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U.S. Citizenship and Immigration Services

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# Memorandum

TO: Field Leadership

FROM: Donald Neufeld /s/
Acting Associate Director, Domestic Operations

SUBJECT: Publication of the final rules: H-2A Agricultural Temporary Worker and H-2B Nonagricultural Temporary Worker

Revisions to *Adjudicator's Field Manual* (*AFM*), Chapters 31.4 and 31.5; Appendix 31-4 (*AFM* Update AD)

## 1. Purpose

The purpose of this memorandum is to provide guidance for processing and adjudicating Form I-129, Petition for Nonimmigrant Worker, filed on behalf of H-2A agricultural temporary workers and H-2B nonagricultural temporary workers.

## 2. Background

**H-2A Classification:** On December 18, 2008, the Federal Register (FR) published a DHS final rule entitled "Changes to Requirements Affecting H-2A Nonimmigrants." [See ) at.73 FR ]. 76891.

On the same date, the FR published a U.S. Department of Labor (DOL) final rule for the H-2A affecting the temporary labor certification process for classification. [See FR at 73 FR 77110]. Both H-2A rules became effective on January 17, 2009. On March 17, 2009 the FR published a DOL notice in the FR proposing a 9-month suspension of its companion H-2A rule. [See 74 FR 11408]. As of the date of this memorandum, DOL's new H-2A rule remains in effect. This notice will be updated if and when the 9-month suspension goes into effect. Subsequently, on April 17, 2009, the FR published a DOL interim rule amending its regulations to extend the transition period of its application filing procedures for H-2A employers with a date of need on

or before July 1, 2009, to include all employers with a date of need on or before January 1, 2010. [See 74 FR 17597.]

The following update to the Adjudicator's Field Manual (AFM) is being made by USCIS as a result of new requirements made to the H-2A program in DHS's final rule. These changes and requirements are unaffected by the DOL's suspension of its H-2A final rule.

**H-2B Classification:** On December 19, 2008, the Federal Register published a DHS rule entitled "Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers" final rule in the FR at 73 FR 78104 . On the same date, the DOL published a rule for H-2B classification in the FR at 73 FR 78020. Both H-2B rules became effective on January 18, 2009.

Additionally, in a separate but related change affecting the H-2B classification, the Consolidated Natural Resources Act (CNRA), Public Law 110-229, includes a provision affecting the H-2B visa classification. Upon the CNRA's implementation, H-2B workers in Guam and the Commonwealth of the Northern Mariana Islands (CNMI) will be exempt from the statutory numerical limitation for H-2B classification from November 28, 2009 to December 31, 2014.

The DHS H-2A and H-2B final rules remove certain limitations on H-2A and H-2B employers and adopt streamlining measures in order to facilitate the lawful employment of these foreign temporary workers. These final rules also address concerns regarding the integrity of the H-2A and H-2B programs and set forth several conditions to prevent fraud and to protect laborers' rights.

**3. Field Guidance and AFM Update**

All USCIS offices are directed to comply with the following guidance. The *Adjudicator's Field Manual (AFM)* Chapter 31.4 entitled "Agricultural Workers (H-2A)" and Chapter 31.5 entitled "Temporary Service or Labor Workers (H-2B)" are amended as follows. Appendix 31-4 "Special Filing Situations Under the H Classification" will be reserved.

31.4 Temporary Agricultural Workers (H-2A).

(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's goal to process all H-2A petitions timely and efficiently. See Donald Neufeld's Interoffice Memorandum of October 19, 2007. In accordance with this 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 31.4(h)(3) of the AFM and 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 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].

Please 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 FR 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 1/22/09 (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 factors, including, *but not limited to*:

- 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;
- 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.
- 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
- 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. 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-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 Chapter 30.3. If the alien is present in the United States and requires an extension of stay, follow the procedures described in 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. Please 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) Sheepherders. Until the most recent H-2A final rule went into effect on January 17, 2009 (73 FR 76891), USCIS refrained from applying the three-year maximum period of stay for H-2A sheepherders. However, effective January 17, 2009, sheepherders 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 sheepherders 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).]

(l) 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 Section 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 76906-07].

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).

(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.

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, peakload, 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).]

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.

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

Peakload 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 peakload need for assembly-line workers to meet its unprecedented production demands for the Christmas season.

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 Superbowl).

(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 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 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 31.5(g)(3) of the AFM 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 paragraph (b)(2));
- 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 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) 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].

Please 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 F.R. 13261-62 (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:

1) If the beneficiary has paid any form of compensation, has the beneficiary been reimbursed? If yes, evidence of the reimbursement must be submitted.
2) 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 (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. 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 ofH-2B 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)(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 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 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. Please 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.]

(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.

Appendix 31-4 Special Filing Situations Under the H Classification.

Reserved.

**4. *AFM* Transmittal Memoranda Revisions.** The *AFM* Transmittal Memoranda button is revised by adding new entries, in numerical order, to read:

| | | |
|---|---|---|
| AD [INSERT DATE] | **Chapters:**<br>• **31.4**<br>• **31.5**<br>• **Appendix 31-4** | This memorandum revises *Adjudicator's Field Manual* (*AFM*) Chapters 31.4 and 31.5 and Appendix 31-4 to reflect the publication of the H-2A and H-2B final rules in the Federal Register on December 18, 2008 and on December 19, 2008 respectively. 73 FR 76891 and 73 FR 78104. |

**5. Use**

This memorandum is intended solely for the instruction and 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 or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

**6. Contact**

Questions regarding this memorandum may be directed to USCIS Headquarters Office of Service Center Operations through appropriate supervisory channels.

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