

# Adjudicator's Field Manual

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## Chapter 31 Petitions for Temporary Workers (H Classifications).

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### 31.1 Background. [Section (b) amended 10/6/2010; AD10-48; PM-602-0009]

#### (a) Current Law .

The present nonimmigrant temporary worker categories have changed significantly, becoming more restrictive in some ways and more generous in others, in several stages since 1986. Current law provides for the admission of several specific categories of temporary workers (H nonimmigrant categories, as well as L, O and P categories discussed in other chapters of this manual):

- H-1B classification, created by Public Law 101-238 (1989) (and the Immigration Nursing Relief Act which also created the now defunct H1-A nurse classification) and modified by Public Law 101-649 (1990) is reserved for aliens employed in “specialty occupations”, defined as in section 214(i) and for fashion models of “distinguished merit and ability”;
  
- H-1C classification, created by Public Law 106-95 (1999), is reserved for registered nurses employed in specifically designated nursing shortage areas;
  
- H-2A classification, created by Public Law 99-603 (1986), is reserved for temporary or seasonal agricultural workers;
  
- H-2B classification, created by Public Law 99-603 (1986), is reserved for other temporary workers;
  
- H-3 classification is reserved for “industrial trainees” who will not primarily be engaged in productive labor.

Each of these categories is precisely defined in section 101(a)(15)(H) of the Act and the petition requirements for each are set out in **8 CFR 214.2(h)** .

#### (b) Prior Laws .

The Immigration Act of 1952 established a new nonimmigrant class of temporary workers. In these provisions, Congress sought to grant the Attorney General sufficient authority to admit temporarily certain alien workers, industrial, agricultural, or otherwise, for the purpose of alleviating labor shortages as they exist or may develop in certain areas or certain branches of American productive enterprises, particularly in periods of intensified production. The provisions also enabled foreign trainees to acquire the knowledge of American industrial, agricultural, and business methods. In 1970, Congress eliminated the requirement that an alien of distinguished merit and ability must be coming to a temporary position. However, both the petitioner and the beneficiary must intend that the employment be for a temporary period of time. Also, in that year Congress added another new immigrant category, the L-1, intracompany transferee.

Prior to 1989, there were three H nonimmigrant worker classifications. The H-1 category included all “persons of distinguished merit and ability” which was generously interpreted to include all persons engaged in occupations which required a bachelor’s degree or equivalent. Also included were registered nurses, athletes, artists and entertainers. There was no maximum time limit on the total period of stay or number of extensions which could be approved for an H-1, although in practice an H-1 requesting an extension beyond five years was generally denied as an “intending immigrant.” There was no limit on the number of H-1 aliens who could be admitted to the United States on an annual basis, nor was there any labor market test required. Among the professions, only medical doctors, other than those entering to perform teaching or research, were precluded from the H-1 classification.

In 1986, Pub. L. 99-603 created a separate H-2A category for temporary/seasonal agricultural workers. Other temporary workers were redesignated as H-2B.

In 1989, Pub. L. 101-238 created a separate category (H-1A) for registered nurses. This Act also redesignated the existing H-1 category as H-1B. The H-1A category was permitted to sunset on September 1, 1995, with some nurses granted extensions in the category through September 30, 1997. On November 12, 1999, the category was replaced by the present, more restrictive, H-1C category created by Pub. L. 106-95.

In 1990, athletes and entertainers, as well as prominent persons in business, science and education were separated into the new O and P categories as a result of Pub. L. 101-649, and the definition of H-1B changed from an alien of “distinguished merit and ability” to one coming to perform “services in a specialty occupation.” In addition, numerical limitations on new admissions of H-1B, H-2A and H-2B nonimmigrants were imposed for the first time. Further, the new law imposed a “labor condition application” provision that required the employer to pay any H-1B worker the higher of the actual or prevailing wage for the occupation in the local area of employment. The requirement that an alien have a residence in a foreign country which he has no intention of abandoning was also removed from the H-1 and L nonimmigrant classifications; however, limits were imposed on the amount of time an alien could remain in H-1B or P status. The H-2 and H-3 nonimmigrant classifications retained the foreign residence

requirement, and the new O, P, and Q nonimmigrant classifications also required that the alien have a residence in a foreign country which he or she has no intention of abandoning.

In 1991, the Miscellaneous and Technical Immigration and Naturalization Amendments further modified the H-1B definition by including fashion models in the category.

In 1998, the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA) mandated that most H-1B petitioners pay an additional fee (originally \$500, later raised to \$1,000) which is designated for the funding of training programs for American workers.

In 2000, three significant pieces of legislation affecting H nonimmigrants were enacted. On October 17, 2000, the President approved enactment of The American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Public Law 106-313. On the same date, the President also approved enactment of Public Law 106-311, an untitled bill to increase the fee for certain H-1B petitions. Finally, on October 30, 2000, the President approved enactment of Public Law 106-396, the Visa Waiver Permanent Program Act (Visa Waiver Act). These amendments made the following changes:

- Public Law 106-313:
  - Increased the numerical limitation on the H-1B nonimmigrant classification to 195,000 for fiscal year 2001 through fiscal year 2003;
  - Allowed for the continued H-1B employment of certain H-1B nonimmigrant aliens who change H-1B employers;
  - Exempted certain H-1B nonimmigrants from the annual numerical limitation;
  - Allowed certain aliens who have applied for adjustment of status to change employers under certain conditions;

- Allowed INS (now USCIS) to grant an extension of stay to H-1B nonimmigrant aliens who are the beneficiaries of employment-based petitions under certain circumstances;
  
- Modified the method of counting H-1B nonimmigrant aliens;
  
- Provided that certain H-1B petitions that are revoked because of fraud or willful misrepresentation shall be subtracted from the numerical count for the year in which the petition was revoked;

- Public Law 106-311:

- Increased the additional filing fee for certain H-1B petitions to \$1,000, with some exceptions;

- Public Law 106-396:

- Amended section 214 of the Act to address whether an amended petition is required of an H-1B petitioner when the petitioner undergoes corporate restructuring.

On November 2, 2002, President Bush signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act (21 st Century DOJ Appropriations Act). One section of the new law amends § 106(a) of the American Competitiveness in the Twenty-first Century Act (AC21) by making the following change:

- Public Law 107-273:

- Removes the six-year limitation on H-1B status for certain aliens on whose behalf an alien labor certification or employment-based (EB) immigrant petition has been pending for 365 days or more.

On December 8, 2004, President George W. Bush signed the Omnibus Appropriations Act of FY 2005 (also known as the H-1B Visa Reform Act) into law. This act:

- Reinstated and increased an additional filing fee to \$1,500 for certain H-1B petitions filed by petitioners with more than 25 employees in the United States, with some exceptions. This is known as the ACWIA (American Competitiveness and Workforce Improvement Act of 1998) fee.
- Set the additional fee at \$750 for certain H-1B petitions filed by petitioners with 25 or fewer employees in the United States, with some exceptions.
- Instituted a Fraud Prevention and Detection Fee of \$500 for the first H-1B petition filed by a particular petitioner on behalf of a specific beneficiary on or after March 8, 2005.

On August 13, 2010, President Barack Obama signed Public Law 111-230. Public Law 111-230:

- Requires the submission of an additional fee of \$2,000 for certain H-1B petitions where those petitions are postmarked on or after August 14, 2010;
- Applies if:
  - The H-1B petitioner employs 50 or more employees in the United States; and
  - More than 50 percent of the petitioner's employees in the United States are in H-1B, L-1A, or L-1B nonimmigrant status; and
- Will remain in effect through September 30, 2014.

## 31.2 General Requirements for H Petitions.

### (a) General .

Petition filing requirements, requirements for maintaining status and requirements for obtaining an extension of stay or change of nonimmigrant status are discussed in Chapter 30 of this manual. General adjudicative practices are discussed in Chapter 10 . The remainder of this chapter deals with the adjudication of I-129 petitions for all H-class temporary workers. Regulations governing the filing and adjudication of these petitions may be located at 8 CFR 214.2(h) . Also helpful are the instructions for Form I-129 . These regulations and instructions are detailed and somewhat complex, because the requirements of the statute itself are complex.

### (b) Filing of Petitions .

#### (1) Filing Location .

A petition to classify a worker under section 101(a)(15)(H) of the Act must be filed with the service center which has jurisdiction over H petitions in the area of intended employment, except in emergent situations. Petitions are filed at the service center unless there is an emergent situation as directed by HQOPRD. In such a case, the district officer must obtain a file number from the service center and send the file to the service center after disposition for records retention. The service centers do not have jurisdiction over special filing situations, such as petitions for Canadian woodsmen. Such petitions are filed with the local district office or a designated USCIS office. (See Appendix 31-4 for a list of such “special filing situation” cases.)

#### (2) Who Can File .

Although the statute requires the *employer* to file an H petition, USCIS allows others to file for the employer to accommodate some situations.

- H-1B petition. A U.S. employer or an agent where appropriate may file the petition.

- H-1C petition. A “facility” as defined by Department of Labor regulations at 20 CFR 655.1102 may file the petition.

- H-2A petition. A U.S. employer, the employer's agent, or an association of U.S. agricultural producers named as a joint employer on the labor certification may file the petition.

- H-2B petition. A U.S. employer, a U.S. agent, or a foreign employer filing through a U.S. agent may file the petition.

- H-3 petition. A U.S. employer must file the petition.

### (3) Services in More than One Location .

Such petitions are usually filed by an agent who is representing numerous employers in various locations, or by one employer which has work to be performed by the beneficiary in more than one location. A detailed itinerary is required to accompany the petition. The procedure where each employer must file a separate petition in order for the alien to work part-time for multiple employers does not apply in petitions filed by agents. [See 8 CFR 214.2(h)(2)(i)(B) .]

### (4) Amended Petition .

An amended petition requires the same filing fee as a new petition. Because the amended petition supplements the original petition, documentation does not have to be duplicated in the amended petition. However, an amended petition must be accompanied by evidence addressing the change which necessitated the filing of the amended petition.

### (5) Agents as Petitioners .

A United States agent may 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 in its behalf. A United States agent may be:

- The actual employer of the beneficiary;
  
- The representative of both the employer and the beneficiary;
  
- A person or entity authorized by the employer to act for, or in the place of, the employer as its agent.

Whenever the beneficiary(ies) will be employed by a single employer, the actual employer(s) must file the petition. USCIS reserves the right to require information from the actual employers and beneficiary(ies). The itinerary of firm engagements provided by the agent is acceptable in lieu of signed contracts, unless the adjudicator has reason to believe the statements are not true and correct. However, the adjudicator should request any additional information from the petitioning agent. Speculative employment should not be included in an itinerary. When the agent, such as a modeling agency, is functioning as the employer, a contract between the agency and the alien, guaranteeing the wages and conditions of employment, must accompany the petition.

#### (6) Named Beneficiaries .

Nonagricultural H petitions must identify the beneficiary (or beneficiaries) by name and other information required on Form I-129 , except in emergent situations involving multiple H-2B aliens. [See 8 CFR 214.2(h)(2)(iii) .]

#### (A) Emergent Situations .

The decision not to require names in an emergent situation is a discretionary one which the director must make. The petitioner's inability to provide names at the time the petition is adjudicated should be due to circumstances which the petitioner could not anticipate or could not control. The names and evidence that

the aliens meet the requirements of the labor certification must be provided by the petitioner to the port of entry or the consular officer prior to their admission at a port of entry or application for a visa.

(B) Multiple Petitions Using the Same Labor Certification .

The petitioner may file multiple petitions at different times as the names of aliens become known, and use copies of the same labor certification until all of the positions covered by the labor certification have been filled. Each subsequent petition must refer to the petition number of all previously filed petitions using that labor certification, if available to the petitioner.

(7) Multiple Petitions .

An H-1B beneficiary can work simultaneously for more than one employer, provided each files a separate petition with its own LCA. Such separate petitions are not necessary if an agent serves as the sole petitioner.

(c) Effect of a Prior H-petition Approval .

Evidence of prior approvals as a form of documentation on a subsequent new petition cannot serve as the basis for future eligibility. Knowledge of prior approval of an H petition can be helpful to USCIS when considered along with other evidence eligibility. A prior approval, however, does not obligate USCIS to approve a subsequent petition or relieve the petitioner of providing sufficient documentation to establish current eligibility.

(d) Limits on a Temporary Stay . **[Chapter 31.2(d) revised 12-05-2006]**

(1) Principal Alien .

Specific limits on what is regarded as a temporary period of stay in all H classifications are included in the

regulations to reflect the temporary nature of these classifications and to achieve consistency in the handling of requests for extensions of stay.

The maximum time limit in an H classification and the requirement to reside abroad upon expiration of this period cannot be avoided by leaving the United States before the expiration of the maximum time limit and reentering within a short period of time under a new petition. In such cases, the approval period of the new petition shall be consistent with and count towards the maximum time limit on an alien's temporary stay.

A new period of authorized stay may begin only when the alien has resided outside the United States for a period required by the classification, or when the alien qualifies for an exemption from limits on the maximum period of stay as discussed below.

## (2) Spouse and Dependents .

Limitations on the duration of time spent in H-1B, H-2, or H-3 nonimmigrant status refer only to the principal worker in H status and do not apply independently to the principal worker's dependent spouse and children. Normal rules for maintenance of derivative status still apply such that the dependent may remain in the United States only for the purpose of family unity with the principal worker.

Time spent as an H-4 dependent does not count against the maximum allowable period of stay for principals in H-1B, H-2, or H-3 status. Thus, a foreign national who was previously an H-4 nonimmigrant and subsequently becomes an H-1B, H-2, or H-3 principal may be eligible for the maximum period of stay allowed under the H-1B, H-2 or H-3 classifications. Furthermore, a principal H-1B, H-2, or H-3 nonimmigrant who subsequently changes to H-4 status may remain in the new derivative status for as long as the principal foreign national spouse maintains that principal status. The application for a change of status to H-4 must be properly filed before the H-1B, H-2, or H-3 foreign national has spent the maximum allowable period of stay in the United States.

USCIS may limit, deny, or refer for removal an H-4 dependent that is not primarily intended for the purpose of being with the principal worker in the United States. Therefore, a spouse or child may be required to show that the requested stay is not intended to evade the normal requirements of the nonimmigrant classification that otherwise would apply when the principal foreign national is absent from the United States.

USCIS officers may adjudicate applications for dependent stays in order to prevent an H-1B nonimmigrant from using only occasional work visits to the United States in order to "park" the family members in the United States for extended periods while the principal alien is normally absent.

(3) Seasonal, Intermittent or Aggregate Periods of Employment of Six Months or Less .

The limitation on the total period of stay does not apply to H-1B, H-1C, H-2B, or H-3 aliens who do not reside continually in the United States and whose employment in the United States is seasonal or intermittent or for an aggregate of six months or less per year.

Further, the limitations do not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

(4) Exemptions to Limitations of Stay . . . **[Updated May 28, 2008]**

The limitation on the total period of stay does not apply to H 1B aliens when, as of the date of filing the extension request:

- 365 or more days have passed since the filing of any application for labor certification, Forms ETA 750 <http://www.foreignlaborcert.doleta.gov/750inst.cfm> or ETA 9089, that is required or used by the alien to obtain status as an EB immigrant; and the labor certification, if approved, has not been revoked, is unexpired or has been timely filed with an EB petition within the labor certification's validity period; or
- 365 or more days have passed since the filing of an EB immigrant petition that is still pending; or
- The alien is the beneficiary of an approved EB immigration petition and is not able to file to adjust status to U.S. permanent legal residence based on the unavailability of an immigrant visa number.

(5) Applying for Exemptions to Limitations of Stay .

In sections 106 and 104(c) of AC21 [ [link to “Sec. 11030A. Extension of H-1B status for aliens with lengthy adjudications” on the i-link Public Laws Amending the INA](#)], Congress provided exemptions from maximum stay rules for certain H-1B aliens who were being sponsored by employers for permanent residence and were subject to long delays either for government processing or for visa numbers.

The relevant subsections emphasize exemption from the maximum admission under INA section 214(g)(4). Congress did not restrict eligibility for additional periods of admission beyond the maximum six years to only requests for extension of stay.

A qualified alien need not be in H-1B status in order to benefit from sections 106 and 104(c) of AC21. The alien may obtain such additional periods of H-1B admission through a petition to change status from another nonimmigrant classification, or through H-1B visa issuance at a U.S. consulate (unless visa exempt) and admission from abroad.

**Note:**

The burden of proof rests with the petitioner and alien to establish his or her eligibility for any additional periods of stay in H-1B status beyond the six year maximum, including evidence of job requirements, alien credentials, labor condition application approval, previous H-1B status, pending labor certification or immigrant petition, and unavailability of immigrant visa number, and admissibility or maintenance of nonimmigrant status.

(e) Amended Petitions .

An amended petition must be filed when there is a material change in the terms and conditions of employment or the beneficiary's eligibility. The amended petition procedure was not devised merely as an avenue to advise USCIS of minor changes in the conditions of employment or the beneficiary's eligibility. Petitioners should advise USCIS of these minor, immaterial changes when extensions of the beneficiary's stay are filed.

The following examples would require a new or amended petition to be filed:

- When a beneficiary is transferred from one employer to another, the filing of a new petition ensures that the new employer is liable for the alien's return transportation abroad and that the employer files a labor condition application.
- A change of the alien's duties from one specialty occupation to another.
- When a beneficiary is transferred from a firm to another firm within the same organization, and the new firm becomes the beneficiary's employer. The mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien's employer and, provided further, the supporting labor condition application remains valid.
- When the beneficiary's employer merges with another firm to create a third entity which will subsequently employ the beneficiary. *This circumstance is distinguished from a change in ownership.*

The following examples would not require a new or amended petition to be filed:

- When a beneficiary is transferred from one branch of a firm to another branch of the same firm. A branch of a firm is not considered to be a separate entity from its parent company.
- If the petitioner changes its name. The petitioner should advise USCIS of the name change if and when it files to extend the alien's stay.
- Changes in the ownership structure of the petitioning entity. It is understood that the new owner(s) of the firm assumes the previous owner's liabilities which would include the assertions the prior owner made on the labor condition application.

### **31.3 H1-B Classification and Documentary Requirements. [Section (h) added 10/6/2010; AD10-48; PM-602-0009]**

#### (a) Definitions .

The following terms relate directly to the H-1B temporary worker classification. Adjudicators should be familiar with these terms. Some of the terms have been used in other contexts under prior law.

#### (1) Specialty Occupation .

The term “specialty occupation” is defined in section 214(i)(1) of the Act and described in 8 CFR 214.2(h)(4)(ii) . The term was created by the Immigration Act of 1990 (IMMACT), although its definition was taken from prior case law which related to “professional” occupations which qualified for pre-IMMACT H-1 status. An alien may qualify for a specialty occupation by virtue of formal education, experience, or a combination of both. However, do not rely on pre-IMMACT precedent case law for guidance on specialty occupations. While there are no published precedent decisions on this subject, service centers (where virtually all such cases are filed) may find prior non-published appellate orders as useful guidance and training material. For statistical purposes, this category is referred to internally as H-1B1.

#### (2) Distinguished Merit and Ability .

As currently applied, this term originates in section 101(a)(15)(H)(i) relating solely to fashion models. Prior to IMMACT, the term was more broadly applied to artists, entertainers, musicians, etc. Case law which relates to this term relates to the earlier definition and should not be applied to new cases. Fashion models are described in 8 CFR 214.2(h)(4)(vii)(A) . See also the definition of “prominence” located in 8 CFR 214.2(h)(4)(ii) . For statistical purposes, this category is referred to internally as H-1B3.

#### (3) DOD (Department of Defense) Cooperative Research Project .

The term “DOD researcher” is described in 8 CFR 214.2(h)(4)(vi)(A) . The term is used to distinguish these H-1B cases from other H-1B cases. It should be noted that unlike the other H-1B cases, the DOD

Researchers do not require a labor condition application. Beneficiaries of such cases must otherwise meet the education and experience qualifications described for a specialty occupation. For statistical purposes, this category is referred to internally as H-1B2.

#### (4) Physicians .

Physicians in the H-1B classification are limited to those described in section 212(j)(2) of the Act. A petition for an alien physician coming to the United States to teach or conduct research or both at or for a public or nonprofit private educational or research institution or agency, in which no patient care will be performed except that which is incidental to the physician's teaching and research may be adjudicated like a petition for an alien coming to perform services in a specialty occupation. If no patient care is involved, neither a license or authorization from the state needs to be submitted.

A petition for an alien physician involved in direct patient care must be accompanied by the following:

- An approved labor condition application;
  
- A license or other authorization required by the state of intended employment to practice medicine if the physician will perform direct patient care and the state requires the license or authorization;
  
- A full and unrestricted license to practice medicine in a foreign state or evidence that the beneficiary has graduated from a medical school in the United States or in a foreign state;
  
- Evidence that the alien has passed the Federal Licensing Examination (FLEX) or an equivalent examination as determined by the Secretary of Health and Human Services unless the alien received his/her medical education in the United States; and
  
- Evidence that the alien has passed the English test given by the Educational Commission of Foreign Medical Graduates (ECFMG) to establish competency in oral and written English language unless the alien has received his/her medical education in Canada or the United States.

Note 1:

The Secretary of Health and Human Services announced the physician licensing examinations which will be considered equivalent to the FLEX. Parts I, II, and III of the National Board of Medical Examiners (NBME), and Steps 1, 2, and 3 examinations of the new United States Medical Licensing Examinations (USMLE) program, have been recognized by the Secretary as equivalent to the FLEX.

Note 2:

Physicians who received their graduate medical training in Canada must take the FLEX, or its equivalent. Many times Canadian MD's can get reciprocal U.S. state licenses based upon their holding Canadian licenses to practice medicine. Even so, they must still take the FLEX to become eligible for H-1B classification if they intend to perform direct patient care. Furthermore, pursuant to a determination of the Department of Health and Human Services (HHS), the Licentiate of the Medical Council of Canada (LMCC) is not equivalent to the FLEX.

(b) Labor Condition Application .

As defined in section 212(n)(1) of the Act, a Labor Condition Application (LCA) is a statement filed with the Department of Labor (DOL) on Form ETA 9035 by a prospective H-1B employer certifying:

- That the alien hired in a specialty occupation (or as a fashion model) will be paid at least the same wage as other similarly employed persons or the prevailing wage for the occupation in the area of employment;
- That the alien will be provided with working conditions which will have no adverse effect on other similarly employed persons;
- That no strike or lockout is in progress; and
- (If the employer is a “dependent employer” as defined in section 212(n)(3)(A) of the Act) that no U.S. worker has been or will be displaced as a result of the H-1B alien’s employment.

Note:

Certain employers, such as willful violators and dependent employers must make additional attestations.

Other details about LCA requirements are described in section 212(n). An LCA may be valid for a period up to three years. [See 20 CFR 655, Subpart H , for a description of DOL handling procedures for an LCA.]

The LCA, which may be a photocopy of the original, must be valid for the period of time requested for the petition. The dates of intended employment cannot extend outside the dates on the LCA. Multiple unnamed beneficiaries may be included on the LCA, however the petitioner must reference, by file number, all previously approved petitions that used the same LCA. Furthermore, once a slot on the LCA has been used for a specific alien, that slot cannot be used for another alien even if the original alien leaves the job permanently before the LCA has expired.

If the alien will be performing the same duties at another location for the same employer a single LCA can be filed if:

- The LCA is filed with the DOL regional office having jurisdiction over the initial place of employment; and
  
- All places of employment are within a single DOL regional office.

Note:

Approval by the DOL of an LCA in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation.

(c) ACWIA Compliance .

As of March 30, 2000, all H-1B petitions must include Form I-129W, H-1B Data Collection and Filing Fee Exemption. As the name implies, the form is used to adjudicate requests for exemption from the additional filing fee (\$1,000) mandated by the American Competitiveness and Workforce Improvement Act of 1998

(ACWIA). In addition, the form is used to collect certain statistical data regarding the education, training and occupations of H-1B beneficiaries. The regulations at 8 CFR 214.2(h)(19) describe the requirements for this exemption.

(d) Documentation .

(1) General .

The regulations and instructions for Form I-129 provide precise, detailed instructions on what types of documentation must be submitted in support of a petition. It is incumbent upon the petitioner to fully and accurately describe the position as well as providing evidence of the beneficiary’s qualifications to immediately engage in the occupation. Review all required documents carefully to determine if they meet, qualitatively, the requirements of the regulations and forms instructions. The following table indicates where these requirements can be found for each type of H-1B petition:

H-1B Petition Type	Petitioner Requirements	Beneficiary Requirements
Specialty occupation described in 8 CFR 214.2(h)(4)(iii)(A)	8 CFR 214.2(h)(4)(iii)(B)	8 CFR 214.2(h)(4)(iii)(C)
DOD researcher described in 8 CFR 214.2(h)(4)(vi)(A) .	8 CFR 214.2(h)(4)(vi)(B)	8 CFR 214.2(h)(4)(vi)(C)
Fashion model described in 8 CFR 214.2(h)(4)(vii)(A)	8 CFR 214.2(h)(4)(vii)(B)	8 CFR 214.2(h)(4)(vii)(C)
Physician described in section 212(j)(2) of the Act	8 CFR 214.2(h)(4)(viii)(B)	8 CFR 214.2(h)(4)(viii)(A)

(2) Professional Licensing .

If the State in which an alien H-1B will work requires a license in order to engage in professional activities, then the alien beneficiary must have that license before an H-1B petition may be approved. The petitioner must provide a certified copy of the alien's valid State license, certification, or registration to practice the profession. A temporary license or State authorization for unlicensed persons to perform professional activities under the supervision of a licensed professional must be examined on a case-by-case basis to determine if the beneficiary can be considered to be employed in a professional capacity. When the alien

has a temporary license, the approval period of the petition and/or extension of stay application cannot exceed the validity period of the temporary license. [ 8 CFR 214.2(h)(v) .]

(3) Adjudicators may face situations where State or Local licensure is required to engage in a particular H-1 B specialty occupation but the alien beneficiary of an H-1 B petition cannot obtain that license without presenting, as a prerequisite, evidence of an approved H-1 B petition on that alien's behalf. A similar "catch 22" scenario exists where a State requires an applicant for a license to present a social security number that is valid for employment but the alien cannot obtain a social security number until he or she has been granted H-1 B status. (Paragraph (d) (3) added 03-21-08. AD08-10)

Under such circumstances, adjudicators should verify that the alien beneficiary is fully qualified to receive the State or local license, meaning that all educational, training, experience, and other substantive requirements must be met at the time of filing the petition. The petitioner must demonstrate that the alien beneficiary has in fact filed an application for such State or local license in accordance with the requirements of the State or local jurisdiction in advance of being granted employment authorization in the U.S. Adjudicators are instructed to approve the petition for a one-year validity period, provided that the sole reason why the alien beneficiary does not possess such license is that the appropriate licensing authority will not grant such license to an alien absent evidence that the alien has been granted H-1 B status. Approval of such a petition does not constitute authorization by USCIS for the alien to engage in any activities requiring such licensure. Any petition that requests an extension of stay beyond the one-year validity period on behalf an alien who has been granted H-1 B status under this provisional measure must show that the alien has obtained the requisite license. If the alien has not obtained the license at the time the petition and extension are filed, such petition will be denied.

(e) Decision Procedures .

Follow the general adjudicative procedures described in Chapter 10 of this manual.

(1) Approval .

If you are satisfied that the LCA and all other required documents are present and the petition is approvable, endorse the approval block. Initial petition approvals may be for a period of up to three years (5 for DOD R&D projects), not to exceed the period of time requested on the petition or the validity period of the LCA. If the occupation is one which requires a license, the validity period for the approval cannot exceed the validity period of the license. The beginning date for a petition should be the date requested by the petitioner or the approval date, whichever is later. Approval may be no more than six months earlier than the date of need. If a beneficiary has been in the U.S. on another H-1B or L-1 petition, the petition may not

be not approved for a period which would permit the beneficiary to remain for an aggregate of more than 6 years (10 for DOD R&D project workers). See Matter of Safetran , 20 I&N Dec 49 (Comm. 1989) . If the alien is present in the United States and requires a change of status, follow procedures described in Chapter 30.3 . If the alien is present in the United States and requires an extension of stay, follow procedures described in Chapter 30.2 . Notify the petitioner of the action taken using CLAIMS Form I-797 , Notice of Action. If action is completed in a local office on an emergent basis, the file must be returned to the appropriate service center for storage. Because of severe numerical limitations, Headquarters, Adjudications must be contacted to obtain authorization before approving an H-1B2 petition for a DOD project alien.

Note:

If the alien is present in the United States in another status or on a different H-1B petition, there can be no significant (i.e., longer than that required for normal mail delivery) time lapse between the beginning date of the extension or change of status and the (subsequent) beginning date of the LCA.

(2) Denial .

Prepare a notice of denial, also on Form I-797. Advise the petitioner of the right of appeal to the Administrative Appeals Office. Retain the file, in accordance with local procedures, until the appeal period expires or the appeal is received.

(f) Transmittal of Petition .

(1) Visa Applicants .

If the beneficiary requires a visa, the duplicate of the approved petition, with the supporting documents, shall be sent to the appropriate consul. When advance notice of approval (via fax or cable) is directed to a consul, the petitioner shall be instructed promptly to have the beneficiary contact the consul. The petition, before being mailed, shall be stamped "Approval previously forwarded".

(2) Visa-exempt Applicants .

When the beneficiary does not require a visa, the duplicate petition without supporting documents shall be forwarded to the appropriate port of entry.

(g) Adjudicative Issues .

(1) Deciding If the Proposed Employment Is a Specialty Occupation .

Although the definition of specialty occupation is included in the statute itself and the regulations are specific regarding the criteria for determining what qualifies as a specialty occupation, approval or denial often comes down to a judgment call by the adjudicating officer. There are numerous references available (such as the DOL's Occupational Outlook Handbook) to describe specific vocational preparation for various occupations. However, it is important to note that occupations are rapidly evolving and job titles themselves are often meaningless. In order to correctly adjudicate a case, it is necessary to consider all the facts surrounding the petition: the beneficiary's education and work experience, the nature of the petitioner's business, industry practice, and salary (both offered to the beneficiary and typical for the industry). It is important not to be so influenced by a single factor, such as the job title or salary, that other indicators are overlooked. If significant doubts exist regarding the beneficiary's work experience, the adjudicating officer may request an overseas investigation (see Chapter 10.5(d) ) or refer the case to the appropriate local ICE office for interview, field examination (see Chapter 17 ), or local investigation.

(2) Equivalency of Experience and Education .

One of the most common situations an adjudicator will encounter is an H-1B petition filed for an alien in specialty occupation where the alien lacks a U.S. bachelor's degree. Adjudicators should be thoroughly familiar with 8 CFR 214.2(h)(4)(iii)(D) which describes the kind and amount of experience which can be used to establish the equivalence of a degree. Three years of professional experience may be used to substitute for each year of college-level training. The most critical aspect of this type of adjudication is deciding whether the quality of experience is at high enough level to qualify as "professional." Experience is generally documented through letters from past employers and may be so lacking in specificity as to make the qualitative determination difficult or impossible. The regulations for deciding equivalency are very specific and must be closely followed.

Foreign educational credentials, licenses and other forms of documentation are easier to evaluate than experience. The petitioner may establish from an authoritative source or from transcripts, certificates, or other such school records that the alien has college-level education. College-level training may have been

acquired at a college or university or other academic institution which grants a degree, diploma, or certificate, such as a technical college. It may be useful to compare the beneficiary's age at completion and the duration of the course of study, with the average age of graduates of United States institutions offering similar programs as a factor in determining equivalency of education.

Specialized training may have been acquired through an apprenticeship program, employee-sponsored training courses, vocational training schools, or other commercial training facilities. The starting and ending dates of all training in the field must be shown. Training certificates and an outline or summary of the curriculum should be submitted.

Membership in a professional association, per se, is insufficient evidence of equivalency. An association which grants certification or registration in the profession should have an accrediting body which has standards for the profession, and which issues an official document to applicants verifying that they have been awarded professional credentials in the profession. The standards of the organization should be reviewed to ensure that bachelor's degree or higher, or its equivalent, is required for membership.

In suspect cases, overseas experience can be verified by the overseas DHS office (see Chapter 10.5(d) on requesting an overseas investigation). Such investigations should not be routinely requested, but can be used when all other avenues have been explored and there is still serious doubt about claimed experience.

### (3) Unsolicited Evaluations .

An evaluation by an official who has authority to grant college-level credit at an accredited college or university with training and/or work experience in the profession can also be used to support an equivalency claim. USCIS does not require the alien to be enrolled in a program for college credit at the university in order to accept the evaluation of such an expert. However, the official must be formally involved with the college or university's official program for granting credit based on training and/or experience to have the required authority and expertise to make such evaluations. The evaluation may be done in the official's name as an individual, or as an authorized representative of the college or university. Any such evaluation should be given considerable weight in determining eligibility.

Results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONS I) must be translated into college credits by an authoritative source in the particular program or by an authorized official from an accredited college or university, such as the registrar, in order for the results to be applied towards the degree requirement.

There are a number of outside organizations which evaluate educational credentials to determine degree equivalency. Some organizations may also provide an opinion on the equivalency of experience to education. It is important that the adjudicator distinguish between these two types of evaluations. The latter type of evaluation carries little weight. Although USCIS does not specifically recognize or accredit any sources of evaluations, foreign educational degree evaluations can be of assistance if they are thorough, well documented and specific in reaching an equivalency determination.

#### (4) Assessing the Needs of the Petitioner for the Services of the Beneficiary .

This issue is occasionally present in H-1B petitions filed by small businesses for aliens with professional skills not normally associated with persons employed in such a business (e.g., a petition for an accountant filed by an auto repair business or restaurant). Often, such petitions are filed by a relative or family friend as an accommodation to the beneficiary. Either the beneficiary will be employed in a lesser capacity or he or she will seek other employment immediately upon arrival. The burden of proof falls on the petitioner to demonstrate the need for such an employee. Unless you are satisfied that a legitimate need exists, such a petition may be denied because the petitioner has failed to demonstrate that the beneficiary will be employed in a qualifying specialty occupation.

#### (5) Determining the Petitioner's Ability to Pay the Required Wage .

This issue, like the preceding one, is most commonly associated with small enterprises which do not necessarily have the assets required to pay the salary guaranteed in the petition. Such a petition may be an accommodation to a relative or friend who will seek other employment or there may be an agreement to work for lower wages. It is not necessary that complete financial data be submitted with every H-1B petition. However, if in the discretion of the adjudicating officer the financial condition of the petitioner is so questionable as to call into question whether the petitioner really intends to employ the alien as claimed, evidence of financial ability may be requested. This is because the financial standing of the petitioner, when taken in consideration with other factors, may be indication that the petition is an accommodation and not a valid job offer. Other factors that may be examined include, but are not limited to, the nature of the petitioner's business, the relationship between the beneficiary and the owners/officers of the petitioning entity, and the petitioner's immigration history.

#### (6) Effect of Beneficiary's Intent to Remain Permanently .

For an H-1B or L nonimmigrant, the fact that a labor certification, permanent visa petition or adjustment of status application has been filed does not effect eligibility for nonimmigrant H-1B or L status. [See 8 CFR 214.2(h)(16) .]

(7) Ability to Engage in the Occupation Immediately upon Entry .

This issue often arises in occupations where a state license is required. If the beneficiary will require training or must take a licensing examination before commencing employment in a specialty occupation, the petition may not be approved. See Matter of St. Joseph's Hospital , 14 I&N Dec. 202 (Reg. Comm. 1972).

(8) Extension of H-1B Status Based on a Pending Labor Certification Application or Employment-Based (EB) Immigrant Petition . [Updated May 28, 2008]

(A) Conditions for the Granting of an H 1B Extension of Stay Under Section 106(a) of AC21.

Assuming the alien is otherwise qualified for an extension of H-1B status, USCIS will grant an extension beyond the 6th year if evidence is provided that:

- A labor certification is unexpired at the time of filing of the Form I-129 H-1B extension petition; and
- The labor certification was filed with DOL or the Form I-140 petition was filed with USCIS at least 365 days prior to the date the alien beneficiary will have exhausted 6 years of H-1B status in the United States pursuant to section 214(g)(4) of the INA; and
- The extension and the I-129 petition are otherwise approvable.

An extension of stay under section 106(a) of AC21 should not be granted if, at the time the extension request is filed, the labor certification has expired by virtue of not having been timely filed in support of an EB immigrant petition during its validity period, as specified by DOL.

(B) Cut off for Granting of an H 1B Extension of Stay Under Section 106(a) of AC21.

USCIS will grant an extension of stay to such H 1B nonimmigrants in one-year increments until a final decision is made to:

- (i) Deny the application for labor certification;
- (ii) If the labor certification is approved, to revoke the approved labor certification;
- (iii) Deny the EB immigrant petition; or
- (iv) Grant or deny the alien's application for an immigrant visa or for adjustment of status.

A decision to certify, deny or revoke an application for labor certification is made by one of the Department of Labor's certifying officers.

If the application is denied or revoked, the employer is advised that there is a period of time within which the decision may be appealed to the Board of Alien Labor Certification Appeals (BALCA):

- For denied Form ETA 750 <http://www.foreignlaborcert.doleta.gov/750inst.cfm> labor certification applications filed prior to March 28, 2005, the employer must file an appeal within 90 days.

- For denied or revoked Form ETA 9089 labor certification applications, the employer must file an appeal within 30 days.

If the employer does not file an appeal within the required timeframe, the denial becomes the final decision of the Secretary of Labor. USCIS will not consider a DOL decision to be final until either the time for appeal has run and no appeal has been filed or, if an appeal is taken, the date a decision is issued by BALCA.

Therefore, the labor certification will still be considered "pending" while the denial or revocation of the labor certification application may be appealed, or while the appeal is actually pending, for the purposes of determining if an H 1B nonimmigrant is eligible for extension of stay.

(C) Combined Pre- and Post-Sixth Year Extension Requests.

USCIS will grant, in certain instances, extensions that request time remaining towards the six-year maximum under section 214(g)(4) of the INA and additional time allowed under section 106(a) of AC21 .

Seventh year extension requests under section 106(a) of AC21 may be made in a petition that also contains a request for an extension of stay that reaches the maximum six year limit. USCIS adjudicators should first determine the amount of H-1B extension time that may be granted to reach the six year limitation of stay, then determine if the labor certification or Form I-140 petition was filed at least 365 days by the conclusion of the six year limitation of stay. If so, then the one year Section 106(a) of AC21 extension may be granted.

However, in no case can an extension be granted for more than a three year period of time. If the alien beneficiary would no longer be in H 1B status at the time that 365 days from the filing of the labor certification application or immigrant petition has run, then the extension of stay request cannot be granted.

(D) Documentation for Form ETA 750 Labor Certifications Filed Pre PERM and Still Pending, and for Form ETA 9089s Filed in PERM.

USCIS will accept the following documents as evidence that an application for labor certification filed on behalf of the H 1B beneficiary is still pending, or has been certified and is still valid:

If the labor certification is a Form ETA 750 <http://www.foreignlaborcert.doleta.gov/750inst.cfm> that is still pending with DOL, a screen-print from the DOL Public Disclosure System (PDS) <http://pds.pbls.doleta.gov/> that shows that the status of the labor certification application is In Process or is actively On Appeal that includes the name of the petitioning employer, the date that the Form ETA 750 was filed, the name of the alien beneficiary, and the case number assigned to the pending Form ETA 750; or

- If the labor certification application was certified on or before July 16, 2007, a complete copy of the Form ETA 750 <http://www.foreignlaborcert.doleta.gov/750inst.cfm> or Form ETA 9089 which shows the date of certification and a copy of the Form I 140 petition receipt notice for the petition filed on behalf of the H 1B beneficiary; or

- If the labor certification application was certified after July 16, 2007, a complete copy of the Form ETA 750 <http://www.foreignlaborcert.doleta.gov/750inst.cfm> or Form ETA 9089 which shows the date of certification and the date upon which the labor certification will expire, along with a copy of the Form I 140 petition receipt notice for the petition filed on behalf of the H 1B beneficiary, if any.

If an applicant for extension of stay cannot present a screen print from the PDS, he or she may present a letter from DOL issued within the previous 60 days prior to the filing of the extension petition instead. The DOL letter must explain why the PDS screen print is unavailable and verify that an application for a labor certification is pending.

(9) Procedures for Calculating Maximum Period of Stay Regarding the Limitations on Admission of H-1B Nonimmigrants . (Revised 10-20-2005; AFM AD05-21)

USCIS officers shall comply with the following guidance to determine whether periods of time spent by an H-1B nonimmigrant worker in a specialty occupation outside the United States will be recaptured:

(A) Periods of Time Outside the United States that May Be Recaptured by an H-1B Nonimmigrant Worker in a Specialty Occupation .

Because section 214(g)(4) of the Act states that “the period of authorized admission” may not exceed 6 years, and because “admission” is defined as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer” only time spent in the United States as an H-1B counts towards the maximum. Thus, upon requesting an extension, the H-1B nonimmigrant can request that full days spent outside the U.S. during the period of petition validity be recaptured and added back to his or her total maximum period of stay. As always, it is the applicant/petitioner’s burden to demonstrate eligibility, and appropriate evidence, such as copies of passport stamps I-94’s, and/or plane tickets must be submitted. The applicant for extension seeking to recapture time spent outside the U.S. need not demonstrate that the time spent outside the U.S. was meaningfully interruptive of his or her H-1B stay. The reason for the absence is not relevant to the question of whether the time may be recaptured. Any trip of at least one 24-hour day outside the U.S. for any purpose, personal or business, can be recaptured. The applicant for extension must only demonstrate to the satisfaction of the adjudicator that he or she was outside the U.S. for the amount of time for which recapture is requested. Matter of IT Ascent, EAC# 0404753189, was designated as binding policy guidance on October 18, 2005. Officers should refer to the reasoning contained in this decision.

(B) Evidence .

The burden of proof remains with the H-1B petitioner and/or the H-1B beneficiary to submit evidence documenting any and all exact periods of physical presence outside the United States when seeking an extension of petition validity and extension of stay as an H-1B nonimmigrant. The petitioner and/or beneficiary are clearly in the best position to organize and submit evidence of the beneficiary’s departures from and reentry into the United States. While petitioners often submit a summary and/or charts of travel and the number or days spent out of the United States, which eases review of the accompanying documentation, petitioners are also required to submit independent documentary evidence establishing that the alien was outside of the United States during all the days, weeks, months etc. that he or she seeks to recapture (e.g. photocopies of passport stamps and/or Form I-94 arrival-departure records).

The fact that the burden may not be met for some claimed periods, or has been met for some claimed periods, has no bearing on the remaining claimed periods. Any periods of time for which the burden has been met may be added to the eligible period of admission upon approval of the application for extension of status. An alien may not be granted an extension of stay for periods of time that are not supported by independent documentary evidence. A Request for Evidence should not be sent to the petitioner for any claimed periods unsupported by evidence .

In some instances, the alien may not be granted the entire period of time requested because the evidence submitted does not establish eligibility for the entire period of stay requested. In those situations, the approval notice should be issued for the period of time for which eligibility has been demonstrated.

The status of an H-4 dependent of an H-1B nonimmigrant is subject to the same period of admission and limitations as the principal alien. For example, if an H-1B alien is able to recapture a two-week business trip abroad for each year for five years in a row (for a total of 10 weeks), then his or her H-4 dependents, if seeking extension of stay, should be given an extension of stay up to the new expiration of the H-1B alien's stay. The statute and regulations allow H-4 status only "if [the dependents] are accompanying or following to join the beneficiary in the United States." If it appears that the dependent is not using or is not intending to use H-4 status primarily to accompany or follow to join the principal H-1B alien, such as a situation in which the principal only is physically present or intends to be physically present in the United States for a small proportion of his or her period of H-1B admission and the dependents are using H-4 status to evade the limitations on or eligibility rules of the no immigrant options that otherwise would be available, then the H-4 extension of stay may be denied, limited or revoked on notice giving the H-4 the opportunity to provide evidence of the intention primarily to accompany the principal.

Officers involved in the adjudication of H-1B petitions are cautioned that the examples provided in this memorandum are not all inclusive. Situations may develop in the adjudication of certain petitions, which will require the adjudicating office to use discretion. Therefore, decisions on petitions for extension concerning this issue that contain unique or novel circumstances may be certified to the Administrative Appeals Office for review.

(10) Requests for an Extension of H 1B Status under the Provisions of Section 104(c) of AC21 §104(c) for Aliens Subject to per Country Visa Limitations. [Updated May 28, 2008]

USCIS interprets section 104(c) of AC21 as only applicable when an alien, who is the beneficiary of an approved Form I 140 petition, is eligible to be granted lawful permanent resident status but for application of the per country limitations. Any petitioner seeking an H 1B extension on behalf of an H 1B alien beneficiary pursuant to section 104(c) of AC21 must thus establish that at the time of filing for such extension, the alien is not eligible to be granted lawful permanent resident status on account of the per country immigrant visa limitations.

USCIS will accept a copy of the H 1B alien beneficiary's Form I 140 petition approval notice which shows that an immigrant visa is not immediately available to him or her based on the approved petition's priority date as evidence of the H 1B alien beneficiary's eligibility for an extension of H 1B status under the provisions of section 104(c) of AC21 .

Adjudicators are instructed to review the Department of State Immigrant Visa Bulletin that was in effect at the time of the filing of the Form I 129 petition in which a request for a section 104(c) of AC21 H 1B extension request is made. If the H 1B alien beneficiary is shown to be ineligible to be granted lawful

permanent resident status because of the per country visa limitations, then the H 1B extension request under the provisions of section 104(c) of AC21 may be granted for a maximum of three year increments, until such time as the alien's application for adjustment of status has been processed and a decision made thereupon.

(11) H 1B Portability Provisions of Section 214 of the INA and Section 105 of AC21. [Updated May 28, 2008]

Section 214(n) of the INA provides that a nonimmigrant who was previously issued an H 1B visa or provided H 1B nonimmigrant status may begin working for a new H 1B employer as soon as that new employer files a nonfrivolous H 1B petition on the nonimmigrant's behalf, if:

- The nonimmigrant was lawfully admitted to the United States;
  
- The nonfrivolous petition for new employment was filed before the end of their period of authorized stay; and
  
- The nonimmigrant has not been employed without authorization since his or her lawful admission to the United States, and before the filing of the nonfrivolous petition.

In order to port, an alien must meet all the requirements of of the INA, including the requirement that the new petition must be filed while the alien is in a "period of stay authorized by the Attorney General."

Successive H 1B portability petitions may be filed for an alien while the previous H 1B petitions remain pending (i.e. creating a "bridge" of H 1B petitions). However, to be approved every H 1B portability petition must separately meet the requirements for H 1B classification and for an extension of stay. In the event that the alien's nonimmigrant status has expired while the petitions are pending, the denial of any filing in the string of extension of stay and/or change of status filings undercuts the "b ridge", meaning that any petition to extend or change status that was filed after the expiration of the alien's status that is denied will result in the denial of all successive requests to extend or change status.

The status of a dependent of a principal nonimmigrant who is working pursuant to portability benefits is linked to the status of the principal nonimmigrant.

(12) Changes in Employment by H 1B Alien Beneficiary under the Provisions of Section 212(n)(2)(C)(v) of the INA. [Updated May 28, 2008]

The American Competitiveness and Workforce Improvement Act of 1998 (ACWIA), Title IV of Div. C. of Public Law 105-277, was enacted on October 21, 1998. ACWIA provides for enhanced penalties against H 1B employers who violate attestations made on the LCA. Among these provisions for enhanced enforcement are measures designed to enable and encourage H 1B workers to report employers who violate certain attestations.

As a result, Section 212(n)(2)(C)(v) of the Act requires the creation of a process under which an H 1B alien beneficiary who files a complaint regarding a violation of section 212(n)(2)(C)(iv) and is otherwise eligible to remain and work in the United States may in some circumstances be allowed to seek other appropriate employment in the United States for a period not to exceed the maximum period of stay authorized for such nonimmigrant classification.

If credible documentary evidence is provided in support of an H 1B petition that the H 1B alien beneficiary faced retaliatory action from his or her employer based on a report regarding a violation of section 212(n)(2)(C)(iv) of the INA, then USCIS adjudicators may consider any related loss of H 1B status by the alien as an "extraordinary circumstance" as defined by 8 CFR 214.1(c)(4). This may allow the alien time to acquire new H 1B employment and remain eligible to apply for a change of status or extension of stay notwithstanding the termination of employment or other retaliatory action by his or her employer.

Such credible documentary evidence should include a copy of the complaint filed by the H 1B alien beneficiary, along with corroborative documentation that such a complaint has resulted in the termination of employment of the H 1B alien beneficiary or other retaliatory action by his or her employer as described in 20 CFR 655.801 <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=67c132e3cef5a550b0c791e06ef979a4&rgn=div8&view=text&node=20:3.0.2.1.34.9.12.2&idno=20> in pertinent part:

(A) No employer subject to this subpart I or subpart H of this part shall intimidate, threaten, restrain,

coerce, blacklist, discharge or in any other manner discriminate against an employee (which term includes a former employee or an applicant for employment) because the employee has-

(i) Disclosed information to the employer, or to any other person, that the employee reasonably believes evidences a violation of section 212(n) or Section 212(t) of the INA or any regulation relating to sections 212(n) or (t), including this subpart I and subpart H of this part and any pertinent regulations of DHS or the Department of Justice; or

(ii) Cooperated or sought to cooperate in an investigation or other proceeding concerning the employer's compliance with the requirements of sections 212(n) or (t) of the INA or any regulation relating to sections 212(n) or (t).

In addition, adjudicators are reminded that the portability provisions of section 105 of AC21 may also apply to the whistleblower H 1B alien beneficiary should he or she choose to use them to seek new employment and obtain relief.

(13) Cap Exemptions Pursuant to 214(g)(5) of the Act . [Chapter 31.3(g)(13) added June 6, 2006]

USCIS officers should comply with the following guidance to determine whether an alien is exempt from the H-1B cap under the provisions of 214(g)(5) of the Act, which reads:

The numerical limitations contained in paragraph (1)(A) shall not apply to any nonimmigrant alien issued a visa or otherwise provided status under section 101(a)(15)(H)(i)(b) who -

(A) is employed (or has received an offer of employment) at an institution of higher education (as defined in section 101(a) of the Higher Education Act of 1965 (20 USC 1001(a)), or a related or affiliated nonprofit entity;

(B) is employed (or has received an offer of employment) at a nonprofit research organization or a governmental research organization.

Note:

Paragraphs (A) and (B) above are INA subsections. Paragraphs (A) and (B) are not separate outline headings in this chapter.

(A) “Employed (or has received an offer of employment) at”

(i) General Discussion

Sections 214(g)(5)(A) and (B) of the Act (Section 103 of AC21) exempt an alien from the H-1B cap if the alien is “employed (or has received an offer of employment) at “an institution of higher education, a related or affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization (hereinafter a “qualifying institution”).”

Commonly, qualifying institutions petition on behalf of current or prospective H-1B employees and claim this exemption. In certain instances, petitioners that are not themselves a qualifying institution also claim this exemption because the alien beneficiary will perform all or a portion of the job duties “at” a qualifying institution. For purposes of this paragraph, such petitioners are referred to as “third party petitioners.”

A third party petitioner is one who petitions on behalf of an H-1B worker who will work “at” a qualifying institution, but where the alien is or will be employed by the third party petitioner, not the qualifying institution. These types of cases should be adjudicated based on the guidance provided below.

Congress deemed certain institutions worthy of an H-1B cap exemption because of the direct benefits they provide to the United States. Congressional intent was to exempt from the H-1B cap certain alien workers who could provide direct contributions to the United States through their work on behalf of institutions of higher education and related nonprofit entities, or nonprofit research organizations, or governmental research organizations. In effect, this statutory measure ensures that qualifying institutions have access to a continuous supply of H-1B workers without numerical limitation.

Congress chose to exempt from the numerical limitations in section 214(g)(1) of the Act aliens who are employed “at” a qualifying institution, which is a broader category than aliens employed “by” a qualifying

institution. This broader category may allow certain aliens who are not employed directly by a qualifying institution to be treated as cap exempt when needed to further the essential purposes of the qualifying institution.

Thus, if a petitioner is not itself a qualifying institution, the burden is on the petitioner to establish that there is a logical nexus between the work predominately performed by the beneficiary and the normal mission of the qualifying entity. Petitioners must therefore demonstrate how the beneficiary's duties are directly and predominately related to, and in furtherance of, the normal, primary or essential purpose, mission, objectives or function of the qualifying institution, namely, higher education or nonprofit or governmental research.

In many instances, third-party petitioners seeking exemptions from the H-1B cap are companies that have contracts with qualifying federal agencies (or other qualifying institutions) which require the placement of professionals on-site at the particular agency. The H-1B employees generally perform work directly related to the purposes of the particular qualifying federal agency or entity and thus may qualify for an exemption to the H-1B cap.

(ii) Examples

As qualifying third-party employment can occur in a variety of other ways, below is a non-exhaustive list of examples to assist adjudicators in determining cap exemption eligibility:

Example 1:

Company A, a for-profit consultant firm that would not otherwise be a qualifying institution, files an H-1B petition on behalf of an employee working directly for the firm. The H-1B petition describes the alien beneficiary's job duties, which will be performed on-site at a qualifying governmental research organization pursuant to a joint-agreement between the two entities.

Company A submits evidence in support of its H-1B petition demonstrating that the alien beneficiary will be working on a research project performing duties similar to those performed by actual employees of the governmental research organization in furtherance of the qualifying entity's mission. If the alien beneficiary was sponsored directly by the government research organization, he or she would clearly qualify for the H-1B cap exemption.

Q: Would the alien beneficiary qualify for the H-1B exemption?

A: Yes. In this case, the alien beneficiary would be exempt from the H-1B cap because the alien beneficiary will perform research duties that would or could otherwise be performed by employees of the qualifying institution, in furtherance of the qualifying institution's primary mission.

Example 2:

Company B, a for-profit hospital and research center that would not otherwise be a qualifying institution, files an H-1B petition on behalf of a renowned oncologist who will be a direct employee of the hospital and whose duties will consist of clinical treatment of cancer patients and laboratory research on a new medication to treat liver cancer.

Company B maintains a relationship with a qualifying non-profit research organization dedicated to finding a cure for liver cancer, whereby Company B occasionally provides resources and data in exchange for access to the non-profit's national database on protocols for treating liver cancer.

Company B's new oncologist will spend 55 percent (i.e., a majority) of her time working on-site at the non-profit research organization conducting research and laboratory experiments on the new medication to treat liver cancer and accessing the national database.

The oncologist will be performing sophisticated research and laboratory experiments that are not normally conducted by employees of the non-profit research organization but that, nonetheless, directly and predominantly further the normal, primary, or essential purpose, mission, objectives or function of the non-profit organization. Company B and the non-profit entity will collaborate on a joint paper publishing the research.

Q: Would the oncologist qualify for an H-1B cap exemption based on this employment?

A: Yes. In this case, the oncologist's work clearly furthers the overall mission of the qualifying non-profit research organization and benefits the United States. The fact that Company B and the qualifying non-profit entity share a cooperative relationship helps establish a sufficient nexus between the oncologist's work and the normal, primary, or essential purpose, mission, objectives or function of the non-profit organization.

Further, the oncologist will spend more than half of her time working physically on-site "at" the qualifying entity.

Example 3:

A medical fellow in pediatrics has been employed at a qualifying non-profit university medical center for two years in H-1B status. At the end of the fellowship, the doctor will become a member of Company C, a private pediatrics practice group which has its primary offices within the university medical center and predominantly trains medical students and treats patients in the medical center.

The doctor will be doing exactly the same work that he did during his fellowship, including remaining on the university medical center's faculty, but for reasons related to hospital billing practices and medical malpractice insurance requirements, his technical, and therefore petitioning, employer will be the private pediatrics practice group.

Q: Would the doctor qualify for an H-1B cap exemption based on this employment?

A: Yes. In this case, the doctor would be exempt from the H-1B cap because the conditions of employment demonstrate that the doctor will be performing the same work that he performed while employed directly by the qualifying university medical center. Thus, the H-1B employment directly furthers the primary mission of the hospital because the doctor will remain on the university medical center's faculty, and will continue to educate and train its medical students and treat patients at the medical center.

Example 4:

Company D, a for-profit market research firm that would not otherwise be a qualifying institution, files an H-1B petition on behalf of a direct employee. The H-1B petition states that the alien beneficiary will be conducting a specific kind of market research on-site at a qualifying university. In addition, the petition states that the university has a specialized research tool that can only be accessed from its facilities and that the alien beneficiary's research will be conducted for the benefit of the petitioner's clients and business, and not for the university.

Q: Would the alien beneficiary qualify for the H-1B exemption based on this employment?

A: No. In this case, the alien would not qualify for a cap exemption as he or she is only physically located "at" the qualifying institution and no nexus has been demonstrated between the work performed by the beneficiary and the normal purpose of the qualifying entity. The alien beneficiary will not perform work for the benefit of the qualifying institution, but rather for the for-profit firm.

(B) Institution of Higher Education or Related or Affiliated Nonprofit Entity

The H-1B regulations, in the context of qualifying for the H-1B fee exemption, directly adopt the definition of institution of Higher Education set forth in section 101(a) of the Higher Education Act of 1965. Adjudicators should adopt the same definition for an institution of Higher Education for purposes of exemptions from the H-1B cap.

In addition, the H-1B regulations define what is an affiliated nonprofit entity for purposes of the H-1B fee exemptions. Adjudicators should apply the same definitions to determine whether an entity qualifies as an affiliated nonprofit entity for purposes of exemption from the H-1B cap. In particular, as outlined in 8 CFR 214.2(h)(19)(iii)(B), the following definition applies:

An affiliated or related nonprofit entity . A nonprofit entity (including but not limited to hospitals and medical or research institutions) that is connected or associated with an institution of higher education, through shared ownership or control by the same board or federation operated by an institution of higher

education, or attached to an institution of higher education as a member, branch, cooperative, or subsidiary.

(C) Definitions of Nonprofit Research Organization or a Governmental Research Organization

This phrase has been defined specifically within the H-1B regulations in the context of qualifying for the H-1B fee exemption. Adjudicators should apply the same definitions to determine whether an entity qualifies as a nonprofit research organization or governmental research organization for purposes of exemption from the H-1B cap. In particular, as outlined in 8 C.F.R. 214.2(h)(19)(iii)(C), the following definitions apply:

A nonprofit research organization or governmental research organization . A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciences, or humanities.

(D) Requests for Changes in Employment or Concurrent Employment Requests for Certain Cap-Exempt Aliens. [Updated May 28, 2008]

H 1B "cap exempt" petitions, as referenced here, include petitions filed by:

- Institutions of higher education, as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a);

- Nonprofit organizations or entities related to or affiliated with institutions of higher education; and

- Nonprofit research organizations or governmental research organizations, as defined in 8 CFR 214.2(h)(19)(iii)(C) .

Petitions filed on behalf of aliens who will be employed by certain types of educational, nonprofit or governmental organizations (these types of petitioners are normally referred to as "cap-exempt" because an H-1B alien employed by such an entity is not subject to the H-1B numerical limitations) are not counted towards the numerical limitations in section 214(g)(1) of the INA. See sections 214(g)(5)(a) and 214(g)(5)(b) of the INA; and 8 CFR 214.2 (h)(8)(A) .

Pursuant to the provisions of section 214(g)(6) of the INA, USCIS has not required that an alien who is cap exempt by virtue of the above types of employment, be counted towards the limitation contained in section 214(g)(1)(a) of the INA if they accept concurrent employment with a non-exempt employer. Section 214(g)(6) of the INA reads as follows:

Any alien who ceases to be employed by an employer described in paragraph (5)(A) shall, if employed as a nonimmigrant alien described in section 1101(a)(15)(H)(i)(b) of this title, who has not previously been counted toward the numerical limitations contained in paragraph (1)(A), be counted toward those limitations the first time the alien is employed by an employer other than one described in paragraph (5). Emphasis added.

Documentary evidence, such as a current letter of employment or a recent pay stub, should be provided in support of such a concurrent employment petition at the time that it is filed with USCIS in order to confirm that the H 1B alien beneficiary is still employed in a cap-exempt position.

At the time of filing of a concurrent employment H 1B petition that is subject to the numerical limitation under section 214(g)(1)(a) of the INA:

- If the H 1B alien beneficiary has not "ceased" to be employed in a cap-exempt position pursuant to sections 214(g)(5)(A) and 214(g)(5)(B) of the INA, then he or she will not be counted towards the cap.

- If the H 1B alien beneficiary has "ceased" to be employed in a cap-exempt position, then the alien will be subject to the H 1B numerical limitation, and the concurrent employment petition may not be approved unless a cap number is available to the alien beneficiary.

· If USCIS determines that an H 1B alien beneficiary has ceased to be employed in a cap-exempt position after a new cap-subject H 1B petition has been approved on his or her behalf, USCIS will deny any subsequent cap-subject H 1B petition filed on behalf of the H 1B alien beneficiary if no cap numbers are available.

(14) Cap Exemption for Employment and Services Performed in the Commonwealth of the Northern Mariana Islands (CNMI) and Guam .

The Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110-229 , includes a provision exempting H-1B workers performing labor or services in the CNMI and Guam from the H-1B numerical limitation in section 214(g)(1)(A) of the INA (aka the “H-1B cap”). Upon the CNRA’s implementation on November 28, 2009, H-1B workers in Guam and the CNMI are exempt from the statutory numerical limitation for H-1B classification from November 28, 2009 to December 31, 2014. See Section 6(b) of Public Law 94-241, as added by section 702 of the CNRA.

This H-1B cap exemption does not apply to any employment to be performed outside of the CNMI or Guam. As such, to qualify for this exemption, the petition must include a Labor Condition Application (LCA) for work locations in the CNMI and/or Guam only.

An H-1B worker granted H-1B status under this CNMI/Guam cap exemption who ceases to be employed in H-1B classification solely in the CNMI and/or Guam shall be deemed subject to the H-1B cap. A subsequent petition filed for such an H-1B worker, i.e. a change of employer petition with a request for an extension of stay, requesting employment located outside of CNMI and/or Guam is subject to the H-1B cap.

(15) H-1B “Remainder” Time

USCIS officers shall comply with the following guidance regarding requests for time in H-1B status on the behalf of an alien who has not exhausted his or her H-1B maximum period of admission and who has been absent from the United States for longer than a year.

Section 214(g)(4) of the INA provides that “the period of authorized admission as [an H-1B]

nonimmigrant may not exceed 6 years.” Section 214(g)(7) of the INA provides, in pertinent part, as follows:

Any alien who has already been counted within the 6 years prior to the approval of a petition described in subsection (c), toward the numerical limitations of paragraph (1)(A) shall not again be counted toward those limitations unless the alien would be eligible for a full 6 years of authorized admission at the time the petition is filed. Where multiple petitions are approved for 1 alien, that alien shall be counted only once.

In H-1 Recapture of Time Spent Outside the United States, AAO Adopted Decision 06-0001 (Sept. 2, 2005), USCIS has confirmed that the six-year period of maximum authorized admission accrues only during periods when the alien is lawfully admitted and physically present in the United States.

The regulations at 8 CFR 214.2(h)(13)(i) provides that when an alien has reached the maximum period of admission, a new petition may be approved only if the alien has remained outside the United States for one year. The statute, regulations, and current policy guidance, however, do not clearly address situations where an alien did not exhaust his or her maximum six-year period of admission.

There have been instances where an alien who was previously admitted to the United States in H-1B status, but did not exhaust his or her entire period of admission, seeks readmission to the United States in H-1B status for the “remainder” of his or her initial six-year period of maximum admission, rather than seeking a new six-year period of admission. Pending the AC21 regulations, USCIS for now will allow an alien in the situation described above to elect either to:

- be re-admitted for the “remainder” of the initial six-year admission period without being subject to the H-1B cap if previously counted; or
  
- seek to be admitted as a “new” H-1B alien subject to the H-1B cap.

NOTE:

This new “remainder” policy does not affect an H-1B alien who was previously admitted to the United States, but who has not been absent from the United States for more than one year. Such an alien would

not be eligible for a new six-year period of admission and therefore may only seek readmission based on time remaining against his or her initial six-year period of admission.

Specifically, the “remainder” period of the initial six-year admission period refers to the full six-year period of admission minus the period of time that the alien previously spent in the United States in valid H-1B status.

For example, an alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, could seek to be admitted in January 2006 for the “remainder” of the initial six-year period, i.e., a total of one year.

If the alien was previously counted toward the H-1B numerical limitations in relation to the time that has accrued against the six-year maximum period of admission, the alien would not be subject to the H-1B cap.

If the alien was not previously counted against the H-1B numerical limitations (i.e. because cap-exempt), the alien will be counted against the H-1B cap unless he or she is eligible for another exemption.

Alternatively, admission as a “new” H-1B alien refers to a petition filed on behalf of an H-1B alien who seeks to qualify for a new six-year admission period (without regard to the alien’s eligibility for any “remaining” admission period) after having been outside the United States for more than one year.

For example, the alien who spent five years in the United States in H-1B status (from January 1, 1999 - December 31, 2004), and then remained outside the United States for all of 2005, is eligible to apply for a “new” period of H-1B status based on his or her absence of at least one year from the United States. Most petitioners electing this option will seek a three-year H-1B petition approval, allowing for the possibility of later seeking a three-year H-1B extension.

“New” H-1B aliens are subject to the H-1B numerical limitations unless they qualify for an exemption. See Sections 214(g)(1) and 214(g)(5) of the INA.

Note:

The burden of proof rests with the alien to show that he or she has been outside the United States for one year or more and is eligible for a new six-year period, or that he or she held H-1B status in the past and is eligible to apply for admission for the H-1B “remainder” time. Petitions should be submitted with documentary evidence of previous H-1B status such as Form I-94 arrival-departure records, Form I-797 Approval notices and/or H-1B visa stamps .

Chapter 31.3(g)(16), Evidence of Employer-Employee Relationship, has been superseded by Rescission of Policy Memoranda, PM-602-0114, issued June 17, 2020.

(h) Additional Fee Required by Public Law 111-230. Public Law 111-230, enacted August 13, 2010, requires the submission of an additional fee of \$2,000 for certain petitions seeking H-1B classification.

(1) Definition of Employer. To determine who is subject to the additional fee of \$2,000, USCIS will apply the definition of "employer" found at 8 CFR § 214.2(h)(4)(ii), which states:

[A] person, firm, corporation, or other association, or organization within the United States which:

- (1) engages a person to work within the United States;
- (2) has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, supervise, or otherwise control the work of any such employee; and
- (3) has an Internal Revenue Service Tax Identification Number.

The use of this definition for purposes of determining the application of this new fee does not extend or authorize its application beyond Public Law 111-230 and the H-1B rules and regulations.

(2) Counting Full-time and Part-time Employees. For the purposes of Public Law 111-230, all employees, whether full-time or part-time, will count towards the calculation of whether an employer is subject to the new fee.

(3) U.S. and Foreign Payrolls. When calculating the percentage of employees in H-1B or L-1 status, all employees in the United States, regardless of whether they are paid through a U.S. or foreign payroll, will count toward the calculation.

(4) Treatment of Petitions Filed Before Publication of Revised Forms. If either an initial petition for H-1B classification or an H-1B petition requesting a change of employer is filed before the revised Form I-129 is published, the adjudicator will review any explanation or supporting evidence to determine whether the fee required by Public Law 111-230 applies to the petition, as explained in the following chart:

If...	And...	And...	And...	Then...
The H-1B petition is postmarked before August 14, 2010				The fee does not apply; adjudicator can adjudicate the case.
The H-1B petition seeking either (a) initial grant of nonimmigrant	The petitioner has paid the fee required by P.L. 111-230 OR the			The adjudicator can adjudicate the case.

<p>classification for the beneficiary or (b) authorization for an alien already classified as an H-1B nonimmigrant to change employers is postmarked on or after August 14, 2010 through, and including, September 30, 2014.</p>	<p>petitioner has attached a statement or evidence that it is exempt from the fee required by P.L. 111-230.</p>			
<p>The H-1B petition seeking either (a) initial grant of nonimmigrant classification for the beneficiary or (b) authorization for an alien already classified as an H-1B nonimmigrant to change employers is postmarked on or after August 14, 2010 through, and including, September 30, 2014.</p>	<p>The petitioner has not paid the fee required by P.L. 111-230 AND the petitioner has not attached a statement or evidence that it is exempt from the fee required by P.L. 111-230.</p>	<p>The employer has fewer than 50 employees in the United States.</p>		<p>The fee does not apply, the adjudicator can adjudicate the case.</p>
<p>The H-1B petition seeking either (a) initial grant of nonimmigrant classification for the beneficiary or (b) authorization for an alien already classified as an H-1B nonimmigrant to change employers is postmarked on or after August</p>	<p>The petitioner has not paid the fee required by P.L. 111-230 AND the petitioner has not attached a statement or evidence that it is exempt from the fee required by P.L. 111-230.</p>	<p>The employer has 50 or more employees in the United States.</p>	<p>50% or fewer of the employees in the U.S. are in H-1B, L-1A, or L-1B nonimmigrant status.</p>	<p>The fee does not apply, adjudicator can adjudicate the case.</p>

<p>14, 2010 through, and including, September 30, 2014.</p>				
<p>The H-1B petition seeking either (a) initial grant of nonimmigrant classification for the beneficiary or (b) authorization for an alien already classified as an H-1B nonimmigrant to change employers is postmarked on or after August 14, 2010 through, and including, September 30, 2014.</p>	<p>The petitioner has not paid the fee required by P.L. 111-230 AND the petitioner has not attached a statement or evidence that it is exempt from the fee required by P.L. 111-230.</p>	<p>The employer has 50 or more employees in the United States.</p>	<p>More than 50% of the employees in the U.S. are in H-1B, L-1A, or L-1B nonimmigrant status.</p>	<p>The fee DOES apply. The adjudicator must issue an RFE explaining that the petitioner must either submit the fee or provide evidence that it is, in fact, not subject to the fee.</p>
<p>The H-1B petition seeking either (a) initial grant of nonimmigrant classification for the beneficiary or (b) authorization for an alien already classified as an H-1B nonimmigrant to change employers is postmarked on or after August 14, 2010 through, and including, September 30, 2014.</p>	<p>The petitioner has not paid the fee required by P.L. 111-230 AND the petitioner has not attached a statement or evidence that it is exempt from the fee required by P.L. 111-230.</p>	<p>The adjudicator CANNOT determine from other documents submitted whether the fee required by P.L. 111-230 applies</p>		<p>The adjudicator must issue an RFE explaining the provisions of P.L. 111-230 and informing the petitioner that he or she must submit either the fee or a statement or other evidence as to why the fee does not apply.</p>

(5) Composition of Request for Evidence (RFE). If the fee applies but was not collected or if the adjudicator cannot determine whether the fee applies, the adjudicator should issue an RFE to the petitioner soliciting

the additional fee or a statement or other evidence that the fee does not apply. The RFE should also cover any other deficiencies in the filing.

An RFE issued to address only the new fee, should provide the petitioner with a maximum of 30 days to respond to the RFE. If the RFE addresses other deficiencies that would normally allow for more time to respond, then the RFE may provide more than 30 days.

The RFE will inform the petitioner that it must submit an additional fee if it employs 50 or more individuals in the United States and over 50% of those employees are in H-1B, L-1A, or L-1B nonimmigrant status.

The adjudicator must deny the petition if the petitioner fails to respond to the RFE. (Previously submitted fees will not be refunded.)

If the petitioner responds to the RFE and indicates that it is not subject to the fee, but there are discrepancies that indicate otherwise, further clarifying information may be requested, or in certain cases, a notice of intent to deny (NOID) may be issued.

A petition cannot be approved if the petitioner responds to the RFE and provides evidence that it is subject to the additional fee, but fails to submit the additional fee with the response. (If a petition is denied, previously submitted fees will not be refunded.)

(6) Treatment of Petitions Once Revised Form I-129 is Published. After the revised Form I-129 is implemented, an H-1B petition subject to the additional fee that is submitted without the fee will be rejected. Rejected filings do not retain a filing date. If, after the revised form is implemented, an adjudicator encounters an H-1B petition that was received without the additional fee and determines that the fee was required, the adjudicator should issue a NOID soliciting the additional fee. Whenever possible, the notice should cover any other deficiencies in the filing.

(7) Submission of Inaccurate Statement(s) by Petitioner to Avoid Payment of Fee. The adjudicator should follow local procedures to refer to the Center fraud Detection Office (CFDO) any petition where there is information or documentation to substantiate that the petitioner has inaccurately presented material facts in the petition and supporting documentation to avoid paying the additional fee.

### Footnotes for Chapter 31.3

1. The right to control the beneficiary is different from actual control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the right to control the beneficiary

2. The following scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

3. The following scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

4. USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See *Matter of Aphrodite*, 17 I&N Dec. 530 (BIA 1980). [ <http://www.justice.gov/eoir/vll/intdec/vol17/2826.pdf> ] However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally *Administrator, Wage and Hour Division v. Avenue Dental Care*, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

5. The Administrative Appeals Office (AAO) of USCIS has issued an unpublished decision on the issue of whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions of the AAO correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees.

However, the unpublished AAO decision did not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." The AAO decision did not reach this pivotal analysis and thus, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.

6 Under 8 CFR 214.2(h)(2)(i)(F) , it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

7. 8 CFR 214.2(h)(9)(i)

8. See 8 CFR 214.2(h)(4)(ii) .

9. In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

## 31.4 Agricultural Workers (H-2A).

[Ch 31.4 revised 06-24-2009]

### (a) General.

The H-2A nonimmigrant classification applies to an alien seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States. USCIS defers to the Department of Labor's determination on the temporary labor certification for H-2A employment as to whether the proffered position qualifies as agricultural.

### (b) Definitions.

#### (1) Seasonal.

In the H-2A context, employment is of a seasonal nature where it is tied to a certain time of the year by an event or pattern, such as a short annual growing cycle (including planting, thinning, harvesting, and similar activities). It can also apply to a longer cycle.

#### (2) Temporary.

Except in extraordinary circumstances, temporary agricultural employment does not last longer than one year. See **8 CFR 214.2(h)(5)(iv)(A)**. Ordinarily, the certification by the Department of Labor (DOL) is sufficient evidence that the employment is temporary. See **8 CFR 214.2(h)(5)(iv)(B)**. When, however, the employer files a permanent certification for the same alien or another alien for the same position, or where USCIS has other substantial evidence that it is not a temporary position, the petition will be denied. Id.

### (c) Timely Processing.

On August 10, 2007, then-Secretary of Homeland Security Michael Chertoff announced a series of reforms to include streamlining the H-2A program. As part of the reform process, it is USCIS' goal to process all H-2A petitions timely and efficiently. See Memorandum: Updated Procedures for H-2A (Agricultural Worker I-129 Petitions) (Oct. 19, 2007), **Appendix 31-2** . In accordance with the October 19, 2007 memo, USCIS provides special handling of H-2A petitions in which:

- Personnel in the Service Center mail room are instructed to generate fee receipts, enter data, and route H-2A petitions for immediate distribution;
  
- H-2A petitions are distributed to adjudication officers no later than the third day after receipt;
  
- Adjudications officers are reminded to adjudicate unnamed beneficiaries' H-2A petitions on the day the cases are assigned to them; and
  
- Once an H-2A approval notice is generated and printed, it should be sent to petitioners within 24 hours of the decision.

(d) Labor Certification .

An H-2A petition must be filed on Form I-129 with a single valid temporary agricultural labor certification. See **8 CFR 214.2(h)(5)(i)(A)** . Generally, the original temporary labor certification should be submitted to USCIS. However, a photocopied labor certification may be accepted by USCIS in cases where the petitioner is filing multiple petitions using the same labor certification.

Each subsequent petition must reference all previously filed petitions using the same temporary labor certification. The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. **See 8 CFR 214.2(h)(5)(i)(B)** .

In emergent circumstances, a single H-2A petition may be extended for a brief period of time up to two

weeks without extending the temporary labor certification. The H-2A worker, however, must continue to be employed by the same employer that obtained the previously approved petition and must continue to perform the same duties. See **8 CFR 214.2(h)(5)(x)** .

(e) H-2A Eligible Countries .

H-2A petitions may only be approved for nationals of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible to participate in the H-2A program.

The list of H-2A eligible countries will be published in a notice in the FR on a rolling basis. This list was initially developed based, in part, on an identification of the top participating countries in the H-2A and H-2B visa programs and their record of timely acceptance of the return of their nationals who are removed from the United States.

Designation of countries on the H-2A list of eligible countries will be valid for one year from publication. The first H-2A eligible countries list was published in the FR on December 18, 2008. See **73 FR 77043** . This list is also posted on the USCIS website.

A national from a country not on the H-2A eligible country list may only be the beneficiary of an approved H-2A petition if the Secretary of Homeland Security, in her sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be the beneficiary of such a petition. See AFM **Chapter 31.4(h)(3)** ; **8 CFR 214.2(h)(5)(i)(F)(1)(ii)** .

(f) Petitioner Requirements .

(1) An H-2A petition may be filed by the employer listed on the labor certification, the employer's agent, or the association of ""U.S."" agricultural producers named as a joint employer on the labor certification.

A U.S. agent may file a petition only in cases where:

- Workers are traditionally self-employed;
- Workers use agents to arrange short-term employment on their behalf with numerous employers; or
- A foreign employer authorizes the agent to act on its behalf.

(2) All H-2A petitions must state the nationality of all beneficiaries.

See AFM **Chapter 31.4(e)**. To avoid processing delays, petitioners are advised to file the petitions for workers from designated H-2A eligible countries and non-eligible countries separately. **See 8 CFR 214.2(h)(2)(ii)**.

Adjudicating officers will issue a request for evidence when petitions filed on behalf of a combination of aliens from both H-2A eligible and non-eligible countries lack sufficient evidence to establish whether the beneficiaries from non-eligible countries qualify for H-2A classification.

(3) Employment-related notifications.

The petitioner must agree to notify USCIS within 2 work days if:

- a worker fails to report to work within 5 work days of the employment start date on the petition or within 5 work days of the start date established by his or her employer, whichever is later;
- the agricultural labor or services for which workers were hired is completed more than 30 days earlier than the employment end date stated on the petition; or

· the worker has not reported for work for a period of 5 consecutive work days without the consent of the employer or the worker is terminated prior to the completion of agricultural labor or services for which he or she was hired.

See **8 CFR 214.2(h)(5)(vi)(B)(1)** . Instructions explaining how a petitioner should make an employment-related notification to USCIS were published in a notice in the FR on December 18, 2008. See **73 FR 77049**

**Note:**

USCIS defers to the DOL's definition of "workday" which, according to the Fair Labor Standards Act, generally means the period between the time on any particular day when an employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities.

A petitioner that fails to meet these requirements is subject to liquidated damages in the amount of \$10 per violation. Failure to notify USCIS in a timely fashion may be excused at the discretion of USCIS if it is demonstrated that the delay was due to extraordinary circumstances beyond the control of the petitioner and USCIS finds the delay commensurate with the circumstances.

Such a determination will be made on a case-by-case basis. If the petitioner fails to demonstrate good cause for failure to make a timely notification, USCIS will notify CBP that the petitioner is liable for liquidated damages. The petitioner will then receive a demand letter for payment directly from CBP. See **8 CFR 214.2(h)(5)(vi)(B)(3)** .

(4) Payment of Fees by Aliens to Obtain H-2A Employment .

An H-2A petition will be denied or revoked on notice if USCIS determines that the petitioner has collected, or entered into an agreement to collect a fee or compensation as a condition of obtaining the H-2A employment, or that the petitioner knows or should have known that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition of obtaining the H-2A employment.

The types of fees that would be prohibited include recruitment fees, attorneys' fees, and fees for

preparation of visa applications. Prohibited fees do not include the lower of the fair market value or the actual reasonable costs of transportation to the United States and any payment of government-specified fees required of persons seeking to travel to the United States (e.g., fees required by a foreign government for issuance of passports, fees imposed by the U.S. Department of State for issuance of visas, inspection fees), except where the passing of such costs to the worker is prohibited by statute or by DOL regulation. See e.g., Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002) (under FLSA, transportation from Mexico to Florida and visa costs under H-2A program may not be passed to H-2A workers).

All H-2A petitioners are required to attest in the H Classification Supplement submitted with the Form I-129 whether:

(A) The petitioner has used a staffing, recruiting, or placement service or agent to locate the H-2A workers included in the petition. If so, the name & address of the service should be provided;

(B) The beneficiaries have paid any form of compensation as a condition of the employment (or have made an agreement to pay such compensation at a later date), not including the lower of the fair market value or actual reasonable costs of transportation to the United States and government-specified fees required for travel to the United States (provided the passing of such costs by the petitioner/employer to the beneficiary is not prohibited by law) for which the worker may be responsible, and answer the following:

(i) If the beneficiary has paid any form of compensation, has the beneficiary been reimbursed? If yes, evidence of the reimbursement must be submitted.

(ii) If the beneficiary has made an agreement to pay such compensation at a later date, has this agreement been terminated? If yes, evidence of the termination must be submitted.

AND

(C) The petitioner has ever had an H-2A petition denied or revoked because an employee paid a job placement fee or other compensation. If so, the information about when it was and the receipt number must be provided. If the worker(s) was/were reimbursed for such fees or compensation, evidence of reimbursement must be submitted. If the worker(s) was/were not reimbursed because of the failure to locate the beneficiary, evidence of the efforts to locate the beneficiary must be submitted.

Adjudicating officers will verify that the petitioner has signed the attestation included on the H Classification Supplement and will review the petitioner's answers to ensure that they are consistent with the petitioner's type of business.

If the alien has paid prohibited fees, the petition will not be denied or revoked if the petitioner demonstrates that:

- prior to the filing of the petition, the alien beneficiary has been reimbursed for the prohibited fees paid;
- where the prohibited fees have not yet been paid, that the agreement to pay has been terminated; or
- where, after the petition is filed, the petitioner learns that the prohibition on collecting or agreeing to collect a fee has been violated by a recruiter or agent, the petitioner notifies USCIS about the prohibited payments, or agreement to make such payments, within 2 work days of finding out about such payments or agreements. See **8 CFR 214.2(h)(5)(xi)(A)** .

Instructions explaining how a petitioner should make a fee-related notification to USCIS were published in a notice in the Federal Register on December 18, 2008. See **73 FR 77049** .

If the H-2A petition is denied or revoked on these grounds, then, as a condition of approval of future H-2A petitions filed within one year of the denial or revocation, the petitioner must demonstrate that the beneficiary has been reimbursed or that the beneficiary cannot be located despite the petitioner's reasonable efforts. See **8 CFR 214.2(h)(5)(xi)(C)** .

(g) Multiple Beneficiaries .

More than one beneficiary may be included in an H-2A petition as long as the total number of beneficiaries does not exceed the number of positions certified by the DOL on the relating temporary labor certification

and the beneficiaries will be performing the same service, or receiving the same training, for the same period of time, and in the same location. See **8 CFR 214.2(h)(5)(i)(B)** .

(h) Beneficiary Requirements.

(1) Petitions filed on behalf of beneficiaries currently in the United States requesting a change of status or extension of stay in H-2A status must identify each beneficiary and provide evidence to show that each beneficiary meets the minimum employment and job training requirements listed on the temporary labor certification (if applicable).

(2) Petitions filed on behalf of beneficiaries who are outside the United States requesting consular notification are not required to identify the beneficiaries or to provide evidence of each beneficiary's qualifications and/or education with the petition because that evidence may be submitted to the consulate at the time of a visa application or to the CBP at a port of entry or pre-flight inspection location upon admission.

(3) Beneficiaries from countries not listed as eligible for H-2A classification. The H Classification Supplement to the Form I-129 , revised 01-22-2009 (p. 8 – 12 of the form) now requires a petitioner who chooses to file an H-2A petition on behalf of H-2A workers who are not from a country that has been designated as an H-2A eligible country to name those beneficiaries and provide the following information about such beneficiaries:

- Full Name;
  
- Date of birth;
  
- Country of birth; and
  
- Country of citizenship.

This provision applies both to beneficiaries who are currently within the United States who are seeking an extension of H-2A stay or change of status to H-2A, as well as to beneficiaries who are outside of the country.

A petition filed on behalf of H-2A workers who are not from a country that has been designated as an H-2A eligible country may be approved only if DHS determines, in its sole and unreviewable discretion, that it is in the U.S. interest for that alien to be a beneficiary of such petition. See **8 CFR 214.2(h)(5)(i)(F)**. In order to make this discretionary determination of U.S. interest, USCIS may take into account the following four factors, including, *but not limited to* :

**Factors:**

- 1 Evidence that a worker with the required skills is not available among U.S. workers or from among foreign workers from a country on the list of eligible countries;
- 2 Evidence that the beneficiary has been admitted to the United States previously in H-2A status and complied with the terms of his/her status.
- 3 Any potential for abuse, fraud, or other harm to the integrity of the H-2A program through the potential admission of these worker(s) that a petitioner plans to hire; and
- 4 Other factors that would serve the U.S. interest, if any.

Each request for a U.S. interest exception is fact-dependent, and therefore must be considered on a case-by-case basis. Although USCIS will consider any evidence submitted to address each factor, USCIS has determined that it is not necessary for a petitioner to satisfy each and every factor. Instead, a determination will be made based on the totality of circumstances.

For factor no. 3 above, USCIS will take into consideration, among other things, whether the alien is from a country that cooperates with the repatriation of its nationals.

For factor no. 4 above, circumstances that are given weight, but are not binding, include evidence substantiating the degree of harm that a particular U.S. employer, U.S. industry, and/or U.S. government entity might suffer without the services of H-2A workers from non-eligible countries.

Petitions filed on behalf of beneficiaries from non-eligible countries that do not initially provide sufficient

evidence to overcome the requirements of **8 CFR 214.2(h)(5)(i)(F)(1)(ii)** will be issued a request for evidence allowing 30 days to respond to USCIS. See **8 CFR 103.2(b)(8)(ii)** and **(iv)** .

(4) The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by the same petitioner, shall be a reason, by itself, to deny the alien's extension of stay. See **8 CFR 214.2(h)(16)(ii)** .

(i) Decision Procedures .

(1) Approval .

If the documentary requirements have been met and the petition is approvable, endorse the action block. The approval period should coincide with the period requested by the petitioner, but should not exceed the validity dates indicated on the temporary labor certification from the Department of Labor.

If the alien is present in the United States and requires a change of status, follow the procedures described in **AFM Chapter 30.3** . If the alien is present in the United States and requires an extension of stay, follow the procedures described in **AFM Chapter 30.2** . Notify the petitioner of the action taken using Form I-797 , Notice of Action. After approval, the file containing one copy of the petition and the supporting evidence should be forwarded to the Harrisonburg File Storage Facility (HBG).

(2) Denial .

Prepare a notice of denial and advise the petitioner of the right of appeal to the Administrative Appeals Office (AAO). Retain the file, in accordance with local procedures, until the appeal period expires or an appeal is received.

**Note:**

While the denial of a petition filed on behalf of a national of a country not listed on the H-2A Eligible Countries List for failure to establish eligibility for the U.S. interest exception in **8 CFR**

**214.2(h)(5)(i)(F)** may be appealed to the AAO, there is no judicial appeal available to challenge such a discretionary denial, as such decisions, by regulation, are, as noted above, made in the Secretary's sole and unreviewable discretion. Id.

(3) Partial Approvals .

A partial approval occurs with petitions for multiple beneficiaries when only some of the beneficiaries included on the petition are found to be approvable and some must be denied.

For example, a partial approval may result in cases where a petition is filed for a combination of beneficiaries from H-2A eligible and non-eligible countries and the petitioner is unable to provide sufficient evidence in response to a USCIS request for evidence that the beneficiaries from non-eligible countries meet the U.S. interest requirement of **8 CFR 214.2(h)(5)(i)(F)(1)(ii)** .

Since USCIS systems are not capable of counting two actions for one receipt, the action on a partial approval is counted as an approval for reporting purposes. Generally, a petitioner may appeal the decision to deny classification to one or more of the beneficiaries or file a new petition in their behalf.

(j) Transmittal of Petitions .

(1) Visa Applicants .

If the beneficiary requires a visa and requests consular notification, the duplicate of the approved petition (if submitted), with the supporting documents, shall be sent to the Department of State's Kentucky Consular Center (KCC).

(2) Visa-exempt Applicants .

If the beneficiary does not require a visa and requests notification to the port of entry or pre-flight inspection facility, forward the duplicate petition (if submitted) with supporting documents to the appropriate port of entry or pre-flight inspection facility.

(k) Special Handling.

(1) Shepherders.

Until the most recent H-2A final rule went into effect on January 17, 2009, USCIS refrained from applying the three-year maximum period of stay for H-2A shepherders. See **73 FR 76891** However, effective January 17, 2009, shepherders are subject to the same three-year maximum period of stay and departure requirements applicable to other H-2A workers. This change in the handling of shepherders is mandated by the statutory requirement that H-2A employment be of a temporary nature .

(2) Canadian Custom Harvest or Combine Operators.

Annually, a group of Canadian custom harvest and combine workers come to the Midwestern United States to assist U.S. farmers with harvesting wheat, corn, and other crops. Because the growing season for these crops varies depending on their specific geographical location, a definitive itinerary of services and locations is generally not provided; however, the operators typically start working in the South and work their way through a number of states north over the course of the harvesting season.

Although petitioners filing for Canadian harvest or combine workers may not have a U.S. address, USCIS has traditionally accepted petitions filed by Canadian employers requesting these types of workers. Such operators typically are coming into the United States to provide services for U.S. employers, who have contracted with a member of the Association of Canadian Harvesters.

(3) Certain Caribbean Residents Seeking Admission to the United States as H-2A Agricultural Workers.

A visa is currently not required for H-2A workers who are British, French, or Netherlands nationals, or nationals of Barbados, Grenada, Jamaica, or Trinidad and Tobago, who have their residence in British, French, or Netherlands territory located in the adjacent islands of the Caribbean area, or in Barbados, Grenada, Jamaica, or Trinidad and Tobago. See **8 CFR 212.1(b)(1)** .

(1) Adjudicative Issues.

(1) Substitution of Beneficiaries.

Beneficiaries may be substituted for previously approved H-2A workers in the following situations, as long as the total number of beneficiaries will not exceed the number of workers authorized in the temporary labor certification:

(A) Before admission.

Substitutions of beneficiaries who have not yet been admitted to the United States are processed directly with the consulate or, if the alien is visa exempt, at the port of entry or pre-flight inspection location.

(B) Stateside substitution :

An H-2A petition may be filed to replace H-2A workers already admitted to the United States:

- Whose employment was terminated earlier than the end date stated on the original H-2A petition and before the completion of work;
  
- Who failed to report to work within five work days of the employment start date (The worker has never worked at the work-site and it has been 5 days since his employment was scheduled to begin); or
  
- Who absconded from the work-site. An H-2A worker has absconded if he or she has not reported for work for a period of 5 consecutive workdays without the consent of the employer. (The worker has been working at the work-site, but abandoned his employment for a period of 5 consecutive workdays without the consent of the employer).

To request a stateside substitution, the petitioner must file an amended petition at the Service Center where the original petition was filed. This amended petition requesting substitution(s) must be filed with:

- A filing fee;
- A copy of the temporary labor certification;
- A copy of the approval notice covering the workers for which replacements are sought;
- A statement giving each terminated worker's name, date and country of birth, termination date, the reason for termination, and the date that USCIS was notified that the alien was terminated or absconded, if applicable; and
- Other evidence as required under **8 CFR 214.2(h)(5)(i)(D)** .

A petition requesting substitution(s) may not be approved where the requirements of paragraph **8 CFR 214.2(h)(5)(vi)** of this section (regarding consent, liabilities and non-compliance) have not been met.

Additionally, a petition requesting substitution(s) does not constitute the notification requirements of paragraph **8 CFR 214.2(h)(5)(vi)(B)(1)** .

(2) Limitation on Period of Stay .

Generally, H-2A workers are authorized a maximum uninterrupted stay of three (3) years in H-2A classification.

An individual who has held H-2A status for a total of 3 years may not again be granted H-2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. See **8 CFR 214.2(h)(5)(viii)(C)** .

Absences from the United States that are less than 3 months can interrupt the accrual of time spent as an H-2A nonimmigrant against the 3-year limit:

- If the accumulated stay is 18 months or less, an absence is interruptive if it lasts at least 45 days; or
  
- If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months.

As of January 18, 2009, sheepherders are no longer exempt from this 3-year limitation of stay. See **73 FR 76906** .

**Note:**

H-2A aliens do not fall under the exception listed in **8 CFR 214.2(h)(13)(v)** . This regulation refers only to H-1B, H-2B, and H-3 classifications, giving them an exception to the limitation on the maximum period of stay for aliens who commute part-time to the United States. or who do not reside continually in the United States and whose employment is seasonal, intermittent, or for an aggregate of 6 months or less per year.

(3) Extension with a New Employer .

In most cases, an H-2A worker who changes employer cannot begin working for the new employer until USCIS approves the petition requesting a change of employer.

However, in cases where a new employer that is participating and in good standing with E-Verify files a

petition for a change of employer on behalf of an H-2A alien requesting an extension of stay, the H-2A alien may work for the new employer, as soon as USCIS receives the petition.

While the petition is pending, the H-2A alien's employment authorization is extended up to 120 calendar days. If USCIS does not approve the new petition within 120 days or denies it before 120-day period expires, USCIS will automatically terminate the H-2A alien's employment authorization in 15 calendar days. In those cases, E-Verify will not notify the new employer that USCIS has terminated employment authorization.

At its discretion, USCIS may periodically audit any new employer's participation in E-Verify, as well as the status of the alien's employment on a post-adjudication basis. Violators will be subject to petition and/or status revocation.

## 31.5 Temporary Service or Labor Workers (H-2B).

[Ch 31.5 revised 06-24-2009]

(a) General.

The H-2B nonimmigrant classification applies to an alien seeking to perform temporary non-agricultural labor or services in the United States. This classification does not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession.

(b) Definitions.

(1) Temporary Services or Labor.

The term “temporary services” is defined as services where the petitioner’s need for the duties to be performed, rather than the job itself, is temporary. It is the nature of the employer's need, not the nature of the duties, that is controlling. See Matter of Artee Corporation, **18 I & N Dec. 366** (Comm. 1982) and Matter of Golden Dragon Chinese Restaurant, **19 I&N Dec. 238** (Comm. 1984) and Matter of General Dynamics Corp., **13 I&N Dec. 23** (Reg. Comm 1968).

The nature of the employer's temporary need for H-2B employment must be seasonal, peak load, intermittent, or a one-time occurrence as defined in the regulations at **8 CFR 214.2(h)(6)(ii)**.

Employment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time occurrence, the period of employment could last longer than one year and up to three years. See 8 CFR 214.2 (h)(6)(ii)(B).

(2) One-Time Occurrence.

The petitioner must establish that the employer:

- Has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future, or
- Has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

**Example:**

A construction company is refurbishing a church and needs to bring in foreign stained glass experts, on a one-time basis, to complete the project. The project is estimated to last two years.

(3) Seasonal Need.

The petitioner must establish that the services or labor is:

- Traditionally tied to a season of the year by an event or pattern; and
- Of a recurring nature.

The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor.

The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petition's permanent employees.

### **Examples**

- Dining staff at Cape Cod resorts for the summer season
- Ski instructors for ski resorts in the Rocky Mountains
- Summer lifeguards in the coastal regions

#### (4) Peak Load Need.

The petitioner must establish that:

- The employer regularly employs permanent workers to perform the services or labor at the place of employment;
- The employer needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand; and
- The temporary additions to staff will not become part of the petitioner's regular operation.

### **Example:**

A toy manufacturing company makes a product that has suddenly surpassed all sales predictions and expectations. It may be able to demonstrate that it has a peak load need for assembly-line workers to meet its unprecedented production demands for the Christmas season.

#### (5) Intermittent Need.

The petitioner must establish that it has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform services or labor for short periods.

**Example:**

A company that specializes in sports jerseys has a need for apparel workers when recurrent surges in production occur around major sporting events (such as the Super Bowl).

(c) Labor Certification.

(1) General.

An H-2B petition must be filed on Form I-129 , Petition for a Nonimmigrant Worker, with an approved temporary labor certification from the Department of Labor (DOL) or, if the work will be located in Guam, from the Governor of Guam or Guam Department of Labor (Guam DOL) certifying that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers. **See 8 CFR 214.2(h)(6)(iv)(A)** .

For employment in the Virgin Islands, such certifications can be issued only for 45 days and are limited to athletes and entertainers. **See 8 CFR 214.2(h)(6)(iv)(C)** .

(2) Employment Start Date.

Effective fiscal year 2010, H-2B petitioners may not request an employment start date on Form I-129 that is different than the date of employment need listed on the accompanying approved temporary labor certification. **See 8 CFR 214.2(h)(6)(iv)(D)** . The only exception to this applies when an amended H-2B petition, accompanied by a copy of the previously approved temporary labor certification and a copy of the initial petition approval notice, is filed at a later date to substitute workers as stated in **8 CFR 214.2(h)(6)(viii)(B)** .

For employment beginning October 1, 2009 (the start of fiscal year 2010), petitions filed with a start date different from the date listed on the temporary labor certification that do not meet this exception will be denied by USCIS without prior issuance of a request for evidence.

(3) Musicians to Be Employed Within 50 Miles of the Canadian Border .

The DOL has pre-certified that qualified persons are unavailable in the Canadian-United States border area (50 miles into the United States, along the Canadian border) and that the admission of Canadian musicians in such areas for periods not in excess of 30 days would not adversely affect the wages and working conditions of workers in the United States who are similarly employed. As such, a temporary labor certification for Canadian musicians within 50 miles of the Canadian border is not required, as per TEGL (Training and Employment Guidance Letter) 31-05 of May 31, 2006 signed by Emily Stover DeRocco.

Where the Canadian-United States boundary line is within a body of water, such as the Great Lakes, the 50-mile area extends inland from the United States shore of that body of water.

The pre-certification with respect to musicians is applicable to stagehands, drivers, and equipment handlers coming to the United States in connection with such musicians' employment, and such supporting workers may be included in the H-2B petition.

In cases where the services of the musicians are needed for longer than 30 days, the prospective employer must file with the DOL for the required temporary labor certification and, upon receipt thereof, shall file a petition with the appropriate Service Center.

(d) H-2B Eligible Countries .

H-2B petitions may only be approved for nationals of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible to participate in the H-2B program. A list of H-2B eligible countries will be published in a notice in the Federal Register (FR) on a rolling basis.

This list was initially developed based, in part, on an identification of the top participating countries in the H-2A and H-2B visa programs and their record of timely acceptance of the return of their nationals who are removed from the United States. Designation of countries on the list of eligible countries will be valid for one year from publication. The first H-2B Eligible Countries List was published in the FR on December 19, 2008. See **73 FR 77729** . This list is also posted on the USCIS website.

A national from a country not on the H-2B eligible country list may only be the beneficiary of an approved H-2B petition if the Secretary of Homeland Security, in the Secretary's sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be the beneficiary of such a petition. See AFM **Chapter 31.5(g)(3)** and **8 CFR 214.2(h)(6)(i)(E)(2)** .

(e) Petitioner Requirements .

(1) An H-2B petitioner may be a United States employer, a United States agent, or a foreign employer filing through a United States agent.

A United States agent may file a petition in one of the following cases where:

- Workers are traditionally self-employed;
- Workers use agents to arrange short-term employment on their behalf with numerous employers; or
- A foreign employer authorizes the agent to act on its behalf.

Furthermore, a petitioner may not file an H-2B petition unless it has obtained a temporary labor certification with the Department of Labor.

A foreign employer (one not subject to service of process in the United States) which has no location in the United States must use the services of a United States agent. A United States agent must be authorized to file the petition and to accept service of process in the United States in proceedings. A United States agent must also consider available United States workers for the temporary services or labor and offer terms and conditions of employment that are consistent with the same type of employment in the United States.

The petitioner must submit with the petition:

- An approved temporary labor certification issued by the DOL or the Governor of Guam unless the DOL has pre-certified the position, see **AFM Chapter 31.5(c)(1)** ;
  
- Evidence addressing the temporary nature of the prospective employer's need;
  
- Evidence of the need for the number of workers requested;
  
- Evidence of the qualifications of the beneficiary(ies), if applicable;
  
- If an agent filing a petition on behalf of a petitioner, evidence that an agent meets one of the conditions in **8 CFR 214.2(h)(2)(i)(F)** ;
  
- If an agent filing on behalf of multiple employers, a complete itinerary of services or engagements specifying the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed.

(2) All H-2B petitions must state the nationality of all beneficiaries.

See **AFM Chapter 31.5(d)** . To avoid processing delays, petitioners are advised to file the petitions for workers from H-2B eligible countries and non-eligible countries separately. See **8 CFR 214.2(h)(2)(ii)** .

Adjudicating officers will issue a request for evidence when petitions filed on behalf of a combination of aliens from both H-2B eligible and non-eligible countries lack sufficient evidence to establish whether the beneficiaries from non-eligible countries qualify for H-2B classification.

(3) The petitioner is responsible for return transportation costs if the alien is dismissed for any reason prior to the end of the validity period of the petition.

(4) In regard to employment-related notification, the petitioner must agree to notify USCIS within 2 work days if:

- a worker fails to report to work within 5 work days of the employment start date on the petition;
  
- the temporary labor or services for which workers were hired is completed more than 30 days earlier than the employment end date stated on the petition; or
  
- the worker has not reported for work for a period of 5 consecutive work days without the consent of the employer or the worker is terminated prior to the completion of the temporary labor or services for which he or she was hired.

See **8 CFR 214.2(h)(6)(i)(F)(1)** . Instructions explaining how a petitioner should make an employment-related notification to USCIS were published in a notice in the FR on December 19, 2008. See **73 FR 77816**

**Note:**

USCIS defers to the DOL's definition of "workday" which, according to the Fair Labor Standards Act, in general, means the period between the time on any particular day when an employee commences his/her "principal activity" and the time on that day at which he/she ceases such principal activity or activities.

(5) Payment of Fees by Aliens to Obtain H-2B Employment .

An H-2B petition will be denied or revoked on notice if USCIS determines that the petitioner has collected, or entered into an agreement to collect a fee or compensation as a condition of obtaining the H-2B employment, or that the petitioner knows or should have known that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition of obtaining the H-2B employment.

The types of fees that would be prohibited include:

- recruitment fees,
  
- attorneys' fees, and
  
- fees for preparation of visa applications.

Prohibited fees do not include the lower of the fair market value or the actual reasonable costs of transportation to the United States and any payment of government-specified fees required of persons seeking to travel to the United States (e.g., fees required by a foreign government for issuance of passports, fees imposed by the U.S. Department of State for issuance of visas, inspection fees), *except* where the passing of such costs to the worker is prohibited by statute or by DOL regulation. See Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228 (11th Cir. 2002) (barring the passing of various costs to alien workers); see also, U.S. Department of Labor, "Notice of Withdrawal of Interpretation," 74 FR 13261-62 (Mar. 26, 2009) (citing H-2B cases applying Arriaga).

All H-2B petitioners are required to attest in the H Classification Supplement submitted with the Form I-129 whether:

- (A) The petitioner has used a staffing, recruiting, or placement service or agent to locate the H-2B workers included in the petition. If so, the name and address of the service and/or agent should be provided;
- (B) The beneficiaries have paid any form of compensation as a condition of the employment (or have made an agreement to pay such compensation at a later date), not including the lower of the fair market value or actual reasonable costs of transportation to the United States and government-specified fees required for travel to the United States (provided the passing of such costs by the petitioner/employer to the beneficiary is not prohibited by law) for which the beneficiary may be responsible, and answer the following:

- If the beneficiary has paid any form of compensation, has the beneficiary been reimbursed? If yes, evidence of the reimbursement must be submitted.

- If the beneficiary has made an agreement to pay such compensation at a later date, has this agreement been terminated? If yes, evidence of the termination must be submitted.

**AND**

(C) The petitioner ever had an H-2B petition denied or revoked because an employee paid a job placement fee or other compensation. If so, information about when the petition was denied or revoked and the petition receipt number must be provided. If the worker(s) was/were reimbursed for such fees or compensation, evidence of reimbursement must be submitted. If the worker(s) was/were not reimbursed because of the failure to locate the beneficiary, evidence of the efforts to locate the beneficiary must be submitted.

Adjudicating officers will verify that the petitioner has signed the attestation included on the H Classification Supplement and will review the petitioner's answers to ensure that they are consistent with the petitioner's type of business.

If the alien has paid prohibited fees, the petition will not be denied or revoked if the petitioner demonstrates that:

- prior to the filing of the petition, the alien beneficiary has been reimbursed for the prohibited fees paid;

- where the prohibited fees have not yet been paid, that the agreement to pay has been terminated; or

- where, after the petition is filed, the petitioner learns that the prohibition on collecting or agreeing to collect a fee has been violated by a recruiter or agent, the petitioner notifies USCIS about the prohibited

payments, or agreement to make such payments, within 2 work days of finding out about such payments or agreements. See **8 CFR 214.2(h)(6)(i)(B)(4)** .

Instructions explaining how a petitioner should make a fee-related notification to USCIS were published in a notice in the FR on December 19, 2008. See **73 FR 77816** .

If the H-2B petition is denied or revoked on these grounds, then, as a condition of approval of future H-2B petitions filed within one year of the denial or revocation, the petitioner must demonstrate that the beneficiary has been reimbursed or that the beneficiary cannot be located despite the petitioner's reasonable efforts. See **8 CFR 214.2(h)(6)(i)(D)** .

(f) Multiple Beneficiaries .

More than one beneficiary may be included in an H-2B petition as long as the total number of beneficiaries does not exceed the number of positions certified by the DOL or Guam DOL (if applicable) on the relating temporary labor certification and the beneficiaries will be performing the same service, or receiving the same training, for the same period of time, and in the same location.

(g) Beneficiary Requirements .

(1) Petitions filed on behalf of beneficiaries currently in the United States requesting a change of status or extension of stay in H-2B status, must identify each beneficiary and provide evidence to show that each beneficiary meets the minimum employment and job training requirements listed on the temporary labor certification (if applicable).

(2) Petitions filed on behalf of beneficiaries who are outside the United States requesting consular notification are not required to identify the beneficiaries or to provide evidence of each beneficiary's qualifications and/or education with the petition, since such evidence may be submitted to the consulate at the time of a visa application or to CBP at the port of entry/pre-flight inspection upon admission.

(3) Beneficiaries from countries not listed as eligible for H-2B classification. The H Classification

Supplement to the Form I-129 revised 1/22/09 (p. 8 – 12 of the form) now requires a petitioner who chooses to file a petition on behalf of H-2B workers who are not from a country that has been designated as an H-2B eligible country to name those beneficiaries and provide the following information about such beneficiaries:

- Full name;
  
- Date of birth;
  
- Country of birth; and
  
- Country of citizenship.

This provision applies both to beneficiaries who are currently within the United States who are seeking an extension of H-2B stay or change of status to H-2B, as well as to beneficiaries who are outside of the country. A petition filed on behalf of H-2B workers who are not from a country that has been designated as an eligible country may be approved only if USCIS determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. See 8 CFR 214.2(h)(6)(i)(E). In order to make this discretionary determination of U.S. interest, USCIS may take into account the following factors, including but not limited to :

- Evidence that a worker with the required skills is not available from a country on the list of eligible countries;
  
- Evidence that the beneficiary has been admitted to the United States previously in H-2B status and complied with the terms of his/her status;
  
- Any potential for abuse, fraud, or other harm to the integrity of the H-2B program through the potential admission of these worker(s) that a petitioner plans to hire; and

- There are other factors that would serve the U.S. interest, if any.

Each request for a U.S. interest exception is fact-dependent, and, therefore, must be considered on a case-by-case basis. Although USCIS will consider any evidence submitted to address each factor, USCIS has determined that it is not necessary for a petitioner to satisfy each and every factor. Instead, a determination will be made based on the totality of circumstances.

For factor no. 3, USCIS will take into consideration, among other things, whether the alien is from a country that cooperates with the repatriation of its nationals. See AFM **Chapter 31.4(h)(3)** .

For factor no. 4, circumstances that are given weight, but are not binding, include evidence substantiating the degree of harm that a particular U.S. employer, U.S. industry, and/or U.S. government entity might suffer without the services of H-2B workers from non-eligible countries. See AFM **Chapter 31.4(h)(3)** .

Petitions filed on behalf of beneficiaries from non-eligible countries that do not initially provide sufficient evidence to overcome the requirements of **8 CFR 214.2(h)(6)(i)(E)(2)** will be issued a request for evidence allowing 30 days to respond to USCIS.

(4) The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by the same petitioner, shall be a reason, by itself, to deny the alien's extension of stay. See **8 CFR 214.2(h)(16)(ii)** .

(h) Decision Procedures .

(1) Approval .

If the documentary requirements have been met and the petition is approvable, endorse the action block. The approval period should coincide with the period requested by the petitioner but should not exceed the validity dates indicated on the temporary labor certification from the Department of Labor.

If the alien is present in the United States and requires a change of status, follow procedures described in AFM **Chapter 30.3** .

If the alien is present in the United States and requires an extension of stay, follow procedures described in AFM **Chapter 30.2** . Notify the petitioner of the action taken using Form I-797 , Notice of Action. After approval, the file containing one copy of the petition and the supporting evidence should be forwarded to the Harrisonburg File Storage Facility (HBG).

USCIS no longer accepts and adjudicates an H-2B petition that lacks an approved temporary labor certification from the Department of Labor or Guam Department of Labor. See **8 CFR 214.2(h)(6)(iv)(A)** and **(v)(A)** . Any such petition will be rejected and returned to the petitioner, together with any fee submitted with the petition. As in the case of other rejected petitions, there is no appeal from the rejection of an H-2B petition lacking an approved temporary labor certification. Appeals of the denied temporary labor certifications must be adjudicated by the Department of Labor's appellate authority the Bureau of Alien Labor Certification Appeals (BALCA). See **20 CFR 655.11** .

(2) Denial .

Prepare a notice of denial and advise the petitioner of the right of appeal to the Administrative Appeals Office (AAO). Retain the file, in accordance with local procedures, until the appeal period expires or an appeal is received.

**Note:**

While the denial of a petition filed on behalf of a national of a country not listed on the H-2B Eligible Countries List for failure to establish eligibility for the U.S. interest exception in **8 CFR 214.2(h)(6)(i)(E)(2)** may be appealed to the AAO, there is no judicial appeal available to challenge such a discretionary denial, as such decisions, by regulation, are, as noted above, made in the Secretary's sole and unreviewable discretion. Id.

(3) Partial Approvals .

A partial approval can occur with petitions for multiple beneficiaries when only some of the beneficiaries included on the petition are found to be approvable and some must be denied. For example, a partial

approval may result in cases where a petition is filed for a combination of beneficiaries from H-2B eligible and non-eligible countries and the petitioner is unable to provide sufficient evidence in response to a USCIS request for evidence that the beneficiaries from non-eligible countries meet the U.S. interest requirements of **8 CFR 214.2(h)(6)(i)(E)(2)** .

Since USCIS systems are not capable of counting two actions for one receipt, the action on a partial approval is counted as an approval for reporting purposes. A petitioner may appeal the decision to deny classification to one or more of the beneficiaries or file a new petition in their behalf.

(i) Transmittal of Petition .

(1) Visa Applicants .

If the beneficiary requires a visa and requests consular notification, the duplicate of the approved petition (if submitted), with the supporting documents, shall be sent to the Department of State's Kentucky Consular Center (KCC).

(2) Visa-exempt Applicants .

When the beneficiary does not require a visa, the duplicate petition (if submitted), without supporting documents, shall be forwarded to the appropriate port of entry or pre-flight inspection facility.

(j) Special Handling Situations .

(1) Boilermakers .

The National Association of Construction Boilermaker Employers and the International Brotherhood of Boilermakers have made arrangements with the Department of Labor and USCIS to obtain expedited

determinations on H-2B temporary labor certification applications and petitions for boilermakers from the Canadian boilermaker's union when there are insufficient U.S. boilermakers to meet contract needs.

(A) Filing Procedures .

The Manpower Optimization Stabilization and Training Fund (MOST) in Kansas City, Kansas serves as the clearinghouse for the employers and workers and will submit all of the paperwork required for temporary labor certification and petition approval. MOST will not be the petitioner or sign forms for the employers.

Petitions for Canadian boilermakers who are outside of the United States may be filed with the service center without the names and evidence of qualifications of beneficiaries. Service center directors shall expedite adjudication of such petitions under emergent procedures. A separate temporary labor certification and petition must be filed for each employer. When the workers for an employer will enter at different ports of entry, a separate petition with a copy of the same temporary labor certification must be filed for each port of entry.

(B) Handling of Approved Petitions .

On approval, the director shall send the petition to the designated port of entry. MOST will provide the port of entry the names and evidence of the qualifications of beneficiaries before they apply for admission. The port director shall be responsible for nonimmigrant control. When an approved petition involves replacement, MOST will provide the port with the names of beneficiaries to be replaced, the date they departed the United States, and the names and evidence of the qualifications of new beneficiaries who will apply for admission.

(2) Fish Roe Workers .

The numerical limitation in **section 214(g)(1)(B)** of the Act does not apply to any nonimmigrant alien issued an H-2B visa or otherwise provided H-2B status who is employed or has received an offer of employment as a fish roe processor, a fish roe technician, or a supervisor of fish roe processing. See **Public Law 108-287** , Section 14006.

(3) Workers performing labor and services in Guam and the Commonwealth of the Northern Mariana Islands (CNMI) .

The Consolidated Natural Resources Act of 2008 (CNRA), **Public Law 110-229** , includes a provision exempting H-2B workers performing labor or services in Guam and the CNMI from the H-2B numerical limitation in **section 214(g)(1)(B)** of the INA (aka the “H-2B cap”). Upon the CNRA’s implementation on November 28, 2009, H-2B workers in Guam and the CNMI are exempt from the statutory numerical limitation for H-2B classification from November 28, 2009 to December 31, 2014. See section 6(b) of Public Law 94-241, as added by **section 702** of the CNRA.

This H-2B cap exemption does not apply to any employment to be performed outside of the CNMI or Guam. As such, to qualify for this exemption, the petition must include an approved temporary labor certification for work locations in the CNMI and/or Guam only.

An H-2B worker granted H-2B status under this CNMI/Guam cap exemption who ceases to be employed in H-2B classification solely in the CNMI and/or Guam shall be deemed subject to the H-2B cap. A subsequent petition filed for such an H-2B worker (i.e. a change of employer petition with a request for an extension of stay) requesting employment located outside of CNMI and/or Guam is subject to the H-2B cap.

(k) Adjudicative Issues .

(1) Determining the Petitioner’s Ability to Pay the Required Wage .

This issue is most commonly associated with small enterprises that do not necessarily have the assets required to pay the salary guaranteed in the petition. Such a petition may be an accommodation to a relative or friend who will seek other employment or there may be an agreement to work for lower wages.

It is not necessary that complete financial data be submitted with every petition. However, if the financial condition of the petitioner calls into question whether the petitioner really intends to employ the alien as claimed, evidence of financial ability may be requested at the discretion of the adjudicating officer in order to determine whether there exists a bona fide job offer.

Other factors that may be examined include, but are not limited to, the nature of the petitioner's business, the relationship between the beneficiary and the owners/officers of the petitioning entity, and the petitioner and beneficiary's immigration histories.

(2) Need for Workers .

As it is within USCIS scope to evaluate whether there is an actual need for the work itself and whether there is a genuine job offer, adjudications officers are advised to evaluate an H-2B petitioner's actual need for the number of employees requested and to issue an RFE in cases where there is doubt as to the need for the number of H-2B workers requested.

(3) Substitution of Beneficiaries .

H-2B workers that have not yet been admitted to the United States may be substituted as long as the employer can demonstrate that the total number of beneficiaries will not exceed the number of beneficiaries certified in the original temporary labor certification.

(A) Substitution of beneficiaries with aliens who are outside of the United States are processed directly with the consular office at which each alien will apply for a visa or, if the alien is visa exempt, at the port of entry or pre-flight inspection location where the alien will apply for admission.

(B) Substitution of beneficiaries with aliens who are currently in the United States is processed by USCIS. The petitioner must file an amended petition at the Service Center where the original petition was filed. The amended petition must retain a period of employment within the same half of the same fiscal year as the original petition and include:

- A filing fee;
  
  
- A copy of the original petition approval notice;

- A copy of the temporary labor certification;
- A statement explaining why the substitution is necessary;
- Evidence of the qualifications of each beneficiary, if applicable;
- Evidence of the beneficiaries' current status in the "United States"; and
- Evidence that the total number of beneficiaries will not exceed the number of H-2B workers authorized on the labor certification.

H-2B workers who were already admitted to the United States may not be substituted. Instead, a new petition accompanied by a newly approved labor certification must be filed.

**31.6 Trainees (H-3) has been superseded by USCIS Policy Manual, Volume 2: Nonimmigrants as of September 9, 2014.**

**31.7, Nurses (H-1C), has been removed as of May 15, 2020, because the program expired as of December 20, 2009.**

### **31.8 Strikes or Lockouts Involving H Petition Beneficiaries.**

If a strike or other labor dispute certified by the Secretary of Labor involving a work stoppage of workers is in progress in the occupation and at the place where the beneficiary is or will be employed or trained, and if the employment or training of the beneficiary would adversely affect the wages and working conditions of United States citizens and lawful resident workers, the following rules apply:

(1) A petition to classify an alien as an H nonimmigrant shall be denied.

(2) If the petition has already been approved, but the alien has not yet entered the United States, the approval of the petition is automatically suspended, and the application for admission on the basis of the petition shall be denied. Notify the consular officer or port of entry to which the approved petition was sent. The notification to the consular officer shall request deferral of visa issuance, or revocation of the visa if already issued. The notification to the port of entry shall request action to place the alien in removal proceedings, permit withdrawal or defer inspection, as appropriate.

(3) If the alien has already commenced employment in the United States under an approved petition and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of dispute involving a work stoppage of workers. However, the alien is subject to the following terms and conditions:

- The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other H nonimmigrants;

- The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

- Any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to removal proceedings.

### **31.9 Dependents.**

The spouse and unmarried minor children of the principal H nonimmigrant beneficiary are entitled to H nonimmigrant classification and will be classified as H-4 nonimmigrants. They are subject to the same period of admission and limitations as the beneficiary, if they are accompanying or following to join the beneficiary in the United States. Brief periods of time when the principal alien is outside the United States (e.g., on business) do not affect dependent status. Neither the spouse nor a child of the beneficiary may accept employment unless he or she is the beneficiary of an approved petition authorizing employment and has been granted a change of status to such nonimmigrant category. Such dependents may attend school and may individually be eligible for student status.

## **Appendix 31-1 List of Occupational Categories for H, J, and L NonImmigrants.**

The occupational categories for use on the back of I-94's for "H", "J", and "L" non-immigrant are as follows (use the underscored title only):

Administrative Support Occupations, including clerical (e.g., bank tellers, computer operators, dispatchers, mail clerks, record clerks, secretaries)

Agricultural Occupations, including horticulture and marine life (e.g., farmers, gardeners, groundskeepers, livestock workers)

Architects and Surveyors

Athletes and Related Workers (e.g., coaches, trainers)

Cleaning and Building Service Occupations, except private household (e.g., janitors, maids, pest control workers)

Computer, Mathematical, and Operations Research Scientists, including computer system analysts

Construction Trades (e.g., brick masons, carpenters, glaziers, electricians, painters, plumbers)

Dentists, Optometrists, Podiatrists and Other Health Occupations (involved in diagnosing and treating, but not including physicians)

Editors, Reporters, Public Relations Specialists, and Announcers

Engineers:

Aerospace Engineers

Agricultural Engineers

Chemical Engineers

Civil Engineers

Electrical Engineers

Electronic Engineers

Industrial Engineers

Marine Engineers

Mechanical Engineers

Metallurgical and Materials Engineers

Mining Engineers

Naval Architects

Nuclear Engineers

Petroleum Engineers

Unspecified Engineers or not elsewhere classified

Executive, Administrative, and Managerial Occupations (e.g., accountants, auditors, financial or personnel mgr.)

Extractive Occupations (e.g., explosive workers, mining machine operators, oil well drillers)

Fishers, Hunters, and Trappers

Food and Beverage Preparation and Service Occupations, except private household (e.g., bartenders, cooks, waiters, waitresses)

Forestry and Logging Occupations

Handlers, Equipment Cleaners, Helpers and Laborers (e.g., construction laborers, garage collectors, parking lot attendants, stevedores)

Health Service Occupations (e.g., dental assistants, nursing aides, orderlies)

Homemakers

Lawyers and Judges

Librarians, Archivists, and Curators

Machine Operators and Tenders, except precision (e.g., assembler, machine setup operator, solderer, welder)

Marketing and Sales Personnel

Mechanics and Repairers

Military Occupations

Performers (e.g., actors, dancers, musicians, singers)

Personal Service Occupations (e.g., baggage porters, barbers, hairdressers)

Pharmacists, Dieticians, Physician's Assistants, and Therapists, except physical therapists

Physical Therapists

Physicians

Precision Production Occupations (e.g., bookbinders, cabinet makers, engravers, shoemakers, tool and dye makers)

Private Household Service Occupations (e.g., childcare workers, cooks, housekeepers, launderers)

Protective Service Occupations (e.g., guards, firefighters, police)

Registered Nurses

Retirees

Scientists:

Life Scientists (e.g., agricultural, biological, forestry, medical)

Physical Scientists (e.g., astronomers, atmospheric, space, chemists, geologists, physicists)

Social Scientists and Urban Planners (e.g., economists, political scientists, psychologists, sociologists)

Social, Recreation and Religious Workers

Students or Children

Teachers:

College and University Teachers

Teachers, Except College and University

Technologists and Technicians, including computer programmers (e.g., drafters, dental hygienists, licensed practical nurses, surveying technicians, technical writers)

Transportation and Material Moving Occupations (e.g., Airline pilots, crane operators, grading machine operators, taxicab drivers, truck drivers, railway transportation workers)

Veterinarians

Vocational and Educational Counselors

Writers, Artists and Composers

Not reported

Unemployed

**Appendix 31-2 Memorandum: Updated Procedures for H-2A (Agricultural Worker I-129  
Petitions (Oct. 19, 2007 [Appendix 31-2 added 06-24-2009]**



U.S. Citizenship  
and Immigration  
Services

HQ 70/6.2.8

## Interoffice Memorandum

To: FIELD LEADERSHIP

From: Donald Neufeld /s/  
Acting Deputy Associate Director  
Domestic Operations

Date: October 19, 2007

Re: Updated Procedures for H-2A (agricultural worker) I-129 Petitions

### 1. Purpose

This memorandum provides United States Citizenship and Immigration Services (USCIS) Service Center personnel and officers with instructions to timely process and adjudicate Form I-129 petitions filed for H-2A classification. This memo is consistent with USCIS's goal to make the H-2A petition process simpler and more efficient.

### 2. Background

On August 10, 2007 Secretary of Homeland Security Michael Chertoff announced a series of reforms to include reforming the H-2A temporary agricultural worker program. As part of the reform process, USCIS is instituting changes which will provide agricultural employers with an orderly and timely flow of legal workers while protecting laborers' rights.

### 3. Use

This memorandum is intended solely for the guidance of USCIS personnel in performing their duties relative to adjudications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

### 4. Contact Information

Questions related to this memorandum should be directed to Hiroko Witherow, USCIS Headquarters Office of Service Center Operations, through appropriate supervisory channels.

## 5. Field Guidance

- Effective October 17, 2007, petitioners are encouraged to send all H-2A petitions to the following designated address (whichever applies) set up at the **California Service Center**. (This change will become mandatory once USCIS publishes a notice in the *Federal Register*.)

For Direct Mail:

**U. S. Citizenship and Immigration Services  
California Service Center  
ATTN: H-2A Processing Unit  
P.O. BOX 10140  
Laguna Niguel, CA 92607-1040**

For non-United States Postal Service (USPS) deliveries (e.g. private couriers):

**U. S. Citizenship and Immigration Services  
California Service Center  
ATTN: H-2A Processing Unit  
24000 Avila Rd Rm 2312  
Laguna Niguel, CA 92677**

- Personnel in the Service Center mail room are instructed to fee receipt, data enter, and route H-2A petitions for immediate distribution.
- H-2A petitions are to be distributed to adjudication officers no later than the third day after receipt.
- Adjudications officers are reminded to adjudicate unnamed beneficiaries' H-2A petitions on the day the cases are assigned to them.
- California Service Center will either fax or overnight mail approved petitions to the Kentucky Consular Center (KCC) for consular processing abroad.
- Once an H-2A approval notice is generated and printed, it should be sent to petitioners within 24 hours of the decision. Service Center personnel are reminded to use a pre-paid mailer whenever it is included.
- If other Service Centers receive an H-2A petition, they should forward it to California Service Center immediately. In the near future, USCIS will post special filing instructions to Form I-129 requiring all H-2A petitions to be filed at the CSC.

- Finally, USCIS will be increasing customer outreach efforts for users of the H-2A program. USCIS plans to hold annual public meetings to address questions, concerns and suggestions for H-2A process improvements.

Distribution:      Regional Directors  
                         Service Center Directors  
                         District Directors  
                         Field Office Directors

## Appendix 31-3 Request for Evidence Checklist.

### RFE Checklist—8/9/00 Optional H-1B RFE Checklist

So that when you compose the RFE, you address all the pertinent issues, use this checklist to track criteria for which further evidence is required to establish that the petition is approvable. Do not send this form to the petitioner or his/her/its representative with the RFE notice; and do not place it in the case file.

Check all that apply:

\_\_\_\_\_ evidence that the petitioner is an entity eligible to file

\_\_\_\_\_ wage guarantee and a copy of the contract of services OR a summary of the terms and conditions of employment (only if the petitioner is an agent)

\_\_\_\_\_ itinerary

\_\_\_\_\_ an original signature by a qualified person in Part 6 of the petition

\_\_\_\_\_ (H-1B1 and H-1B3 only) a complete LCA ( ETA Form 9035 ) certified by the Department of Labor

\_\_\_\_\_ evidence that an actual job offer exists or that prospective employment is legitimate

\_\_\_\_\_ (H-1B1 only) evidence that the position qualifies as a specialty occupation

\_\_\_\_\_ evidence that the beneficiary meets position qualifications

\_\_\_\_\_ evidence that the beneficiary possesses the license required by the occupation

\_\_\_\_\_ evidence that the beneficiary meets special requirements required for physicians

\_\_\_\_\_ complete, signed Form I-129W

\_\_\_\_\_ \$500 ACWIA-required fee

For H-1B2 petitions only:

\_\_\_\_\_ names of other aliens on the project that the proposed beneficiary will work on

\_\_\_\_\_ verification letter

For H-1B3 petitions only:

\_\_\_\_\_ evidence that services involve an event, production or activity which have a distinguished reputation or the services are to be performed for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons

For COS only:

\_\_\_\_\_ a complete and endorsed [I-566](#) (if changing from A or G classifications only).