

H-2A Agricultural Temporary Worker Final Rule

Department of Homeland Security, U.S. Citizenship and
Immigration Services

in cooperation with

Department of Labor, Office of Foreign Labor Certification
Employment & Training Administration

Atlanta, Georgia - December 12, 2008

Denver, Colorado – December 15, 2008



U.S. Citizenship
and Immigration
Services

Notice of Proposed Rulemaking

- Published on February 13, 2008 (73 FR 8230)
- Public comment period closed on April 14, 2008
- 163 comments received



Final Rule

- Federal Register publication date: December 18, 2008
- Effective date: January 17, 2009



Consideration of denied labor certification

- All H-2A petitions must be accompanied by an approved labor certification



Unnamed beneficiaries

- Beneficiaries outside the U.S. do not have to be named
- Beneficiaries in the U.S. (applying for a change of status or an extension of stay) must be named
- Exception: will be explained in the eligible countries provision



Multiple beneficiaries

- Petitioners may file one petition for multiple beneficiaries from multiple countries
- Beneficiaries must perform the same service for the same period of time and in the same location
- Exception: will be explained in the eligible countries provision



Payment of fees by beneficiaries to obtain H-2A employment

An H-2A petition will be denied or revoked if USCIS determines that:

- the petitioner has collected or entered into an agreement to collect a fee from the beneficiary as a condition of the beneficiary obtaining the H-2A employment, or
- the petitioner knows or reasonably should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition or requirement of obtaining an H-2A job offer



Payment of fees by beneficiaries to obtain H-2A employment

- Eligibility requirement questions will be included on the “Petition for a Nonimmigrant Worker,” Form I-129
- Prohibited fees do not include:
 - the lower of the fair market value of or actual costs for transportation to the United States, if permitted by applicable law
 - payment of any government-specified fees such as fees required by a foreign government for issuance of passports and by the U.S. Department of State for the issuance of visas



Payment of fees by beneficiaries to obtain H-2A employment

A 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 paid fees;
- Where the prohibited fees have not yet been paid, that the agreement to pay has been terminated; or
- Where the prohibition on collecting or agreeing to collect a fee is violated by a recruiter or agent after the filing of the petition without knowledge of the petitioner, the petitioner notifies USCIS about the prohibited payment or agreement to make such payments within 2 work days of learning about such prohibited payment or agreement



Notification to USCIS: Payment of fees by beneficiaries to obtain H-2A employment

- The USCIS receipt number of the H-2A petition;
- The petitioner's name, address, and telephone number;
- The employer's name, address, and telephone number, if different from that of the petitioner; and
- The name and address of the facilitator, recruiter, or placement service to which alien beneficiaries paid or agreed to pay the prohibited fees



Notification to USCIS: Payment of fees by beneficiaries to obtain H-2A employment

- By mail: Must be postmarked before the end of the 2 work day reporting window

California Service Center
P.O. Box 10695
Laguna Niguel, CA 92607-1095

- By email: CSC.H2AFee@dhs.gov



Payment of fees by beneficiaries to obtain H-2A employment

- If a petition was denied or revoked within the previous year based on payment of prohibited fees by the worker, a petitioner must demonstrate that:
 - The petitioner reimbursed the alien beneficiary for such fees, or
 - The H-2A worker cannot be located despite the petitioner's reasonable efforts
- H-2A workers who are in the United States based on an approved petition that is later revoked due to the payment of prohibited fees may remain in the United States up to 30 days



Notification to USCIS: Employment-related

Petitioner must notify USCIS:

- Where an 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;
- Where the agricultural labor or services for which H-2A workers were hired is completed more than 30 days earlier than the end date stated on the H-2A petition;
- Where the H-2A worker does not report for work for a period of 5 consecutive work days without the consent of the petitioner or is terminated prior to the completion of agricultural labor or services for which he/she was hired.



Notification to USCIS: Employment-related

- The reason for the notification;
- The reason for untimely notification and evidence for good cause, if applicable;
- The USCIS receipt number of the approved H-2A petition;
- The petitioner's name, address, telephone number, and employer identification number (EIN);
- The employer's name, address, and telephone number, if it is different from that of the petitioner;
- The name of the H-2A worker in question;
- The date and place of birth of the H-2A worker in question; and
- The last known physical address and telephone number of the H-2A worker in question.



Work day

The period between the time on any particular day when such employee commences his or her principal activity and the time on that day at which he or she ceases such principal activity or activities



Notification to USCIS: Employment-related

- By mail: Must be postmarked before the end of the 2 work day reporting window

California Service Center

Attn: Div X/BCU ACD

P.O. Box 30050

Laguna Niguel, CA 92607-3004

- By email: CSC-X.H-2AAbs@dhs.gov



U.S. Citizenship
and Immigration
Services

Notification to USCIS: Employment-related

- An H-2A petitioner is required to retain evidence of any such notification, as well as the changed employment start date, for one year
- If it is determined by Immigration and Customs Enforcement (ICE) that the petitioner has violated the notification requirements, the petitioner will be given written notice and 30 days to reply



Liquidated damages

- \$10 for each instance where the petitioner cannot demonstrate that it has complied with the notification requirements
- A petitioner will receive a demand letter for payment for liquidated damages directly from Customs and Border Protection (CBP) and pay directly to CBP



Substitution

- An H-2A petitioner may file a petition to replace H-2A workers:
 - Whose employment was terminated earlier than the end date stated on the H-2A petition and before the completion of work;
 - Who failed to report to work within 5 days of the employment start date on the H-2A petition or within 5 days of the start date established by the petitioner, whichever is later;
 - Who did not report for work for a period of 5 consecutive work days without the petitioner's consent



Violation of H-2A status

By statute, an alien beneficiary may not be granted H-2A status if he/she violated, other than through no fault of his/her own, any terms or conditions of H-2A status during the past 5 years



Revocation of labor certification

- An H-2A petition will be revoked if the labor certification is revoked by Department of Labor
- H-2A workers who are in the United States based on an approved petition that is later revoked because of DOL's revocation of the labor certification may remain in the United States up to 30 days



Eligible countries

- DHS will designate, with the concurrence of the Secretary of State, countries whose nationals are eligible to participate in the H-2A program.
- DHS expects to publish the list of eligible countries each year in a notice in the Federal Register.
- Designation of countries will be valid for one year from publication.
- All H-2A petitions must state the nationality of all beneficiaries.
- All H-2A petitions on behalf of workers who are not from a country that has been designated as an eligible country must name all the workers in the petition and meet the additional requirements.
- H-2A petitions for workers from designated participating countries and non-designated countries should be filed separately.



Additional requirements for beneficiaries who are not from a country on the list of eligible countries

- 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 the H-2A status and has complied with the terms of the H-2A status;
- Consideration of the potential for abuse, fraud, or other harm to the integrity of the H-2A program through the potential admission of a beneficiary from a country not currently on the list; and
- Consideration of such other factors as may serve the U.S. interest



Period of Admission

H-2A workers may remain in the United States up to 30 days following the expiration of the H-2A petition



Post H-2A waiting period

- H-2A worker's stay: Limited by the term of an approved petition not to exceed the period of approved labor certification (plus 30 days)
- H-2A's maximum period of stay: Up to 3 years, including extensions
- An H-2A worker who has reached the 3-year maximum period of stay: Must wait outside the United States for 3 months before he/she is eligible to re-obtain H-2A status
- Shepherders: Same departure requirement as other H-2A workers



Interruption in accrual towards 3-year maximum period of stay

The following absence will be considered interruptive of accrual of time towards the 3-year limit

- If the accumulated stay is 18 months or less: 45 days
- If the accumulated stay is longer than 18 months: 2 months



Extending status with new employer and participation in E-Verify

- An H-2A worker may begin work with a new petitioning employer, while awaiting an approval of a petition, *provided* that the new employer is a registered user in good standing of USCIS's E-Verify program
- E-Verify: Free and voluntary internet-based system operated by USCIS that allows participating employers to electronically verify the employment eligibility of their newly hired employees
 - E-Verify: link on www.uscis.gov



Temporary Worker Visa Exit Program

- Customs and Border Protection (CBP) is establishing a pilot exit program, which will commence on August 1, 2009.
- An H-2A alien worker admitted through a port of entry participating in the pilot program must depart through a participating port of entry
- CBP has published a Notice in the Federal Register:
 - Designating San Luis, AZ, and Douglas, AZ, as ports of entry participating in the program; and
 - Establishing which biographical and biometric information must be submitted upon the worker's final departure.

