



February 15, 2018

PM-602-0156

## Policy Memorandum

**SUBJECT:** Implementing the National Defense Authorization Act for Fiscal Year 2018 (NDAA) and the Exemption to the Temporary Need Requirement for H-2B Workers on Guam

### Purpose

This policy memorandum (PM) provides guidance regarding the filing and adjudication of H-2B nonimmigrant petitions that fall under section 1049 of the National Defense Authorization Act for Fiscal Year 2018 (NDAA). This PM pertains to certain H-2B petitions requesting start dates on or after April 11, 2018, and before October 1, 2023, for an otherwise qualified H-2B worker to perform service or labor on Guam pursuant to any agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a contract or subcontract for construction, repairs, renovations, or facility services that is directly connected to, or directly associated with, the military realignment occurring on Guam. Under the NDAA, an employer's need for these specific types of service or labor is not required to be temporary in nature if the employment start date is on or before September 30, 2023.

### Scope

This PM applies to all U.S. Citizenship and Immigration Services (USCIS) employees. This guidance goes into effect the date it is published.

USCIS will issue future guidance on cases that are filed under section 1049 of the NDAA for H-2B positions in the Commonwealth of the Northern Mariana Islands (CNMI).<sup>1</sup>

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<sup>1</sup> Although section 1049 of the NDAA also refers to the CNMI, a delayed effective date provision means that it will have no applicability to H-2B employment in the CNMI until December 31, 2019 at the earliest. Therefore, this PM will apply to Guam only. USCIS employees should continue to adjudicate H-2B cases involving the CNMI under existing DHS regulations and policy guidance.

## **Authority**

- National Defense Authorization Act for Fiscal Year 2018 (NDAA), Pub. L. 115-91, section 1049, Workforce Issues for Military Realignments in the Pacific.
- Section 6 of Pub. L. 94-241, as amended, 48 U.S.C. 1806(b).
- INA 101(a)(15)(H)(ii)(b); 8 USC 1101(a)(15)(H)(ii)(b).
- Title 8 Code of Federal Regulations (CFR) 214.2(h)(6).

## **Policy**

On December 12, 2017, the president signed the NDAA, which included a provision addressing H-2B visas on Guam and in the CNMI. Section 1049 of the NDAA amends section 6(b) of Public Law 94-241, 48 U.S.C. 1806(b), first by restating the current law that employers in Guam and the CNMI are exempt from the national H-2B cap and other H caps until December 31, 2019. It then adds the following:

In the case of such an alien [i.e., a nonimmigrant worker] who seeks admission under section 101(a)(15)(H)(ii)(b) of [the INA], such alien, if otherwise qualified, may, before October 1, 2023, be admitted under such section for a period of up to 3 years to perform service or labor on Guam or the [CNMI] pursuant to any agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a cont[r]act or subcontract for construction, repairs, renovations, or facility services that is directly connected to, or associated with, the military realignment occurring on Guam and the [CNMI], notwithstanding the requirement of such section that the service or labor be temporary.

Under the NDAA, for each fiscal year from 2018 through 2023, not more than 4,000 H-2B workers may be admitted annually to Guam pursuant to the exemption from the temporary need requirement that otherwise applies to H-2B nonimmigrants. For H-2B petitions for workers on Guam, the amendment applies beginning April 11, 2018, 120 days after the date of the enactment of the NDAA.

For H-2B petitions for employment on Guam that do not qualify under the NDAA exemption, USCIS will adjudicate those petitions according to existing DHS regulations and policy concerning the H-2B classification.

### H-2B Petition Eligibility for the NDAA Guam Exemption

Based on the language of the NDAA, USCIS will require petitioners requesting this exemption to demonstrate that all services or labor to be performed by H-2B nonimmigrants on Guam are:

- Pursuant to an agreement entered into by a prime contractor or subcontractor; and

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- For services or labor required for performance of a contract or subcontract<sup>2</sup> that is:
  - For construction, repairs, renovations or facility services; and
  - Directly connected to, or associated with, the military realignment on Guam.

Accordingly, any contract or subcontract for labor or services for construction, repairs, renovations, or facility services must be directly connected to, or directly associated with, the military realignment and cannot be only indirectly, incidentally, or tangentially connected to or associated with the realignment.

For example, the NDAA's H-2B provision is unlikely to apply to H-2B workers performing services or labor under a contract or subcontract at hotels, restaurants, retailers, vendors, and other service-type establishments located near a U.S. military base. On the other hand, infrastructure improvements, such as to utility or transportation systems, are likely to qualify for employment of H-2B workers under the NDAA exemption if the petitioner can establish that the contract or subcontract for such labor or services directly supports the military realignment on Guam, even if the contract or subcontract for such improvements is not with the U.S. military directly.

To qualify for the NDAA exemption, the direct connection or association cannot be with just any military activity on Guam or in the CNMI; it must be with "the military realignment occurring on Guam and the [CNMI]." The term "military realignment" refers generally to the planned realignment of U.S. Marines from Okinawa, Japan to Guam. Guam has a long-established U.S. military presence (including U.S. Air Force and U.S. Navy bases) that predates this military realignment, including ongoing activities that are not necessarily related to the military realignment. While some military activity on Guam or in the CNMI that is not specifically related to the Marines may come under the term "the military realignment", distinguishing U.S. military activity that is "the realignment" as compared to other military activity in Guam or the CNMI is a particularly difficult task for USCIS adjudicators as this is a military function determination, and the broader strategic goal supported by a particular contract or subcontract is unlikely to be evident from the contract documents themselves. For this reason, input from the Department of Defense (DoD) is particularly important, as further described below.

Submission of Evidence for Petitioners Requesting an NDAA Exemption

Petitioners that request their cases to be considered for eligibility under the NDAA H-2B Guam exemption should submit with their Form I-129, Petition for Nonimmigrant Worker, the following:

- A cover sheet indicating "NDAA Eligible" in large, bold letters.
- A copy of any applicable agreement, contract or subcontract for services or labor for construction, repairs, renovations, or facility services that is directly connected to, or associated with, the military realignment occurring on Guam.

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<sup>2</sup> The "agreement," depending on the circumstances, may be the "contract or subcontract."

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- Other probative evidence that each requested H-2B position meets the requirement that the worker will perform services or labor on Guam pursuant to any agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a contract or subcontract for construction, repairs, renovations, or facility services that is directly connected to or associated with the military realignment occurring on Guam.
- A signed statement from an official within DoD (including a branch of the armed forces). This statement should provide the DoD view regarding whether the applicable agreement, contract, or subcontract is directly connected to, or directly associated with, the military realignment. If this DoD statement is not provided, the petitioner should establish why it could not be obtained.

USCIS will provide additional information about petition filing procedures under the NDAA standard on its public website.

### Adjudicating H-2B Petitions for Workers on Guam Under the NDAA

USCIS officers will determine whether the petitioner has met its burden of demonstrating eligibility under the NDAA based on the totality of the evidence. The signed statement from DoD, although not determinative, should be given appropriate weight, particularly with respect to determining the relationship between the services or labor and the military realignment, as opposed to other U.S. military activity. If the USCIS officer determines that the case does not meet the NDAA exemption and/or the 4,000 limit has been reached for that fiscal year, then he or she should adjudicate the petition under existing H-2B policy and regulations. If a petition is denied it may be appealed to the USCIS Administrative Appeals Office.

For cases meeting the NDAA exemption regarding H-2B petitions for workers on Guam for services or labor directly connected to, or associated with, the military realignment, USCIS officers will not perform an analysis of whether the need for the H-2B position is temporary under otherwise applicable law and regulations until the applicable 4,000 limit has been met. Officers will, however, continue routine case processing to include reviewing whether the petition includes an approved temporary labor certification (TLC) issued by Guam's Department of Labor. As provided by Department of Homeland Security (DHS) regulations, the Guam Department of Labor may approve a TLC for a period of up to one year, with the possibility for extension.

### Annual Cap

H-2B petitions that meet the NDAA exemption will be counted against a cap of 4,000 workers per fiscal year.<sup>3</sup> These cap numbers will be issued on a first come, first served basis, beginning immediately for

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<sup>3</sup> Although this cap may include some H-2B workers in the CNMI in the future, because of the delayed effective date for the CNMI until at least December 31, 2019 described earlier, it only applies to workers on Guam at present. The NDAA as applied to the CNMI will be the subject of further guidance.

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eligible petitions requesting an employment start date in the current fiscal year, and for subsequent fiscal years, for eligible petitions requesting employment start dates on or after the first day of the fiscal year.<sup>4</sup> USCIS will announce on its website when the NDAA cap has been reached.

Extensions of stay for workers who previously have been counted against an annual NDAA cap of 4,000 will not be counted again toward the cap, within the three-year maximum period of admission. Petitions seeking a change of status to H-2B will be counted against the NDAA cap if the NDAA exemption applies.

### Period of Admission

Before October 1, 2023,<sup>5</sup> an H-2B worker whose service or labor meets the NDAA exemption may be admitted for a consecutive period of up to 3 years, depending on the specific need stated in the H-2B petition.<sup>6</sup> He or she may again apply for admission under the NDAA exemption after residing and being physically present outside the United States for the immediately preceding 3 months as set forth in 8 CFR 214.2(h)(13)(iv). Because the provisions of the NDAA will sunset at the end of the day on September 30, 2023, petitions with employment start dates on or after October 1, 2023, will be subject to adjudication and admission under the law and regulations that apply to the H-2B program on that future date.

### **Implementation**

The NDAA states that “in the case of services or labor to be performed on Guam, such amendment shall apply beginning on the date that is 120 days after the date of the enactment of this Act.” Therefore, once USCIS publishes this PM, it will begin immediately accepting petitions that meet the H-2B NDAA provisions. However, the employer date of need (i.e., employment start date) must be on or after April 11, 2018.

### **Use**

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties. 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 or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

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<sup>4</sup> Under 8 CFR 214.2(h)(9)(i)(B), an H-2B petition may not be filed or approved more than 120 days before the date of the actual need for the beneficiary’s services identified on the temporary labor certification.

<sup>5</sup> Because the NDAA refers to admission “before” October 1, 2023, the last eligible requested employment start date is September 30, 2023, the last day of fiscal year 2023.

<sup>6</sup> Any single grant of a period of admission is limited to the validity period of the TLC, which may not exceed one year. If eligible, the worker may obtain extensions of stay for a total period of admission of up to three years.

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**Contact Information**

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.