

## New H-2B Regulations from USCIS and DOL

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The Department of Homeland Security (DHS) amended the regulations regarding temporary nonagricultural workers, and their U.S. employers, within the H-2B nonimmigrant classification. The final rule removes certain limitations on H-2B employers and adopts streamlining measures in order to facilitate the lawful employment of foreign temporary nonagricultural workers.

The rule generally removes the requirement for H-2B petitioners to state on petitions the names of prospective H-2B workers who are outside the United States and reduces the existing obligatory waiting period from 6 months to 3 months for an H-2B worker who has reached his or her maximum three-year period of stay in H-2B nonimmigrant status before such person may seek an extension of nonimmigrant stay, change of status, or readmission to the United States in any H or L nonimmigrant status. The rule provides a more flexible definition of "temporary services or labor," which is generally defined as a period of one year but could be for a specific one-time need of up to 3 years.

This rule eliminates DHS's current practice of adjudicating H-2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification. The rule also prohibits H-2B petitioners from requesting an employment start date on the Form I-129, Petition for a Nonimmigrant Worker, that is different than the date of need listed on the approved temporary labor certification. The final rule requires H-2B petitioners to notify DHS when the H-2B worker fails to report for work, is terminated prior to the completion of the work for which he was hired, or absconds from the worksite. This rule also precludes employers from passing the cost of recruiter fees charged by a petitioner, agent, facilitator, recruiter, or similar employment service to prospective H-2B workers as a condition of an offer of H-2B employment. Under this rule, employers and H-2B workers may agree that certain transportation costs and government-imposed fees be borne by H-2B workers, if the passing of such costs to these workers is not prohibited under the Fair Labor Standards Act or any other statute.

The rule enforces the existing penalties at section 214(c)(14) of the Immigration and Nationality Act (INA) in the case of an employer who fails to meet any of the conditions of the H-2B petition, or who willfully misrepresented a material fact in the H-2B petition. Employers who fail to meet the H-2B conditions or who willfully make material misrepresentations on an H-2B petition may, under the statute, be precluded from approval for a period of up to 5 years of any H (except H-1B1), L, O, or P-1 nonimmigrant visa petition, or any immigrant visa petition described in section 204 of the INA, they may file with DHS.

This rule also provides that DHS will publish in a notice in the Federal Register a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H-2B program. Finally, this rule establishes a pilot exit control program for certain H-2B workers, by requiring them to report their departure at designated ports of entry. U.S. Customs and Border Protection (CBP) will publish a notice in the Federal Register describing the procedures and requirements for participation in this pilot program.

Effective Date: January 18, 2009