Office of Communications
U.S. Citizenship and Immigration Services

USCIS Update

August 28, 2009

Clarification Regarding H-2B Petitions Filed by Certain Associations on Behalf of Their Members

United States Citizenship and Immigration Services (USCIS) would like to clarify to associations and their members certain regulatory requirements for filing petitions for H-2B classification on behalf of foreign workers. We are issuing this clarification so that the public can be better informed of filing requirements and avoid unnecessary denials of individual petitions that may be otherwise approvable.

We have noticed a particular type of filing error in many H-2B petitions filed by certain associations on behalf of their members. Rather than file an individual petition with USCIS, some employers who are members of an association have sought H-2B non-agricultural workers via a "master" petition filed by their association.

A "master" petition is a petition that:

(1) is filed by an association (listing the association as petitioner) on behalf of several of its member-employers, and
(2) includes multiple temporary labor certifications which have been issued by the Department of Labor (DOL) for each individual member-employer, rather than a single temporary labor certification certified for the particular association itself as an employer or "joint employer."[1]

While we recognize that the facts of each case may be different, for the reasons discussed below, association member-employers generally should file a petition for H-2B classification directly and separately (listing themselves as the petitioner) with USCIS, rather than through a "master" petition filed by an association (listing the association as the petitioner) on behalf of several of its members.

Petitions filed by associations that fail to meet the petitioner requirements for H-2B classification will be denied.

Discussion and Analysis

There are several reasons why H-2B petitions filed by associations on behalf of their employer members generally would not qualify for H-2B classification:

1. **Labor certification.** 8 CFR 214.2(h)(6)(iii)(C) states that "the petitioner may not file an H-2B petition unless the United States petitioner has applied for a labor certification and with the Secretary of Labor…and has obtained a favorable labor certification determination…" [Emphasis added.] Under DOL's TEGL 21-06, associations are unable to obtain the required temporary labor certification on behalf of their members unless the association itself meets the definition of "employer" in 20 CFR 655.200(c). An H-2B petition filed on behalf of several association members and supported by several temporary labor certifications granted by DOL to each of the association's members directly and separately would not meet the requirement of 8 CFR 214.2(h)(6)(iii)(C) and would therefore be subject to denial. In sum, this provision requires that

the entity which obtained the temporary labor certification be the same entity filing the H-2B petition.

2. **Multiple beneficiaries.** Second, 8 CFR 214.2(h)(2)(ii) provides that more than one beneficiary may be included in an H-2B 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." An H-2B "master" petition filed by an association, in some cases, has included several labor certifications approved for several of its member employers. Since each temporary labor certification issued to a certain employer is certified for a specific job position in a specific location with a specific validity period, not all of the beneficiaries for whom the petition is filed will actually be performing the same services for the same period of time, and in the same location. In essence, by filing in such a way, the association, as the petitioner, is attempting to use a single petition for multiple employers, each of whom will be the sole employer of separate groups of beneficiaries. Even if an association would otherwise be eligible to file an H-2B petition under 8 CFR 214.2(h)(6)(iii)(C), the petition may be subject to denial, unless the association can demonstrate that the requirements of 8 CFR 214.2(h)(2)(ii) have been met with respect to each of the intended beneficiaries of the petition.

3. **Petitioner as Agent**. 8 CFR 214.2(h)(2)(i)(A) states that, unless otherwise provided by regulation, the entity filing an H-2B petition must be the "United States employer" that seeks to classify the alien. 8 CFR 214.2(h)(2)(i)(F) provides a limited exception to this general requirement, by allowing an agent to file a petition:

> …in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf.

In consideration of whether any association meets the requirements to file an H-2B petition as an agent, the burden is on the association, as the petitioner, to demonstrate that the type of workers sought in their petitions are either traditionally self-employed and/or that the alien beneficiaries of the petition use agents to arrange short-term employment on their behalf with numerous employers. Absent a showing in the H-2B petition that such workers meet either of these two criteria, a petition filed by an industry association would be subject to denial.

Please note that cases involving "master" petitions adjudicated prior to this clarification that may have been inadvertently approved will not be subject to revocation, absent evidence of some other error, fraud or misrepresentation.

For more information on USCIS and its programs, visit www.uscis.gov.

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[1] See 20 CFR 655.200(c) (definition of the term "employer").