

National Immigration Conference

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U.S. Citizenship
and Immigration
Services

Topics of Discussion

- **H-1B Classification**
 - Basic Criteria
 - Specialty Occupation
 - H-1B Petition Process
- **H-2A Classification**
 - Basic Criteria
 - H-2A Petition Process
 - Employment-Related Notification to USCIS
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Topics of Discussion (cont'd)

- **H-2B Classification**
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H-1B Visas



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H-1B Classification for Specialty Occupation Workers

H-1B

- Specialty occupation workers;
- Department of Defense (DOD) cooperative research and development project or co-production project workers; and
- Fashion models of distinguished merit and ability.



H-1B Classification for Specialty Occupation Workers

H-1B1

- Pursuant to free trade agreements, specialty occupation workers that are nationals of Chile and Singapore
- A Form I-129 is not required to be filed with USCIS
 - Individuals may apply for an H-1B1 visa directly at a consular office overseas.
 - However, employers file Form I-129 with USCIS to request an extension of the H-1B1 beneficiary's status, or to request a change of the beneficiary's status from another nonimmigrant status to H-1B1, within the United States.



H-1B Classification Criteria

- Petitioner is a U.S. employer or U.S. agent;
- Petitioner has obtained a certified labor condition application from the Department of Labor for the occupational specialty in which the nonimmigrant will be employed;
- Position qualifies as a specialty occupation; and
- Beneficiary is qualified to perform the specialty occupation position, including, generally, if applicable, any state licensure requirement.



Specialty Occupation

- “Specialty occupation” is broadly defined as an occupation which requires the theoretical and practical application of a body of highly specialized knowledge and attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation.
- To qualify as a specialty occupation, the position must meet one of the following criteria:
 - A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;



Specialty Occupation

- The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.



General H-1B Classification Information

- The annual H-1B cap is set at 65,000.
 - The first 20,000 H-1B petitions filed on behalf of beneficiaries with a U.S. Master's or higher degree are exempt from the annual cap.
 - Petitions by, or for employment at, certain organizations are not counted against the cap (e.g. nonprofit or public institutions of higher education and related/affiliated nonprofit entities).
 - Certain exemptions and exceptions that apply to the beneficiary might also render the petition cap-exempt.



General H-1B Classification Information

- While in H-1B status, the nonimmigrant may also seek permanent residence in the United States.
- Labor Condition Application is required for specialty occupation and fashion model H-1B petitions.
- Maximum stay of 6 years, with limited exceptions
 - For example, H-1B nonimmigrants who are the beneficiary of a labor certification application or I-140 immigrant petition filed more than 365 days before the end of the individual's 6 year H-1B period of stay may obtain extensions beyond the 6 year term



H-1B Petition Process

- Petitioner files a Labor Condition Application (LCA) with Department of Labor (DOL) for certification.
- The LCA contains several attestations by the petitioner, including:
 - ✓ The foreign worker will be paid the prevailing wage or the actual wage, whichever is higher.
 - ✓ Employment of the foreign worker will not adversely affect U.S. workers.



H-1B Petition Process

- An employer who is H-1B dependent or a willful violator must also attest that it has met or will meet the following requirements:
 - *Displacement*: Non-displacement of the U.S. workers in the employer's workforce;
 - *Secondary Displacement*: Non-displacement of the U.S. workers in another employer's workforce; and
 - *Recruitment and Hiring*: Recruitment of U.S. workers and hiring of U.S. workers applicant(s) who are equally or better qualified than the H-1B non-immigrant(s).



H-1B Petition Process

- Once DOL certifies the LCA, the petitioner submits Form I-129 with a certified LCA to a USCIS Service Center.
- If USCIS approves the petition for a beneficiary who is outside the United States and requires a visa to enter the United States, the beneficiary will need to schedule a visa interview at a U.S. Embassy or Consulate abroad.
 - ✓ If issued an H-1B visa, the beneficiary may apply for admission to the United States with CBP.



H-1B Petition Process

- If the beneficiary does not require a visa to enter the United States, he/she may apply for admission into the United States with CBP using the USCIS approval notice. This beneficiary can therefore obtain H-1B admission without prior contact or interaction with DOS.
- If the beneficiary is in the United States (in valid nonimmigrant status), the petitioner may include a request to change the beneficiary's status from another nonimmigrant status to H-1B or extend H-1B beneficiary's stay on the Form I-129.



Filing Procedures

Form I-129, Petition for a Nonimmigrant Worker

- Completed and properly signed forms
 - Original signatures
 - Completed/properly signed H Classification Supplement to Form I-129
 - Premium processing fee & form (Form I-907), if applicable
 - Corresponding Labor Condition Application that has been signed by DOL and signed by the petitioner
- Appropriate fees
- Petition is mailed to the California Service Center or to the Vermont Service Center, consistent with filing jurisdictions (found on <http://www.uscis.gov/i-129-addresses>)



H-2 Visas



Nonimmigrant Classification for Temporary Workers

H-2A Workers: The H-2A classification was created to enable U.S. employers to bring foreign nationals to the United States to fill seasonal and temporary agricultural jobs for which U.S. workers are not available.

H-2B Workers: The H-2B classification was created to allow U.S. employers to bring foreign workers to the United States to fill temporary non-agricultural jobs for which U.S. workers are not available.



What is the Process?

- The employer files a temporary labor certification (TLC) application with the U.S. Department of Labor.
- After receiving an approved TLC, the employer and/or its agent signs the approved TLC and files a Form I-129, together with an H Supplement, with USCIS (multiple workers may be included on a single petition).
- If the foreign worker is outside the United States and requires a visa, he or she applies for an H-2A or H-2B visa with the U.S. Embassy or consulate.
- H-2A or H-2B workers who are arriving from abroad must present themselves for inspection and be admitted by a CBP officer.



Prohibited Fees

An H-2 petition will be denied or revoked on notice if certain fees were collected from the beneficiaries.

- These fees include recruitment or hiring-related fees or other compensation (either direct or indirect, whether or not incurred by the H-2 worker in the United States or abroad) before or after the filing or approval of the petition.
- Fees may not be collected from H-2 workers by a petitioner, agent, facilitator, recruiter or similar employment service.
- The U.S. Department of Labor's H-2 regulations set forth in detail fees that may not be collected from beneficiaries in connection with applications for temporary labor certifications.



Prohibited Fees

- USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any agent, facilitator, recruiter, or similar employment service as a condition of an offer of the H-2 employment.

*Exception: The petitioner demonstrates that, prior to the filing of the petition, the petitioner, agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full *or* the agreement to collect fees or an agreement to provide compensation was terminated before any fees or things of value were collected from the beneficiary.



Eligible Country List

- H-2 petitions may be approved for nationals of countries that the Secretary of Homeland Security, with concurrence from the Secretary of State, has designated as participating countries (the “eligible countries list” or “ECL”).
- Once published, the ECL is effective for one year after the date of publication in the Federal Register.
- A new list will be published each year or at shorter intervals with possible additions or deletions of countries.
- The current eligible countries list may be found at www.uscis.gov.



Eligible Country List (cont'd)

Determining which countries go on the list takes into account several factors, including but not limited to:

- The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;
- The number of final and unexecuted orders of removal against citizens, subjects, nationals and residents of that country;



Eligible Country List (cont'd)

In order for USCIS to consider approval of a beneficiary from a non-list country, the petitioner must submit evidence to establish that it is in the U.S. interest to grant the beneficiary H-2 status. Determination of such a U.S. interest will take into account factors, including but not limited to:

- Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers from a country currently on the list;
- Evidence that the beneficiary has been admitted to the United States previously in H-2 status;
- The potential for abuse, fraud, or other harm to the integrity of the H-2 visa program through the potential admission of a beneficiary from a country not currently on the list; and
- Such other factors as may serve the U.S. interest.



H-2A Visas



Nonimmigrant H-2A Classification for Temporary Agricultural Workers

H-2A employment must be for seasonal and temporary agricultural jobs

- To qualify as seasonal, employment must be tied to a certain time of year by an event or pattern, such as a short annual growing cycle or specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.
- To qualify as temporary, the employer's need to fill the position will, except in extraordinary circumstances, last no longer than one year.



General H-2A Classification Information

- There is no yearly numerical limit (“cap”).
- A Temporary Labor Certification, issued by the U.S. Department of Labor, is required.



H-2A Employment-Related Notification to USCIS

Petitioners must notify USCIS within 2 work days if an H-2A worker stops working earlier than expected.

- **No show**: The H-2A worker fails to report to work within 5 work days of the employment start date on the H-2A petition or within 5 work days of the start date established by the petitioner, whichever is later.
- **Absconder**: The H-2A worker who has not reported for work for a period of 5 consecutive workdays without the consent of the employer.
- **Termination**: The H-2A worker is terminated prior to the completion of the H-2A labor or services for which he or she was hired; or
- **Early completion**: The H-2A worker finishes the labor or services for which he or she was hired more than 30 days earlier than the date specified in the H-2A petition.



Filing Procedures

Form I-129, Petition for a Nonimmigrant Worker

- Completed/properly signed forms
 - Completed/properly signed H Classification Supplement to Form I-129
 - Original signatures
- Appropriate fees
- An approved temporary labor certification
- Petition is mailed to the California Service Center, consistent with filing jurisdictions (found on <http://www.uscis.gov/i-129-addresses>)



H-2B Visas



Nonimmigrant H-2B Classification for Temporary Non-Agricultural Workers

The H-2B classification was created to allow U.S. employers to bring foreign workers to the United States to fill temporary non-agricultural jobs for which U.S. workers are not available.

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.



General H-2B Classification Information

- TLC required.
- Fee-related notifications required.
 - Petitioners, agents, facilitators, and recruiters are prohibited from collecting a recruitment or job placement fee or other compensation from an H-2B worker as a condition of employment.
- Employer-related notifications required.
 - No show, absconder, termination, early completion.
- Eligible countries list used.
- Temporary period of stay (granted up to the period of time authorized on the TLC, extensions in 1 year increments, up to maximum period of 3 years).



The H-2B Cap

- The annual H-2B cap is set at 66,000 H-2B workers per year. This is allocated on a semi-annual basis.
 - 33,000 for 1st half of the Fiscal Year (Employment starting from 10/1 – 3/31).
 - 33,000 for 2nd half of the Fiscal Year plus any unused numbers from the 1st half of the Fiscal Year (Employment starting from 4/1 – 9/30).
- Petitioners may file up to 120 days before the start date of FY 2016, which begins on October 1, 2015.



Exceptions to the H-2B Cap

- USCIS will continue to accept and process petitions filed on behalf of the following persons:
 - Fish Roe Processors.;
 - H-2B workers in the United States or abroad who have previously been counted towards the cap during the current fiscal year.;
 - Current H-2B workers seeking an extension of stay.;
 - Current H-2B workers seeking a change of employer or terms of employment.;
 - Workers employed in the Commonwealth of the Northern Mariana Islands and/or Guam. This exemption is scheduled to end on December 31, 2019.



H-2B Program Status

- On April 29, 2015, DOL and DHS issued a joint interim final rule immediately implementing the H-2B temporary labor certification program together with a final H-2B wage rule establishing the prevailing wage for the program.



H-2B Program Status (cont'd)

- On April 2, 2015, USCIS announced a sufficient number of petitions to reach the congressionally mandated H-2B cap for fiscal year (FY) 2015.
- March 26, 2015 was the final receipt date for new H-2B worker petitions requesting an employment start date prior to October 1, 2015.
- FY 2016 fiscal year begins on October 1, 2015.
- USCIS continues to accept H-2B petitions that are exempt from the congressionally mandated cap.



Filing Procedures

Form I-129, Petition for a Nonimmigrant Worker

- Completed/properly signed forms
 - Completed/properly signed H Classification Supplement to Form I-129
 - Original signatures
- Appropriate fees
- An approved TLC
- Petition is mailed to the California Service Center or Vermont Service Center, consistent with filing jurisdictions (found on <http://www.uscis.gov/i-129-addresses>)



H-4 EADs



Employment Authorization for Certain H-4 Dependent Spouses of H-1B Nonimmigrants

- On February 24, 2015, DHS announced it extended eligibility for employment authorization to certain H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident (LPR) status. DHS amended its regulations to allow these H-4 dependent spouses to accept employment in the United States.
- This final rule is effective **May 26, 2015**.



Eligibility Criteria

Eligible individuals include certain H-4 dependent spouses of H-1B nonimmigrants who:

- Are the principal beneficiaries of an *approved Form I-140*, Immigrant Petition for Alien Worker; or
- Have been granted an extension of H-1B status under *sections 106(a) and (b)* of the American Competitiveness in the Twenty-first Century Act of 2000 as amended by the 21st Century Department of Justice Appropriations Authorization Act (*AC21*). These sections of the Act permits H-1B nonimmigrants seeking lawful permanent residence to work and remain in the United States beyond the six-year limit on their H-1B status.

* Both the H-4 and the H-1B nonimmigrants must be maintaining status



Filing Procedures

- Under the rule, eligible H-4 dependent spouses must file Form I-765, Application for Employment Authorization, with supporting evidence and the required \$380 fee in order to obtain employment authorization and receive a Form I-766, Employment Authorization Document (EAD).
- Once USCIS approves the Form I-765 and the H-4 dependent spouse receives an EAD, he or she may begin working in the United States.
- USCIS will be posting FAQs and filing instructions for the public before May 26, 2015. Updates will be available at www.uscis.gov.
- USCIS will begin accepting applications requesting employment authorization on this basis on **May 26, 2015**.



For more information, please visit the USCIS website at www.USCIS.gov or call the USCIS National Customer Service Center at 1 (800) 375-5283.



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