equivalent to the completion of the degree (as determined by Department of Homeland Security

(DHS)) and expertise in the specialty through progressively responsible positions relating to the specialty.

b. The criteria for qualifying as an H-1B physician are found at 9 FAM 41.53 N4.2-3 through 9 FAM 41.53 N4.2-6 below.

c. Prior to filing a petition with the DHS on behalf of an alien in a specialty occupation, the prospective employer must have filed a labor condition application (see 9 FAM 41.53 N6 below) with the Department of Labor (DOL) as specified in INA 212(n)(1). The filing of a labor condition application does not constitute a determination that the occupation in question is a specialty occupation. DHS is responsible for determining whether the application involves a specialty occupation and whether the particular alien for whom H-1B status is sought qualifies to perform services in that occupation.

9 FAM 41.53 N4.2-2 Certain Fashion Models

(TL:VISA-615; 04-28-2004)

a. H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. "Distinguished merit and ability" is defined by DHS as prominence; i.e., the attainment of a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading or well-known in the field. Such an alien must also be coming to the United States to perform services which require a fashion model of prominence.

b. The prospective employer of a fashion model of distinguished merit and ability must file a labor condition application (see 9 FAM 41.53 N6 below) with the Department of Labor (DOL) prior to filing a petition for the alien.

9 FAM 41.53 N4.2-3 Graduates of Foreign or U.S. Medical Schools

(CT:VISA-1539; 09-24-2010)

An alien graduate of a medical school, as defined in INA 101(a)(41), may enter the United States as an H-1B nonimmigrant to perform services as a member of the medical profession if he or she has a full and unrestricted license to practice medicine in a foreign state or if he or she has graduated from medical school in either the United States or in a foreign state. In addition, if he or she will provide direct patient care, he or she must generally have a valid medical license in the State of intended employment; however, USCIS may grant a limited-validity petition in order to allow the beneficiary time to obtain a professional license. An alien involved in a medical residency program, for example, may have an approved H-1B petition, even though he or she does not yet have a full and unrestricted U.S. medical license.

9 FAM 41.53 N4.2-4 Coming to Teach or Conduct Research

(TL:VISA-64; 08-07-1992)

An alien physician may be classified H-1B if he or she is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency. Such an alien may only engage in direct patient care that is incidental to his or her teaching and/or research.

9 FAM 41.53 N4.2-5 Alien Physicians Not Eligible for H-2B or H-3 Classification

(CT:VISA-1539; 09-24-2010)

Alien physicians who are coming to the United States to perform medical services or receive graduate medical training are statutorily ineligible to receive H-2B or H-3 status. Such aliens must qualify for H-1B, J-1, or immigrant visas.

9 FAM 41.53 N4.2-6 Aliens in Department of Defense Cooperative Research and Development or Co-production Projects

(CT:VISA-1755; 10-26-2011)

a. Aliens coming to the United States, pursuant to Section 222 of the Immigration Act of 1990, to participate in a cooperative research and development project or a co-production project under a government-to-government agreement administered by the Department of Defense (DOD) are classifiable as H-1B nonimmigrants. Such aliens must perform services of an exceptional nature requiring exceptional merit and ability. For purposes of this classification, services of an exceptional nature must be those which require a baccalaureate or higher degree (or its equivalent, as determined by Department of Homeland Security (DHS)) to perform the duties.

b. The requirement for filing a labor condition application with the Department of Labor (DOL) does not apply to petitions involving DOD cooperative research and development or co-production projects.

9 FAM 41.53 N4.3 H-2A Nonimmigrants

(CT:VISA-1812; 02-29-2012)

a. The H-2A classification applies to aliens who are coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.

b. The prospective employer must file a temporary agricultural labor certification with the Department of Labor (DOL) prior to filing a petition with DHS to classify an alien as an H-2A nonimmigrant.

c. The Department of Homeland Security (DHS) limits the approval of Form I-129, Petition for a Nonimmigrant Worker, filed on behalf of an H-2A worker to individuals who are nationals of a country designated as an H-2A program participating country, except as noted in 9 FAM 41.53 N7.1.

(1) Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Montenegro, Nauru, the Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Spain, Switzerland, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu.

(2) Countries were designated as H-2A program participating countries based on:

(a) The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal from the United States;

(b) The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;

(c) The number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and

(d) Such other factors as may serve U.S. interest.

(3) The designation of the above countries as H-2A program participating countries was effective January 19. 2010. Posts will be advised when there are changes to the list of participating countries as well as the effective dates for their formal participation in the program. Subsequent designations will be valid for one year from the date of publication of the list of eligible countries in the Federal Register. On a case-by-case basis, DHS may allow a worker from a country not on the participating country list to be eligible for the H-2A program if such participation is in the interest of the United States.

(4) Posts recommending that a country obtain, maintain, or lose status as an H-2A program participant should contact the responsible regional country desk officer and CA/VO/F/P.

9 FAM 41.53 N4.4 H-2B Nonimmigrants

(CT:VISA-1884; 09-14-2012)

a. The H-2B classification applies to aliens who are coming temporarily to the United States to perform nonagricultural services or labor of a temporary or

seasonal nature, other than graduates of medical schools coming to provide medical services, if qualified persons capable of performing such work cannot be found in the United States. DHS defines temporary services or labor as those that will be needed by the employer for a limited period of time; i.e., where the job will end in the near, definable future. Such a period of time generally will be limited to one year or less, but in the case of a one-time event could last up to three years. The employer's need for services or labor would be on a one-time basis, seasonal, for a peak load, or intermittent. He or she may not be classified as H-2A for purpose of occupying a permanent or indefinite position, except in the case of sheepherders.

b. This classification requires a temporary labor certification issued by the Department of Labor (DOL) or the Government of Guam, prior to the filing of a petition with DHS to confer H-2B status.

c. DHS limits the approval of Form I-129, Petition for a Nonimmigrant Worker, filed on behalf of an H-2B worker to individuals who are nationals of a country designated as an H-2B program participating country, except as noted in 9 FAM 41.53 N7.1.

(1) Argentina, Australia, Barbados, Belize, Brazil, Bulgaria, Canada, Chile, Costa Rica, Croatia, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Jamaica, Japan, Kiribati, Latvia, Lithuania, Macedonia, Mexico, Moldova, Montenegro, Nauru, the Netherlands, Nicaragua, New Zealand, Norway, Papua New Guinea, Peru, Philippines, Poland, Romania, Samoa, Serbia, Slovakia, Slovenia, Solomon Islands, South Africa, South Korea, Spain, Switzerland, Tonga, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, and Vanuatu.

(2) Countries were may be designated as H-2B program participating countries based on:

(a) The country's cooperation with respect to the issuance of travel documents to citizens, subjects, nationals, and residents of that country who are subject to a final order of removal from the United States;

(b) The number of final and unexecuted orders of removal against citizens, subjects, nationals and residents of that country;

(c) The number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and

(d) Such other factors as may serve U.S. interest.

(3) The designation of the above countries as H-2B program participating countries was effective January 18, 2011. Posts will be advised when there are changes to the list of participating countries as well as the effective dates for formal participation in the program. Subsequent designations will be valid for one year from the date of publication of the list of eligible

countries in the Federal Register. On a case-by-case basis, DHS may allow a worker from a country not on the participating country list to be eligible for the H-2B program if such participation is in the interest of the United States.

(4) Posts recommending that a country obtain, maintain, or lose status as an H-2B program participant should contact the responsible country desk officer from the regional bureau and CA/VO/F/P.

9 FAM 41.53 N4.5 H-3 Nonimmigrants

(CT:VISA-1539; 09-24-2010)

The H-3 classification applies to an alien who is a temporary worker who is invited by an individual or organization for purposes of receiving instruction and training other than graduate medical education or training. The training program must be one that is not designed primarily to provide productive employment. The trainee must have a foreign residence to which he or she must return. See 8 CFR 214.2(h)(7)(i).

9 FAM 41.53 N4.5-1 Alien Trainees

(CT:VISA-1539; 09-24-2010)

The regulatory criteria for an H-3 petition approval are that the proposed training is not available in the alien's home country, the beneficiary will not be placed in a position that is in the normal operation of the business in which U.S. citizen and legal permanent resident workers are normally employed, and that there will be no productive employment unless it is incidental and necessary to the training and pursuance of a career outside of the United States. See 8 CFR 214.2(h)(7)(ii)(A).

9 FAM 41.53 N4.5-2 Alien Participants in Special Education Exchange Program

(CT:VISA-1620; 01-20-2011)

A special education exchange program, described in section 223 of the Immigration Act of 1990, allows up to 50 aliens per year to come to the United States in H-3 visa status in order to receive practical training and experience in the education of children with physical, mental, or emotional disabilities. The length of stay in the United States is normally limited to 18 months. Alien participants in this program will either be nearing completion of a Bachelor's level degree or higher, or alternatively they will have extensive prior training or experience in this field. (See 8 CFR 214.2(h)(ii)(E)(2).)

9 FAM 41.53 N4.6 Evidence Submitted in Support of H Petitions

(CT:VISA-1539; 09-24-2010)

a. Evidence of employment/job training. For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met the certification's minimum employment and job training requirements, if any are prescribed, as of the date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of the past employer or employers' detailed statement(s) or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from persons who worked with the beneficiary that demonstrate the claimed employment or job training.

b. Evidence of education and other training. For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met all of the certification's post-secondary education and other formal training requirements, if any are prescribed in the labor certification application as of date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of documents, issued by the relevant institution(s) or organization(s) that show periods of attendance, majors and degrees or certificates accorded.

9 FAM 41.53 N5 NATURE OF POSITION OR TRAINING FOR H NONIMMIGRANTS

9 FAM 41.53 N5.1 H-1B Nonimmigrants

(CT:VISA-930; 02-28-2008)

An alien may be classified H-1B whether the position to be temporarily occupied is permanent or temporary in nature. For example, a foreign professor coming to fill a position on the faculty of a United States university could be classified H-1B.

9 FAM 41.53 N5.2 H-2A and H-2B Nonimmigrants

(CT:VISA-1884; 09-14-2012)

An H-2A or H-2B nonimmigrant must be coming to fill a position that is temporary in nature. He or she may not be classified H-2A or H-2B for the purpose of occupying a permanent or indefinite position, except in the case of sheepherders.

9 FAM 41.53 N5.3 H-3 Nonimmigrants

(CT:VISA-1539; 09-24-2010)

An alien may not be classified H-3 if his or her training program is primarily designed to provide productive employment, except in the case of a participant in a special education exchange program (see 9 FAM 41.53 N4.5-1 and 5-2).

9 FAM 41.53 N5.4 Using B-1 in Lieu of H Classification

(CT:VISA-1378; 11-24-2009)

For a discussion of whether or not a B-1 in lieu of H classification may be used, see 9 FAM 41.31 N11.

9 FAM 41.53 N6 LABOR CONDITION APPLICATION FOR H-1B NONIMMIGRANTS

(CT:VISA-1539; 09-24-2010)

a. Prior to filing a Form I-129, Petition for a Nonimmigrant Worker, with Department of Homeland Security (DHS) for an H-1B nonimmigrant (other than an alien in a Department of Defense (DOD) research and development or co-production project), the employer must file a labor condition application with the Department of Labor (DOL). The labor condition application must state that:

   (1) The employer is offering and will pay the alien the greater of the actual or prevailing wage paid to all other workers with similar experience and qualifications for the specified employment in the area of employment;

   (2) The employer will provide working conditions for the alien that will not adversely affect the working conditions of workers similarly employed; and

   (3) There is no current strike or lockout as a result of a labor dispute in the occupational classification at the place of employment.

b. Additional restrictions are placed on any employer that is either an "H-1B dependent employer," as defined in INA 212(n)(3) (see 9 FAM 41.53 N1, paragraph b), or an employer which has been the recipient of funds through the Troubled Asset Relief Program (TARP) or under section 13 of the Federal

Reserve Act. As a result of section 1611 of the Employ American Workers Act of 2008 (EAWA), Public Law 110-343, until February 17, 2011, the latter category of employer is subject to restrictions applicable to an "H-1B dependent employer." An "H-1B dependent employer" must make the following additional attestations to the U.S. Department of Labor (DOL) when filing a Labor Condition Application (LCA):

(1) It has taken good faith steps to recruit U.S. workers (defined as U.S. citizens or nationals, lawful permanent resident aliens, refugees, asylees, or other immigrants authorized to be employed in the United States (i.e., workers other than nonimmigrant aliens)) using industry-wide standards and offering compensation that is at least as great as those offered to the H-1B nonimmigrant;

(2) It has offered the job to any U.S. worker who applies and is equally or better qualified for the job that is intended for the H-1B nonimmigrant;

(3) It has not "displaced" any U.S. worker employed within the period beginning 90 days prior to the filing of the H-1B petition and ending 90 days after its filing. A U.S. worker is displaced if the worker is laid off from a job that is essentially the equivalent of the job for which an H-1B nonimmigrant is sought; and

(4) It will not place an H-1B worker to work for another employer unless it has inquired whether the other employer has displaced or will displace a U.S. worker within 90 days before or after the placement of the H-1B worker.

9 FAM 41.53 N7 PETITION PROCEDURES

9 FAM 41.53 N7.1 Using Form I-129, Petition for a Nonimmigrant Worker

(CT:VISA-1378; 11-24-2009)

a. An employer must file a Form I-129, Petition for a Nonimmigrant Worker, with Department of Homeland Security (DHS) to accord status as a temporary worker or trainee. Form I-129 is also used to request extensions of petition validity and extensions of stay in H status. The form must be filed with the DHS Service Center which has jurisdiction over the area where the alien will perform services or receive training.

b. More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time and in the same location.

c. According to DHS procedures, a national from a country not on the list of participating countries may be the beneficiary of an approved Form I-129 petition upon the request of the petitioner or potential petitioner, if the

Secretary of the DHS determines that it is in the U.S. interest for the petition to be approved. When making such a determination the Secretary of Homeland Security will take into consideration a variety of factors, including but not limited to consideration of:

(1) Evidence that a worker with the required skills is not available within the U.S. workforce or from the pool of foreign workers who are nationals of H-2A or H2B program participating countries;

(2) Evidence that the beneficiary has been admitted to the United States in H-2A or H2B status on a previous occasion and has complied with the terms of that status;

(3) The potential for abuse, fraud, or other harm to the integrity of the H-2A or H-2B program through the potential admission of the beneficiary; and

(4) Such other factors as may serve the U.S. interest. You should not refuse a visa based on the nationality of the beneficiary, but may presume that DHS has approved this exception in the absence of any evidence to the contrary.

d. Petitions filed for beneficiaries from designated countries and undesignated countries must be filed separately. By not co-mingling the two distinct classes of beneficiaries, the DHS may more properly make a determination of the U.S. interest.

e. There are specific DHS requirements of petitioners for naming beneficiaries on all H-2A and H-2B petitions. An H-2A or H-2B petition must list the names of all beneficiaries who are currently in the United States, but the petitioner is not required to do so for those not currently in the United States. However, DHS retains the authority to require, at its discretion, the naming of beneficiaries of H-2B petitions if they are currently outside the United States. All H-2A and H-2B petition must include the nationality of all beneficiaries whether named or unnamed.

9 FAM 41.53 N7.2 Notifying Petitioner of Petition Approval

(CT:VISA-1041; 09-26-2008)

DHS uses Form I-797, Notice of Action, to notify the petitioner that the H petition filed by the petitioner has been approved or that the extension of stay in H status for the employee has been granted. The petitioner may furnish Form I-797 to the employee for the purpose of making his or her H visa appointment or to facilitate the employee’s entry into the United States in H status, either initially or after a temporary absence abroad during the employee’s stay in H status. (See 9 FAM 41.53 N8.1 below.)

9 FAM 41.53 N7.3 “NAFTA Professional” (TN) Status in

Lieu of H-1B Petition for Canadian Citizens

(CT:VISA-1406;   03-11-2010)

a. No visa, prior petition, labor condition attestation, or prior approval is required for a Canadian citizen who is a business person seeking to enter the United States temporarily to engage at a professional level in one of the professional activities listed in Chapter 16 Appendix 1603.D.1 of the North American Free Trade Agreement (NAFTA). Engaging in a professional activity listed in this appendix would not necessarily result in qualification for H-1B status. The criteria used to develop Appendix 1603.D.1 differ from the statutory requirements for determining H-1B classification. To qualify for "TN" status, the alien must present supporting documentation to an immigration officer at the port of entry demonstrating that he or she seeks entry to engage in a listed profession at a professional level and meets the criteria to perform at that level. (See 9 FAM 41.59 Notes.)

b. Mexican nationals applying for a TN visa do not/not require a petition approved by DHS. (See 9 FAM 41.59 N4.2 through 9 FAM 41.59 N4.3.)

9 FAM 41.53 N7.4 Filing H Petitions for Visa-Exempt Aliens

(CT:VISA-1041;   09-26-2008)

Except with regard to Chapter 16, Appendix 1603.D.1 professionals described in 9 FAM 41.53 N7.3 above, the petitioner must file a petition in advance with Department of Homeland Security (DHS), and the visa-exempt beneficiary must present a copy of Form I-797, Notice of Action, at a port of entry.

9 FAM 41.53 N8 ISSUING H VISAS

9 FAM 41.53 N8.1 Evidence Forming Basis for H Visa Issuance

(CT:VISA-1755;   10-26-2011)

a. Before issuing a visa, posts must verify that the petition has been approved. Posts should first use the electronic Petition Information Management Service (PIMS) record created by the Kentucky Consular Center (KCC) to verify petition approval (see 9 FAM 41.53 N2.2 above). Posts are able to access the details of approved nonimmigrant visa (NIV) petitions using the PIMS Petition Report in the Consular Consolidated Database (CCD), under the Nonimmigrant Visa tab. If no record of the petition is found in PIMS, posts may use the Person Centric Query Service (PCQS), in the CCD under the Cross Applications tab, to verify that the petition has been approved. If post finds a petition approval in PCQS

that was not in PIMS, the post should send an e-mail to PIMS@state.gov as follows: Petition with Receipt Number EAC1234567890 was found in PCQS but not in PIMS.

b. When presented at post, an approved Form I-129, Petition for a Nonimmigrant Worker, and a Form I-797, Notice of Action, may be used as sufficient proof to schedule an appointment, but posts should not review these forms for purposes of H visa issuance. Only PIMS or PCQS must provide the evidence forming the basis for H visa issuance.

c. A valid Form I-797 must include the date of the Notice, the name of the petitioner, the name of the beneficiary, the petition/receipt number, the expiration date of the petition, and the name, address, and telephone number of the approving DHS office. The paper Form I-797 is an unsigned computer-generated form. Both confirmation of the information contained in the Form I-797 and initiation of adjudication process may both be accomplished through PIMS. In the event PIMS does not yet contain the record, posts may search for the petition record using PCQS. If the petition is not found in PCQS, posts should send an e-mail to PIMS@state.gov. KCC’s Fraud Prevention Unit (FPU) will research approval of the petition and, if able to confirm its approval, will make the details available through the CCD within two working days. You may not authorize a petition-based NIV without verification of petition approval either through PIMS or through PCQS.

d. Posts must also verify whether or not the employer may be restricted in hiring certain H-1B applicants. Certain limitations apply to employers that have received funding under title I of the Emergency Economic Stabilization Act of 2008 (EESA) or section 13 of the Federal Reserve Act. The EESA authorizes the U.S. Treasury Department to administer the Trouble Asset Relief Program (TARP). Information about recipients of funding under section 13 has not been disclosed publicly. However, employers seeking to hire H-1B workers should know whether or not they have received covered funding. EESA title I (TARP) funding recipients are listed in a periodically updated report posted by the Treasury Department, under “Reports and Documents.”

   (1) Until further notice, as part of the process of determining the H-1B qualifications of an applicant who has not been working for the same employer in the United States in H-1B or another NIV classification for which employment was authorized, posts must check whether the most recent Treasury list of TARP funding recipients includes the H-1B petitioner. An employer who is a TARP recipient in the Treasury list must disclose this fact in responding to Part A, question 1.d of the Form I-129 H-1B Data Collection and Filing Fee Exemption Supplement (Rev. 03/11/09) and provide an H-1B dependent employer attestation in Section F-1 of the Labor Condition Application (Form ETA-9035) regarding the displacement of U.S. workers.

   (2) Any petition for a new employee filed before February 17, 2009 by a TARP

funding recipient would not include the new question or be accompanied by a Labor Condition Application that contains the necessary H-1B dependent employer certification. Any such petition with an employer that has received TARP funding therefore should therefore be returned for revocation in accordance with 9 FAM 41.53 N2.3 above and 9 FAM 41.53 PN4.

(3) There may also be cases in which a Form I-129 was filed on or after February 17, 2009 and approved by USCIS, but the employer was listed subsequently as a funding recipient and the petitioned employee has not yet commenced employment. The applicable Form I-129 petition likewise should be returned for revocation.

(4) If you are unsure whether Form I-129 should be returned based on receipt of covered funding, request an advisory opinion from CA/VO/L/A.

(5) Consular officers may refer to 9 FAM 41.53 Exhibit I for further guidance to assist in making determinations under these new regulations.

9 FAM 41.53 N8.2 Kentucky Consular Center (KCC) to Make Entries in PIMS

(CT:VISA-1406; 03-11-2010)

a. KCC will review and monitor the TARP lists as they are published. KCC will make dated entries in PIMS by checking the "adverse information" box to indicate that a particular employer is listed on the TARP list. Post should then query the PIMS information on the company to verify whether the company has received TARP funding as not all adversely marked companies are TARP recipients. Post should return for revocation any petition that was filed by a listed employer based on guidance in 9 FAM 41.53 Exhibit I.

b. KCC will also attach further processing guidance into the employer's PIMS record. If a PIMS petitioner record does not indicate the presence of "adverse information," posts are thus relieved from having to review the TARP list for every company.

9 FAM 41.53 N8.3 Approved Petition is Prima Facie Evidence of Entitlement to H Classification

(CT:VISA-1755; 10-26-2011)

a. You should no longer require that an approved Form I-129, Petition for a Nonimmigrant Worker, or evidence that the H petition has been approved (a Form I-797, Notice of Action (see 9 FAM 41.55 Exhibit I), be presented by an applicant seeking an H visa. All petition approvals must be verified through the Petition Information Management Service (PIMS) or through the Person Centric Query Service (PCQS). Once you have verified approval through PIMS or

PCQS, consider this as prima facie evidence that the requirements for H classification, which are examined in the petition process, have been met. You may not question the approval of H petitions without specific evidence, unavailable to DHS at the time of petition approval, that the beneficiary may not be entitled to status. A large majority of approved H petitions are valid, and involve bona fide establishments, relationships, and individual qualifications that conform to the DHS regulations in effect at the time the H petition was filed.

b. You must suspend action on an alien's application and submit a report to the approving DHS office if you know or have reason to believe that an alien applying for a visa under INA 101(a)(15)(H) is not entitled to the classification as approved.

9 FAM 41.53 N8.4 Validity of H Visas

(CT:VISA-1755; 10-26-2011)

a. The validity of an H visa may not exceed the period of validity of a petition approved to accord H status or the period for which the alien's authorized stay in H status was extended. If the period of reciprocity is less than the validity period of the approved petition or extension of stay, the period permitted by the reciprocity schedule must prevail. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

b. Posts are authorized to accept H visa petitions and issue visas to qualified applicants up to 90 days in advance of applicants' beginning of employment status. Post must inform applicants verbally and in writing that they can only use the visa to apply for reentry to the United States starting ten days prior to the beginning of the approved status period. In addition, such visas must be annotated, "Not valid until (ten days prior to the petition validity date.)"

c. When there is no change of employers, and no gap in authorized status, an alien may obtain an H-1B visa that is valid during the time remaining on the first petition (and/or any extensions) and the validity of the second petition, and does not have to wait until 10 days before the start date of the second petition to reenter the United States.

9 FAM 41.53 N8.4-1 Validity of H1-B Visas When Change of Employer Pending

(CT:VISA-1406; 03-11-2010)

a. Public Law 106-313 provides for "portability" for H1-B aliens, permitting them to change jobs while the application filed by their new employer is still pending approval by Department of Homeland Security (DHS). In order to change employers without penalty, H1-B aliens must meet the following conditions:

(1) The alien had been lawfully employed;

(2) The new employer filed a petition for the alien prior to the expiration of his or her authorized stay; and

(3) The alien had not worked without authorization prior to the filing of that new petition.

b. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

9 FAM 41.53 N8.4-2 H1-B Aliens May Travel Abroad While Change of Employer Pending

(CT:VISA-1406; 03-11-2010)

H1-B aliens traveling abroad during the period when their new employment petition is pending may use their old petition and visa for return to the United States provided the applicant:

(1) Is otherwise admissible;

(2) Has a valid passport and visa (whether new or the original visa with the prior employer's name);

(3) Has the prior Form I-94, Arrival and Departure Record, a Form I-797, Notice of Action, or a copy of, showing the original petition's validity dates; and

(4) Has a dated filing receipt or other evidence that a new petition was filed in a timely fashion.

9 FAM 41.53 N8.4-3 Validity of H-1B When There is a Change of Employer

(CT:VISA-1406; 03-11-2010)

a. After changing H-1B employers in accordance with DHS procedures for making such a change, an H-1B visa holder may continue to use his or her original H-1B visa for entry into the United States. Upon applying for entry, the visa holder must present the new Form I-797, Notice of Action, evidencing the approval of the change of employer in addition to the visa.

b. An H-1B applicant can change employers without penalty while in the United States provided the following criteria were met:

(1) The alien was lawfully admitted to the United States;

(2) The new employer filed the petition for the alien prior to the expiration of his or her authorized stay;

(3) The alien had not worked without authorization prior to the filing of the new petition; and

(4) Has not been employed in the United States without authorization subsequent to lawful admission but before filing such petition.

c. After the filing of the new petition the H-1B is authorized to accept employment until the petition is adjudicated. If the new petition is denied, employment must cease. If the alien's prior visa and petition have expired, the alien is not eligible to receive a new visa until the pending petition has been approved.

9 FAM 41.53 N8.4-4 Limiting Validity of H Visas

(CT:VISA-1755; 10-26-2011)

a. You may restrict visa validity in some cases to less than the period of validity of the approved petition or authorized period of stay (for example, on the basis of reciprocity or the terms of a waiver of a ground of ineligibility). In any such case, in addition to the other notations required on the H visa, posts must insert the following:

"PETITION VALID/STAY AUTHORIZED (whichever is applicable) TO (date)"

b. Posts should use appropriate operating instructions for annotating visas.

9 FAM 41.53 N8.4-5 Job Flexibility for Long-Delayed Applicants for Adjustment of Status to Legal Permanent Residence (LPR)

(CT:VISA-1406; 03-11-2010)

INA 204(j) (8 U.S.C. 1154(j)) provides that if an H-1(B) alien, whose employer has filed for permanent residence status for him or her as an employment-based immigrant under INA 204(a)(1)(D) (8 U.S.C. 1154(a)(1)(D)), changes employers or jobs, the petition and the labor certification approved for the original employer will remain valid if:

(1) The petition of the new employer has remained unadjudicated for 180 days or more; and

(2) The new job is in the same or a similar occupational classification as the job for which the petition was filed.

9 FAM 41.53 N8.4-6 Reissuance of Limited H Visas

(CT:VISA-1406; 03-11-2010)

When an H visa has been issued with a validity of less than the validity of the petition or authorized period of stay, you may reissue the visa any number of times within the period allowable. If a fee is prescribed in the reciprocity schedule, posts must collect the fee for each reissuance of the H visa.

9 FAM 41.53 N8.4-7 Issuing Single H Visa Based on More Than One Petition

(CT:VISA-1406; 03-11-2010)

If an alien is the beneficiary of two or more H petitions and does not plan to depart from the United States between engagements, you may issue a single H visa valid until the expiration date of the last expiring petition, reciprocity permitting. In such a case, the required notations from all petitions should be placed below the visa.

9 FAM 41.53 N8.5 Multiple Beneficiaries

(CT:VISA-1406; 03-11-2010)

More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time and in the same location.

9 FAM 41.53 N8.6 Beneficiaries with More than One Employer

(CT:VISA-1406; 03-11-2010)

If a nonagricultural beneficiary is performing services for or receiving training from more than one employer, each employer must file a petition unless an established agent files the petition.

9 FAM 41.53 N8.7 Substitution of Beneficiaries

(CT:VISA-1406; 03-11-2010)

Beneficiaries may be substituted in an H-2B petition approved on behalf of a group or for unnamed beneficiaries, or when the job offer does not require any education, training, and/or experience. (See Department of Homeland Security (DHS) regulation at 8 CFR 214.2(h)(2)(iv)).

9 FAM 41.53 N9 VALIDITY OF APPROVED PETITIONS

9 FAM 41.53 N9.1 Initial Period of Approval

(CT:VISA-1755; 10-26-2011)

DHS has established the following initial approval period of an H petitions; however, individual petitions may vary. You should always be sure to check the expiration date on the actual petition itself:

(1) An approved H-1B petition for an alien in a specialty occupation must be valid for a period of up to three years but may not exceed the validity period of the labor condition application;

(2) An approved H-1B petition for a fashion model of distinguished merit and ability must be valid for a period of up to three years;

(3) An approved H-1B petition involving a participant in a Department of Defense (DOD) research and development or co-production project must be valid for a period of up to five years;

(4) An approved H-2A petition is valid through the expiration of the relating labor certification;

(5) An approved H-2B petition must be valid for a period of up to one year;

(6) An approved H-3 petition for an alien trainee must be valid for a period of up to two years; and

(7) An approved H-3 petition for an alien participating in a special education exchange program must be valid for a period of up to 18 months.

9 FAM 41.53 N9.2 Petition Extension

(CT:VISA-1539; 09-24-2010)

A petitioner wishing to extend the validity of a petition must file a request for a petition extension to DHS, using Form I-129, Petition for a Nonimmigrant Worker. Supporting evidence is not required unless requested by Department of Homeland Security (DHS). A request for a petition extension may be filed only if the validity of the original petition has not expired. Only the Department of Homeland Security can extend the validity of a petition.

9 FAM 41.53 N9.3 Validity of H-1B Petition When Company Restructures

(CT:VISA-1041; 09-26-2008)

An H-1B petition remains valid if a company is involved in a corporate restructuring, including but not limited to, a merger, acquisition or consolidation if:

(1) The new corporate entity interests and obligations remain the same; and

(2) The terms and conditions of employment remain the same.

9 FAM 41.53 N10 LENGTH OF STAY

(CT:VISA-1378; 11-24-2009)

An H-2B or H-3 petition beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to ten days before the validity

period of the petition begins and ten days after it ends. An H-2A petition beneficiary may be admitted to the United States for the validity period of the petition, plus one week before the beginning of the approved petition and 30 days following the expiration of the approved petition. The beneficiary may not work except during the validity period of the petition.

9 FAM 41.53 N11 EXTENSION OF STAY PROCEDURES

(CT:VISA-1755; 10-26-2011)

The petitioner must request the extension of an alien's stay in the United States on the same Form I-129, Petition for a Nonimmigrant Worker, used to file for the extension of the alien's petition. The effective dates of the petition extension and of the beneficiary's extension of stay must be the same. The beneficiary must be physically present in the United States at the time the extension of stay petition is filed. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the alien may apply at a consular section overseas for the visa. The Form I-797 for the extension of stay must be entered into PIMS or approval of the extension of stay must be accessible through PCQS before the visa can be issued (see 9 FAM 41.53 N9.1 above). When the maximum allowable period of stay in an H classification has been reached (see 9 FAM 41.53 N12 below), no further extensions may be granted.

9 FAM 41.53 N12 EXTENSION PERIODS AND MAXIMUM TOTAL PERIODS OF STAY

(CT:VISA-1406; 03-11-2010)

The petitioner may apply for the extension of an alien's stay in the United States up to the maximum total period of stay for each H category described below. Total maximum period of stay will be calculated by determining the actual total number of days the alien is lawfully admitted and physically present in the United States in H category status.

NOTE: Time spent as an H-4 dependent does not count against the maximum allowable period of stay available to a principal H-1B alien.

9 FAM 41.53 N12.1 H-1B Nonimmigrants

(CT:VISA-1620; 01-20-2011)

a. Generally H-1B visas should be issued for the validity of the petition or per the reciprocity schedule, whichever is less.

b. Most H-1B's can work in the United States for a maximum of 6 continuous

years, but an alien participating in a Department of Defense (DOD) research and development or co-production project may work for a maximum of ten years. Note that petition validity is usually for a maximum of 3 and 5 years, respectively. Also, other factors, such as time recapture and "AC21" extensions can affect the validity of an H-1B petition.

c. Under the American Competitiveness Act in the 21st Century ("AC21", Public Law 106-313), the Department of Homeland Security (DHS) may approve an H-1B petition in 1- or 3-year increments for an unlimited number of times beyond the 6- or 10-year maximum if the alien has an employment-based immigrant petition, or an adjustment of status application pending, or if it has been more than 365 days since the labor certification application or the petition was filed. The AC21 law also increased the ability of H-1B employees to switch employers.

9 FAM 41.53 N12.2 H-2A and H-2B Nonimmigrants

(CT:VISA-1539; 09-24-2010)

An extension of stay for the beneficiary of an H-2A or H-2B petition may be authorized for the validity of the labor certification or for a period of up to one year. The alien's total period of stay may not exceed three years, except that in the U.S. Virgin Islands, the alien's total period of stay may not exceed 45 days.

9 FAM 41.53 N12.3 H-3 Nonimmigrants

(CT:VISA-1539; 09-24-2010)

An extension of stay may be authorized for the length of the training program for a total period of stay not to exceed two years for an H-3 trainee, or for a total period of stay not to exceed 18 months for an H-3 participant in a special education exchange program.

9 FAM 41.53 N13 READMISSION AFTER THE MAXIMUM TOTAL PERIOD OF STAY HAS BEEN REACHED

(CT:VISA-1755; 10-26-2011)

a. A nonimmigrant who has spent the maximum allowable period of stay in the United States in H and/or L status, the alien may not be issued a visa or be readmitted to the United States under the H or L visa classification, nor may a new petition, extension, or change of status be approved for that alien under INA 101(a)(15)(H) or (L), unless the alien has resided and been physically present outside the United States, (except for brief trips for business or pleasure) for the time limit imposed on the particular H category. Periods when the alien fails to maintain status must be counted towards the applicable limit;

an alien may not circumvent the limit by violating his or her status.

b. All time spent outside of the United States is subtracted and thus does not count towards the maximum allowable period of stay in H or L visa status; however, it does not count toward fulfillment of the required time abroad. The required periods of residence abroad prior to readmission for H nonimmigrants who have reached their maximum period of stay are as follows. (See 9 FAM 41.53 N13.1 and 9 FAM 41.53 N13.2.)

9 FAM 41.53 N13.1 H-1B Nonimmigrants

(CT:VISA-1539; 09-24-2010)

An H-1B alien who has reached his or her maximum allowable period of stay in H1B visa status must have resided and been physically present outside the United States for the immediate prior year in order to re-qualify.

9 FAM 41.53 N13.2 H-2A, H-2B, and H-3 Nonimmigrants

(CT:VISA-1378; 11-24-2009)

a. An H-3 applicant who has spent the maximum allowable period of time in the United States in H status must have resided and been physically present outside the United States for the immediate prior six months before he or she may be granted H-3 status again.

b. An H-2A or H-2B applicant who has spent the maximum allowable period of time in the United States in H status must have resided and been physically present outside the United States for the immediate prior three months before he or she may be granted H-2A or H-2B status. Additionally, the amount of time that will serve to interrupt the accrual of the three-year limitation on H-2A or H-2B status is affected by any absence from the United States. If the accumulated length of stay is less than 18 months an absence of 45 days from the United States will be interruptive. If the accumulated length of stay is more than 18 months an absence of two months will be interruptive. An absence of less than 45 days will not be interruptive.

9 FAM 41.53 N14 EXCEPTIONS TO LIMITATIONS ON READMISSION

(CT:VISA-1755; 10-26-2011)

The limitations described in N13.2 above must not apply to H-1B, H-2B, and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent, or was for an aggregate of six months or less per year, nor to aliens who resided abroad and regularly commuted

to the United States to engage in part-time employment. These exceptions will not apply if the principal alien's dependents have been living continuously in the United States in H-4 status. The alien must provide clear and convincing proof (e.g., evidence such as arrival and departure records, copies of tax returns, records of employment abroad) that he or she qualifies for these exceptions.

9 FAM 41.53 N15 READMISSION OF H-1B FOLLOWING ACCEPTANCE OF NEW EMPLOYMENT

(CT:VISA-1539; 09-24-2010)

a. It is quite likely that an H-1B may travel during the period following acceptance of new employment. The Department of Homeland Security (DHS) considers them admissible without a new visa during the period of validity of the original petition plus ten days, provided the applicant:

   (1) Is otherwise admissible;

   (2) Has a valid passport and visa (even if it is the original visa); and

   (3) Has a dated filing receipt or other evidence that a new petition was filed in a timely fashion.

b. If both the prior visa and the prior petition have expired, the applicant would not be eligible for a new H-1B visa until the new petition has been approved.

9 FAM 41.53 N16 RETURN TRANSPORTATION IF H-1B OR H-2B ALIEN'S EMPLOYMENT TERMINATED INVOLUNTARILY

(CT:VISA-1041; 09-26-2008)

If an H-1B or H-2B nonimmigrant is dismissed from employment before the end of his or her authorized admission by the employer who sought the alien's H-1B or H-2B status, the employer is responsible for providing the reasonable cost of transportation to the alien's last place of residence. This requirement does not apply if the alien voluntarily terminates his or her employment.

9 FAM 41.53 N17 SPOUSE AND CHILDREN OF H ALIENS

9 FAM 41.53 N17.1 Derivative Classification

(CT:VISA-1539; 09-24-2010)

a. The spouse and children of a principal alien classified H-1B, H-1C, H-2A, H-2B, or H-3, who are accompanying or following to join the beneficiary in the United States, are entitled to H-4 classification and are subject to the same visa validity, period of admission, and limitation of stay as the principal alien. It is not required that the spouse and children of H-1 nonimmigrants demonstrate that they have a residence abroad to which they intend to return. However, H-4 dependents of H-2 and H-3 aliens are subject to the INA 214(b) residence abroad requirement.

b. If an H-1B, H-2B, or H-3 alien has maintained his or her family in the United States in H-4 status, he or she cannot qualify for one of the exceptions to the maximum allowable periods of stay described in 9 FAM 41.53 N14.

9 FAM 41.53 N17.2 Verifying Principal Alien is Maintaining Status

(CT:VISA-1755; 10-26-2011)

When an alien applies for an H-4 visa to follow to join a principal alien already in the United States, you must be satisfied that the principal alien is maintaining H status before issuing the visa. If you have any doubt about the principal alien's status, a PIMS record of petition approval or change of status should be obtained, or the information on the principal alien may be obtained through PCQS. In the event neither PCQS nor PIMS contains the record, send an e-mail to PIMS@state.gov. KCC's Fraud Prevention Unit (FPU) will research approval of the petition and, if able to confirm its approval, will make the details available through the CCD within two working days.

9 FAM 41.53 N17.3 Employment in United States by H-4 Dependent Aliens Prohibited

(CT:VISA-1755; 10-26-2011)

Aliens in H-4 status are generally not authorized to accept employment while in the United States. The spouse and children of H nonimmigrants may not accept employment unless they qualify independently for a classification or a work authorization from DHS in which employment is, or can be, authorized. You must take this into account in evaluating whether family members have furnished adequate evidence of their support while in the United States. H-4 aliens are permitted to study during their stay in the United States.

9 FAM 41.53 N17.4 Using B-2 instead of H-4

Classification

(CT:VISA-1539;   09-24-2010)

Although the H-4 classification is provided specifically for the spouse and children of H nonimmigrants, if their planned period of stay is to be brief, and if they overcome INA 214(b), such aliens could also travel as temporary visitors using a B1/B2 visa. In addition, if the spouse or child already has a valid B-2 visa and it would be inconvenient or impossible for him or her to apply for an H-4 visa, you need not require the latter visa. As always, consular officers should be aware that it is possible for a person to qualify for more than one nonimmigrant visa classification at the same time.

9 FAM 41.53 N18 SERVANTS OF H NONIMMIGRANTS

(CT:VISA-1406;   03-11-2010)

Personal or domestic servants seeking to accompany or follow to join H nonimmigrant employers may be issued B-1 visas, provided they meet the requirements of 9 FAM 41.31 N9.3-3.

9 FAM 41.53 N19 CERTAIN NURSES ELIGIBLE FOR H-3 CLASSIFICATION

(CT:VISA-1041;   09-26-2008)

A petitioner may seek H-3 status for a nurse if it can be established that there is a genuine need for the nurse to receive a brief period of training that is unavailable in the alien's native country, and that such training is designed to benefit the nurse and the foreign employer upon the nurse's return to his or her country of origin. For a nurse to qualify for H-3 classification, certain criteria established by Department of Homeland Security (DHS) must be met. These include the alien having a license to practice where the alien was trained (unless in the United States or Canada) and the petitioner's certification that, under the laws where the training will take place, the petitioner is authorized to give such training and the alien to receive it.

9 FAM 41.53 N20 MEDICAL STUDENTS QUALIFYING AS H-3 EXTERNS

(CT:VISA-1041;   09-26-2008)

A hospital approved by the American Medical Association (AMA) or the American Osteopathic Association (AOA) for either an internship or residency program may

petition to classify a student attending a medical school abroad as an H-3 trainee, if the alien will engage in employment as an extern during his or her medical school vacation.

9 FAM 41.53 N21 ALIEN COMING TO TRAIN OTHERS AND/OR ORGANIZE BUSINESS

(CT:VISA-1041; 09-26-2008)

An alien seeking to enter the United States to train others or to organize a business operation may be considered to be coming to a temporary position and is classifiable H-2B if otherwise qualified. For example, a cook coming to train other cooks or organize a kitchen may be classified H-2B, but a cook coming to assume a job of a permanent nature may not be accorded H-2B or any other nonimmigrant status and would have to qualify for an immigrant visa (IV).

9 FAM 41.53 N22 *ALIENS EMPLOYED BY UNITED STATES EXHIBITORS AT INTERNATIONAL FAIRS OR EXPOSITIONS*

(CT:VISA-1884; 09-14-2012)

Alien employees of United States exhibitors or employers at international fairs or expositions held in the United States are classifiable as H-1B or H-2B temporary workers.

9 FAM 41.53 N23 *NUMERICAL LIMITATIONS ON CERTAIN H NONIMMIGRANTS*

(CT:VISA-1884; 09-14-2012)

a. *Given the unexpectedly high demand by employers for technology specialists, the numerical limitations on H-1B nonimmigrants have been in a state of flux in recent years. The most recent revision in this respect was in Public Law 106-313, the "American Competitiveness in the Twenty-first Century Act of 2000." Accordingly, the current limitations on the total number of aliens who could have been or now can be accorded H nonimmigrant visa classification in the categories indicated below is limited as follows:*

   (1) *Aliens classified as H-1B nonimmigrants, excluding those participating in Department of Defense (DOD) research and development or co-production projects, could not exceed: 65,000 in each fiscal year preceding 1999;*

   (2) *115,000 was the initial limit for fiscal year 1999 but that was increased in Public Law 106-313 to include whatever number of aliens were issued such*

a visa or provided such status during the period beginning at the time the 115,000 was reached and ending September 30, 1999;

(3) *115,000 was also the initial limit for fiscal year 2000; however, Public Law 106-313 specifies that any H-1B petition filed prior to September 1, 2000 (whenever approved) is to be counted against the ceiling for FY-2000 and increased the 115,000 ceiling in the same fashion as for FY-99;*

(4) *The new total limit for following years are 195,000 each in fiscal years 2001, 2002, and 2003;*

(5) *Aliens classified as H-1B nonimmigrants to work in Department of Defense (DOD) research and development or co-production projects may not exceed 100 at any time;*

(6) *Aliens who are employed by (or have an offer of employment from) an institution of higher education, a related or affiliated nonprofit entity, or a nonprofit or governmental research organization are not to be counted against these ceilings. Such aliens will be counted if they move from such a position to one which is within the ceiling applicability;*

(7) *Aliens classified as H-2B nonimmigrants may not exceed 66,000 during any fiscal year; and*

(8) *Aliens classified as H-3 participants in special education exchange programs may not exceed 50 in any given fiscal year.*

b. *These numerical limitations are controlled by Department of Homeland Security (DHS) which allocates a number to each alien included in a new petition when the petition is filed. Petitioners are required to notify the appropriate DHS Service Center Director when numbers are not used, so that they may be reassigned. Consequently, the data provided above is solely for informational purposes. You should not be concerned about the availability of visa numbers for beneficiaries of approved petitions, nor should you inform DHS when H visa applications in affected categories are abandoned or denied.*

c. *The dependents of principal aliens in these categories must not be counted against the numerical limitations.*

9 FAM 41.53 N24 *FORMER EXCHANGE VISITORS SUBJECT TO TWO-YEAR FOREIGN RESIDENCE REQUIREMENT*

(CT:VISA-1884; 09-14-2012)

For instructions regarding requests for waivers of the two-year foreign residence requirement by H visa applicants who are former exchange visitors and subject to the two-year residence abroad requirement of INA 212(e), see 9 FAM 40.202 Regulations and 9 FAM 40.202 Notes.

9 FAM 41.53 N25 *FREE TRADE AGREEMENT NONIMMIGRANT PROFESSIONALS*

(CT:VISA-1884; 09-14-2012)

a. *The President signed free trade agreements (FTAs) with Chile and Singapore on September 3, 2003. The FTAs with Chile and Singapore were authorized by Congress in Public Law 108-77 and Public Law 108-78 respectively. Both agreements became effective on January 1, 2004.*

b. *The FTAs with Chile and Singapore include immigration provisions that allow for the temporary entry of business professionals into the territory of the trading partners in order to facilitate free trade opportunities. The temporary entry of nonimmigrant professionals is provided for in Chapter 14 of the U.S.-Chile Agreement and in Chapter 11 of the U.S.-Singapore Agreement. The temporary entry chapters in both agreements establish four categories of nonimmigrant entry for business purposes. Three of the categories, business visitors, traders and or investors, and intra-company transferees, qualify for visas under the existing B-1, E-1/E-2, and L-1/L-2 visa categories. The FTAs establish a new fourth category of temporary entry for nonimmigrant professionals, the H-1B1 category.*

9 FAM 41.53 N26 *H-1B1 REQUIREMENTS*

9 FAM 41.53 N26.1 *H-1B1 Applications Subject to Numerical Limitations*

(CT:VISA-1884; 09-14-2012)

a. *Annual numerical limits are set for aliens who may obtain H-1B1 visas. One thousand four hundred professionals from Chile and 5,400 professionals from Singapore are allowed to enter the United States annually. These numerical limits fall within and are registered against the existing annual numerical limit (currently 65,000) for H-1B aliens. Only principals are counted against each country's respective numerical limitation. Initial applications for H-1B1 classification, as well as the sixth and all subsequent extensions of stay, are counted against the H-1B1 annual numerical limitations.*

b. *At the end of each fiscal year, unused H-1B1 numbers will be returned to that year's global numerical limit and will be made available to H-1B aliens during the first 45 days of the new fiscal year.*

c. *The Department of Homeland Security (DHS) is required to keep a numerical count of the H-1B1 visas issued. To assist DHS in meeting this responsibility, you will be required to report to the Directorate for Visa Services at designated intervals the number of visas issued to first-time H-1B1 visa applicants. The*

Office of Visa Services (CA/VO) monitors the number used based on workload data. On a periodic basis, CA/VO provides this information to DHS.

9 FAM 41.53 N26.2 *No Petition Required*

(CT:VISA-1884; 09-14-2012)

An employer of an H-1B1 professional is not required to file a petition with DHS. Instead, an employee will present evidence for classification directly to you at the time of visa application.

9 FAM 41.53 N26.3 *Applicants Subject to Labor Condition*

(CT:VISA-1884; 09-14-2012)

a. Employers must submit a Labor Attestation for foreign workers from Chile or Singapore under the H-1B1 program. The law requires the Department of Labor (DOL) to certify to the Department of State that the appropriate Labor Condition Application (LCA), form ETA-9035, Labor Condition Application for H-1B Nonimmigrants, has been filed with DOL. If certified, the employer transmits a copy of the signed, certified LCA to the alien together with a written offer of employment. At the time of visa application, the alien will present a certified copy of the LCA, clearly annotated by the employer as "H-1B1 Chile" or "H-1B1 Singapore," as proof of filing.

b. The validity of the visa should not exceed the validity period of the LCA. Although still under discussion, the Department and DHS have agreed to an 18-month minimum validity period at the time an applicant applies for an H-1B1 visa.

9 FAM 41.53 N26.4 *H-1B1 Professionals in Specialty Occupations*

(CT:VISA-1884; 09-14-2012)

a. The new H-1B1 category allows for the entry of nonimmigrant professionals in "specialty occupations." The definition of "specialty occupation" set forth in both FTAs is presently identical to the regulatory definition for H-1Bs; i.e., an occupation that requires:

(1) Theoretical and practical application of a body of specialized knowledge; and

(2) Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States" (8 CFR 214.2). Consular officials should refer to this section for guidance in connection with an applicant's qualifications as an H-1B1

professional.

b. Both agreements allow for alternative credentials for certain professions. The United States has agreed to accept alternative credentials for Chilean and Singaporean nationals in the occupations of Disaster Relief Claims Adjuster and Management Consultant with a combination of specialized training and 3 years experience in lieu of the standard degree requirements. For Chilean nationals only, Agricultural Managers and Physical Therapists can also qualify with a combination of a post-secondary certificate in the specialty and three years experience in lieu of the standard degree requirements. You may accept specified documentary evidence of alternative credentials.

9 FAM 41.53 N26.5 *Temporary Entry*

(CT:VISA-1884; 09-14-2012)

a. Both agreements provide for the temporary entry of professionals into the United States. Temporary entry is defined in both agreements as "an entry into the United States without the intent to establish permanent residence." You must be satisfied that the alien's proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. The circumstances surrounding an application should reasonably and convincingly indicate that the alien's temporary work assignment in the United States will end predictably and that the alien will depart upon completion of the assignment. An intent to immigrate in the future, which is in no way connected to the proposed immediate trip, need not in itself result in a finding that the immediate trip is not temporary. An extended stay, even in terms of years, may be temporary, as long as there is no immediate intent to immigrate.

b. H-1B1 nonimmigrant professionals are admitted for a one-year period renewable indefinitely, provided the alien is able to demonstrate that he or she does not intend to remain or work permanently in the United States.

9 FAM 41.53 N26.6 *Licensing Requirements*

(CT:VISA-1884; 09-14-2012)

For admission into the United States in a specialty occupation, an alien must meet the academic and occupational requirements. However, the requirements for classification as an H-1B1 nonimmigrant professional do not include licensure. Licensure to practice a given profession in the United States is a post-entry requirement subject to enforcement by the appropriate state or other sub-federal authority. Proof of licensure to practice in a given profession in the United States may be offered along with a job offer letter, or other documentation in support of an application for an H-1B1 visa. However, admission and or classification should not be denied based solely on the fact that the applicant does not already hold a license to practice in the United States.

9 FAM 41.53 N26.7 *Fees*

(CT:VISA-1884; 09-14-2012)

A special fee may be imposed for initial classification as an H-1B1 worker, if such a fee is required for the global H-1B program. Currently there is no special fee required for H-1B or H-1B1.

9 FAM 41.53 N26.8 *H-1B1 Visa Application Procedures*

(CT:VISA-1884; 09-14-2012)

a. A national of Chile or Singapore must meet the general academic and occupational requirements for the position pursuant to the definition cited. Proof of alternative credentials must be submitted for certain professions as discussed in 9 FAM 41.53 N26 b.

b. An applicant must submit evidence that his or her employer has filed a Labor Condition Application (LCA) with Department of Labor (DOL) covering the applicant's position. A certified form ETA-9035 clearly annotated as "H-1B1 Chile" or "H-1B1 Singapore" must be submitted as evidence of filing.

c. An applicant must submit evidence that the employer has paid any applicable fee imposed.

d. An applicant must submit evidence that his or her stay in the United States will be temporary (a letter or contract of employment should be evidence that the employment is being offered on a temporary basis).

e. An applicant must pay the Machine Readable Visa (MRV) fee or provide proof of payment.

9 FAM 41.53 N27 *BACKGROUND*

(CT:VISA-1884; 09-14-2012)

Your primary responsibility in visa adjudication is to carry out the requirements of U.S. immigration law. Occasionally, you may discover indications of possible violations of other U.S. laws, even if you issue a visa. This note outlines types of possible violations of U.S. labor law, and tells you how to report them to the Department of Labor (DOL). In most of these situations, you likely would still issue a visa. (See 9 FAM 41.53 N2.3 for information on when petitions should be returned to DHS for possible revocation.)

9 FAM 41.53 N27.1 *What Should I Report?*

(CT:VISA-1884; 09-14-2012)

a. Only report violations that occurred in the United States within the 12 months immediately prior to DOL's receipt of the report of violation. DOL is not

authorized to investigate other violations.

b. *For a violation to have occurred in the United States, H-1B workers who are allegedly not being employed correctly must already have been in the United States and employed by the petitioner/employer. It is difficult to show that a violation occurred within the last 12 months. However, if the applicant provides tax documents for the preceding calendar year and these show evidence of significant underpayment of wages without explanation (illness, return to country of origin for a portion of the year, etc.), then DOL could file a labor complaint up until the end of the current calendar year.*

c. *You also may provide evidence of an ongoing labor violation by a petitioner by reviewing the petitioner's quarterly employment tax documents in relation to the number of employees the employer states it has on the Form I-129, Part 5 and the number of petitions for that employer for which still valid visas have been issued. For example, the petitioner's quarterly tax documents may show that unemployment and social security taxes were paid for 10 employees, which is the same number the employer reports on the Form I-129. A CCD review may show 50 visa applications in the CCD for that petitioner, however, and that 30 of those visas are still valid. While there may be an explanation for this, such a large discrepancy implies there may be no employer/employee relationship between the petitioner and the petitioned-for aliens or that the aliens are not being appropriately compensated, a situation calling for a labor violation complaint.*

d. *You should report a possible labor violation in any of the following circumstances:*

   (1) *Underpayment of the Required Wage*

   The Required Wage is the higher of either the Prevailing Wage for the occupation in the geographic area of intended employment, and listed on a Labor Condition Application (LCA), or the Actual Wage paid to all other individuals, including United States workers, employed at the worksite with similar experience and qualifications for the specific employment in question. The Required Wage can include reasonable costs for housing and transportation as long as this arrangement is agreed to by the employee, voluntarily and in writing. In addition, these costs must be reported on the employer's payroll records as earnings for the employee and all appropriate taxes and fees must be paid. Evidence of underpayment might constitute a matter for enforcement follow-up by the DOL and should be referred.

   (2) *Alien is required to pay fees and travel reimbursement.*

   DOL regulations provide that employers cannot require that a temporary worker pay for petition and/or fraud fees. Complete details can be found at Fact Sheet #62H on DOL's Web site. Consider referring such a case for consideration of an enforcement action.

   (3) *Benching*

"Benching" is the common term to describe not paying workers when there is no specific job available. Benching is most often seen in IT-related professions. 20 CFR 655.731(c)(6)(ii) requires that a petitioner begin paying a H-1B nonimmigrant the required wage beginning 30 days after the date of admission to the United States in H-1B status, even if the alien has not yet entered into employment (i.e., making oneself available for work or otherwise coming under the control of the employer). If the alien is already present in the United States on the date when the petition is approved, the employer is required to pay the required wage beginning 60 days after the date the alien becomes eligible to work for the employer (i.e., 60 days after the latter of the date of need stated on the H-1B petition or the date that USCIS changes the alien's status to H-1B). A complete explanation can be found at Fact Sheet #62I on DOL's Web site. If you have evidence that the employer failed to satisfy this requirement, you should report it. Some employees in a benching situation report wages on Form IRS-1099-C, Cancellation of Debt, identifying themselves as independent contractors, not on a W-2 as would be the case for a true employee.

(4) Systematic LCA Violations, Including Off-Site Work

Labor Condition Applications (in H-1B cases) are made for a specific location, and temporary workers are supposed to be living and working in that location. DOL regulations permit short-term placement of a worker, for a period of no more than 30 or (if the alien maintains ties to the original and approved worksite, such as maintenance of a residence) 60 days within a one year period, as described in DOL Fact Sheets found at Fact Sheet #62K on DOL's Web site and Fact Sheet #62J on DOL's Web site. USCIS has issued guidance on work in more than one location for H-1B beneficiaries. A labor contractor or consultant petitioning for H-1B workers to work at multiple client sites must provide a detailed itinerary of those sites at the time the petition is filed. A Press Release on this subject is available at Public Notice, March 24, 2006. You may report an employer's systematic LCA violations.

9 FAM 41.53 N27.2 *How Do I Report Violations?*

(CT:VISA-1884; 09-14-2012)

E-mail information to the Fraud Prevention Unit at the Kentucky Consular Center (KCC) at FPMKCC@state.gov or mail it to:

Attention: FPU
Labor Complaint
3505 N. Hwy 25W
Williamsburg, KY 40769

You must include the "Consular Report of Labor Violation" memo (exemplar available on the Fraud Prevention Program (FPP's) Web site or by asking post's FPP desk officer) and must scan complaints and supporting documents into the CCD record and identify them as supporting evidence for a Labor Violation. KCC personnel will pull the supporting documentation from the CCD, and will track all labor violation complaints.

9 FAM 41.53 N27.3 *What Will Department of Labor (DOL) Do With a Complaint?*

(CT:VISA-1884; 09-14-2012)

If DOL finds that a labor violation has occurred, it may impose penalties in the form of back pay reimbursement to injured parties, fines to the company, and/or a ban on the filing of further Labor certifications by the company. In some cases, the DOL may apply the ban to any company associated with the violator.

9 FAM 41.53 N27.4 *Information Available from Department of Labor (DOL)*

(CT:VISA-1884; 09-14-2012)

a. *DOL has printed business cards with information on legal protections for H-1B and H-2 workers. These cards are a simple and effective way to get the word out to each beneficiary. You may e-mail Frederick.Emily@dol.gov to request cards. Specify the type of card (H-1B or H-2), the quantity of each type, and the mailing address at post.*

b. *Administrative actions on labor violations may be found at OALJ on DOL's Web site. Individuals wishing to file labor violation complaints can find instructions at H-1B Nonimmigrant Information on DOL's Web site.*

c. *DOL has helpful Fact Sheets on immigration related issues and particularly on H1B issues. Some have been referenced in 9 FAM 41.53 N28 and all are available on DOL's Web site at Topical Fact Sheet Index.*

9 FAM 41.53 N28 *TEMPORARY WORKER VISA EXIT PILOT PROGRAM*

(CT:VISA-1884; 09-14-2012)

a. *The Department of Homeland Security (DHS) has adopted a Temporary Worker Visa Exit Program Pilot for temporary workers. An alien admitted on an H-2A or H-2B visa at a port of entry (POE) participating in the program must also depart through a POE participating in the program and present designated biographic and/or biometric information upon departure. U.S. Customs and Border Protection has designated San Luis, Arizona and Douglas, Arizona as ports of*

entry for the land-border exit system. Only those workers who enter through the designated ports will be required to register their final departure for purpose of the pilot program.

b. U.S. Customs and Border Protection will inform H-2A and H-2B workers of their obligations through an education effort with agricultural workers, foreign governments, the agricultural industry, association leaders, and U.S. employers. This will include details on the format for submission of the designated biographic and/or biometric information by the departing designated temporary workers.

9 FAM 41.53 N29 *RESPONSIBILITIES OF CONSULAR OFFICERS INFORMING APPLICANTS OF LEGAL RIGHTS*

(CT:VISA-1884; 09-14-2012)

a. The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (WWTVPRA) requires you to ensure that all individuals applying for H visas are made aware of their legal rights under Federal immigration, labor, and employment laws. This includes information on the illegality of slavery, peonage, trafficking in persons, sexual assault, extortion, blackmail, and worker exploitation in the United States. At the time of the nonimmigrant visa interview, you must confirm that a pamphlet ("Certain Employment or Education-Based Nonimmigrants") prepared by the Department detailing this information has been received, read, and understood by the applicant. See 9 FAM 41.21 N6.5 for information about WWTVPRA enforcement and consular officer responsibilities. Consular officers must enter a mandatory case note in the NIV system stating the pamphlet was provided and that the applicant indicated he or she understood its contents.

b. If an H visa applicant is eligible for an in-person interview waiver (see 9 FAM 41.102 N3) and the applicant's previous visa was issued at a time when post was adhering to the WWTVPRA requirements, post may apply the fingerprint reuse/interview waiver policies and ensure a copy of the pamphlet is returned to every issued applicant along with his or her visa.