



Frequently Asked Questions Aug. 15, 2008

USCIS PROPOSES STREAMLINING PROCEDURES FOR H-2B PROGRAM

When U.S. employers face a shortage of available U.S. workers to fill temporary non-agricultural jobs, they may petition U.S. Citizenship and Immigration Services (USCIS) for permission to bring foreign workers into the United States to perform that work. Once approved, these workers enter the United States in H-2B nonimmigrant status. USCIS has announced a series of proposed rules that will streamline the process of hiring temporary non-agricultural workers under the H-2B program.

Questions & Answers

Q: What is the H-2B classification?

A: The H-2B nonimmigrant classification applies to aliens seeking to perform non-agricultural labor or services of a temporary nature in the United States on a temporary basis. The H-2B petition must establish that the petitioner's need for the services or labor is temporary, regardless of whether the underlying job is permanent or temporary. The petitioner's need is considered temporary if it is a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need. Under current regulations, 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 H-2B visa application process?

A: Prospective employers of H-2B 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-2B aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers. H-2B workers can remain with an employer only for as long as DOL has certified the job.

Once the employer has obtained an approved 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-2B visa at a U.S. consulate abroad or, if the worker is already in the U.S., his or her status is changed to the H-2B.

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

Q: What changes are included in the proposed rule?

A: The proposed modifications to the H-2B program include provisions that would:

- Relax the current limitations on the ability of U.S. employers to petition for unnamed workers;

- Reduce from six months to three months the amount of time an H-2B worker whose status has expired must wait outside the United States before he or she is eligible to obtain status under the H or L classification;
- Require employer attestations on the scope of the H-2B employment and the use of recruiters to locate beneficiaries and provide for denial or revocation of an H-2B petition if an H-2B worker was charged a fee in connection with the employment either (a) by the petitioner, or (b) by a recruiter where the petitioner knew or reasonably should have known that the recruiter was charging such fees;
- Eliminate the ability of employers to file an H-2B petition without an approved temporary labor certification;
- Preclude the change of the employment start date after the grant of the temporary labor certification;
- Require employer notifications to the Department of Homeland Security when H-2B workers fail to show up for work, are terminated, or abscond from the worksite;
- Change the definition of “temporary employment” to clearly define that an employment is of a temporary nature when the need for the employee will end in the near, definable future;
- Prohibit the approval of H-2B petitions for nationals of countries determined to be consistently refusing or unreasonably delaying repatriation of their nationals; and
- Establish a land-border exit system pilot program under which H-2B 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: Why is this proposed rule necessary?

A: The H-2B program is popular among businesses in seasonal industries that frequently have a difficult time locating temporary workers. USCIS is aware, however, that the current H-2B program regulations do not accommodate the needs of U.S. employers and alien workers who use the H-2B program, or want to use the H-2B program, as effectively as possible.

Q: How will this proposed rule protect the rights of workers?

A: An employer will be required to provide an attestation regarding the scope of the H-2B employment and the use of recruiters to locate beneficiaries. If an H-2B 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-2B workforce, the rule will provide USCIS the authority to deny or revoke the petition.

The rule will also eliminate the ability of employers to file an H-2B petition without an approved temporary labor certification.

Q: How will this rule strengthen enforcement and ensure the integrity of the H-2B program?

A: The rule will prohibit the approval of H-2B petitions for nationals of countries determined to be consistently refusing or unreasonably delaying repatriation of their nationals that we are trying to deport. The rule also requires employer notifications when H-2B workers fail to show up for work, are

terminated, or abscond from the worksite. Finally, the rule will propose to establish a land-border exit system pilot program under which H-2B 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 rule become effective?

A: There will be a 30-day comment period to this proposed rule. Once the public comments are received and reviewed, we will finalize the rule and the final rule will be published. The final rule will include an effective date. Existing H-2B 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-2B program?

A: The proposed rule is available for review on the USCIS Web site.