U.S. Citizenship and Immigration Services

Questions and Answers

Dec. 18, 2008

USCIS FINALIZES STREAMLINING PROCEDURES FOR H-2B TEMPORARY NON-AGRICULTURAL WORKER PROGRAM

BACKGROUND

When U.S. employers have a shortage of available U.S. workers to fill temporary nonagricultural jobs, they may file an H-2B petition with U.S. Citizenship and Immigration Services (USCIS) for permission to employ foreign workers to perform that work in the United States. Once the petition is approved, eligible workers may be admitted to the United States in H-2B nonimmigrant status.

On Aug. 20, 2008, USCIS announced a number of proposed rule changes to provide U.S. employers with a streamlined process to hire temporary non-agricultural workers under the H-2B program. USCIS provided a 30-day comment period in the proposed rule, which ended on Sept. 19, 2008. USCIS received 119 comments.

After considering the comments, USCIS has modified some of the proposed changes and finalized the rule, adopting many of the regulatory amendments set forth in the proposed rule.

QUESTIONS/ANSWERS

Q: What is the H-2B classification?

A: The H-2B nonimmigrant classification applies to aliens seeking to perform non-agricultural labor or services of a temporary nature in the United States. The H-2B petition must establish that the petitioner's need for the services or labor is temporary, regardless of whether the underlying job can be described as permanent or temporary. The petitioner's need is considered temporary if it is a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need.

Q: What is the process for obtaining H-2B status?

A: Prospective employers of H-2B workers must first obtain certification from the U.S. Department of Labor (DOL) (or Governor of Guam) that (1) there are not sufficient U.S. workers who are able, willing, qualified, and available to do the temporary work; and (2) the employment of H-2B aliens will not adversely affect the wages and working conditions of similarly employed U.S. workers. H-2B workers are employment authorized for a period not to exceed the period of employment certified by DOL (or Governor of Guam).

Once the employer has obtained an approved temporary labor certification, the employer may file a Form I-129, "Petition for a Nonimmigrant Worker," with USCIS to classify the individual as an H-2B worker. If the petition is approved, the worker may apply for an H-2B visa at a U.S. embassy or consulate abroad. If the worker is already in the United States and in a valid nonimmigrant status, the petitioner may also request a change of nonimmigrant status to H-2B or an extension of the worker's current H-2B nonimmigrant stay.

Q: Can an H-2B worker extend his or her stay?

A: An employer may request that USCIS extend a beneficiary's H-2B stay on the basis of a temporary labor certification with the same or a new employer for an uninterrupted period of up to three years in H-2B status.

Q: Which proposed amendments are adopted in the final rule?

A: The final rule retains several provisions from the proposed rule without any further changes:

- Reduces from six months to three months the time an H-2B worker who has spent three years in the U.S. must reside and be physically present outside the United States before he or she is eligible to re-obtain H-2B status;
- Prohibits H-2B employers and recruiters from imposing certain fees on prospective H-2B workers as a condition of securing employment;
- Eliminates USCIS' current authority to adjudicate H-2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification;
- Enhances employer sanctions by imposing debarment provisions. If the Department of Labor finds that a petitioner substantially failed to meet any of the conditions of the H-2B petition or willfully misrepresented a material fact in such petition, USCIS may deny certain petitions filed by that petitioner for a period of at least 1 year but not more than 5 years. This debarment process is covered by the Department of Labor's final H-2B regulations, which are being published in the Federal Register on [date]. H-2B employers who have been debarred by the DOL under these provisions are ineligible to obtain a temporary labor certification for the period determined by DOL. Because a temporary labor certification is required to qualify for H-2B classification, these employers will not be eligible to file H-2B petitions during the DOL imposed debarment period.
- Beginning with petitions filed for workers for Fiscal Year 2010, prohibits H-2B employers from requesting an employment start date on Form I-129 that is different from the date of need stated on the accompanying approved temporary labor certification;
- Clarifies USCIS' authority to issue a notice of denial or revocation of a Form I-129 if USCIS determines that the statements on the petition or application for labor certification are inaccurate or fraudulent, or misrepresent a material fact;
- Establishes a land-border exit system pilot program under which H-2B workers admitted through a participating port of entry must also depart through that participating port of entry and present, upon departure, designated biographical information, possibly including biometric identifiers;
- Amends the current definition of "temporary services or labor" to include a specific one-time need of up to three years, without requiring the employer to demonstrate extraordinary circumstances;
- Reduces the minimum period spent outside the United States that would be considered interruptive of accrual of time towards the three-year limit; and
- Allows the substitution of beneficiaries who were previously approved for consular processing, but have not been admitted, with aliens who are currently in the United States.

Q: What modifications from the proposed rule are included in the final rule?

A: Among other things, the final rule will:

- Remove the separate attestation requirement contained in the proposed rule and amend the Form I-129, "Petition for Nonimmigrant Worker," to include the attestation provisions.
- Offer H-2B petitioners a means to avoid denial or revocation of the H-2B petition in cases where USCIS determines that the petitioner discovers after filing that the worker paid or has agreed to pay to a third party prohibited fees as a condition of obtaining H-2B employment.
- Permit the approval of H-2B petitions only for nationals of certain countries important to the operation of the program and appearing on a list to be published annually in the *Federal Register*. The initial list of participating countries to be published simultaneously with the Final Rule includes Mexico, Jamaica, and 26 others. DHS may allow on a case-by-case basis a worker from a country not on the list to be eligible for the H-2B program if such participation is in the U.S. interest;
- Require H-2B employers whose petitions have been denied or revoked based on the payment of prohibited fees to demonstrate, as a condition of approval of H-2B petitions filed within one year of the denial or revocation, that the H-2B workers have been reimbursed or the H-2B workers cannot be located despite the petitioner's reasonable efforts.
- Require petitioners to provide notification to USCIS within 2 work days in the following instances: (a) where an H-2B worker fails to report to work within five work days of the employment start date on the H-2B petition; (b) where the non-agricultural labor or services for which H-2B workers were hired is completed more than 30 days earlier than the end date stated on the H-2B petition; or (c) where the H-2B worker absconds from the worksite or is terminated prior to the completion of the non-agricultural labor or services for which he or she was hired;
- Provide that an employer may not file an H-2B petition more than 120 days before the date of the employer's actual need for the beneficiary's services or labor, as identified on the temporary labor certification. This ensures consistency between USCIS and DOL regulations.
- Provide USCIS the flexibility to require H-2B petitioners to name beneficiaries, if located outside the United States, in the event that Congress reauthorizes the returning worker provisions or enacts similar legislation exempting certain H nonimmigrants from the numerical limits.
- Not adopt the proposed provision to preclude an alien from being accorded H-2B status if USCIS finds that the alien has, at any time during the past 5 years, violated any of the terms or conditions of the current or previously accorded H-2B status, other than through no fault of the alien.

Q: What effect will the new rule have on the H-2B cap?

A: The Immigration and Nationality Act, as amended, provides an annual limitation (or "cap") on the number of aliens who may be accorded H-2B nonimmigrant status to 66,000 per fiscal year, with 33,000 aliens allocated H-2B nonimmigrant status the first half of the fiscal year and 33,000 allocated the second half of the fiscal year. This final rule does not increase the H-2B cap limits, nor does it change the H-2B visa allocation process under the cap.

Q: How will the final rule protect the rights of U.S. and alien workers?

A: The rule will no longer allow U.S. employers to file an H-2B petition unless the Secretary of Labor or the Governor of Guam has granted a temporary labor certification. As noted above, if an H-2B worker was charged a fee by the petitioner as a condition of securing the employment, or if a labor recruiter, with

the knowledge of the petitioner, demanded a payment from a worker as a condition of selection for the petitioner's H-2B workforce, the rule will provide USCIS the authority to deny or revoke the petition. As a precondition to approval of any subsequent H-2B petitions filed within one year of the denial or revocation, the employer would have to show that it reimbursed the alien for such fees or that the H-2B worker cannot be located despite the petitioner's reasonable efforts to do so.

Q: How will the final rule strengthen enforcement and ensure the integrity of the H-2B program?

A: The Final Rule will permit the approval of H-2B petitions only for nationals of certain countries important to the operation of the program and appearing on a list to be published in the *Federal Register*. In adding new countries to the list in order to allow the participation of their nationals in the program, DHS will consider a variety of factors, including a country's cooperation with respect to the issuance of travel documents for individuals subject to a final order of removal. It also requires that employers notify USCIS when an H-2B worker fails to show up for work, is fired, or absconds. Finally, the rule will establish a land-border exit system pilot program under which H-2B workers admitted through a port of entry participating in the program must also depart through a port of entry participating in the program and present, upon departure, designated biographical information, possibly including biometric identifiers.

Q: When will the final rule go into effect?

A: The rule will go into effect 30 days from the date of the publication in the *Federal Register*. Existing H-2B regulations and policies will remain in effect until the effective date of the final rule.

Q: Will the Department of Labor be publishing a final rule addressing the H-2B program as well?

A: Yes. As noted above, the Department of Labor's final rule was posted in the *Federal Register* on Dec. 18, 2008, and is scheduled to be published on Dec. 19, 2008. It will go into effect on Jan. 18, 2009.

Q: Where can I locate information regarding the current proposed rule addressing the H-2B program?

A: The final rule can be reviewed at www.uscis.gov. Detailed information on temporary workers is also available on the USCIS Web site.

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