

§214.2

8 CFR Ch. I (1-1-01 Edition)

of this chapter, except for those aliens enumerated in 8 CFR 248.2, have his or her nonimmigrant classification changed to that of an alien classified pursuant to section 101(a)(15)(S) of the Act as set forth in 8 CFR 248.3(h).

(Title VI of the Health Professions Educational Assistance Act of 1976 (Pub. L. 94-484; 90 Stat. 2303); secs. 103 and 214, Immigration and Nationality Act (8 U.S.C. 1103 and 1184))

[38 FR 35425, Dec. 28, 1973]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §214.2, see the List of CFR Sections Affected, which appears in the Finding Aids section in the printed volume and on GPO Access.

EFFECTIVE DATE NOTE: At 65 FR 43531, July 13, 2000, in §214.2, paragraphs (h)(2)(i)(A), (B), (D), and (E), (iii), (iv), (v), (5)(i)(A) through (D), (ii), (iv)(B), (v), (ix), (9)(ii)(C), (10)(ii), (iii), (11)(i), (ii), (iii)(A) introductory text, (B), (12)(i), (13)(i)(A), (14), (16)(ii) and (18) were revised and paragraph (h)(9)(i)(C) was added, effective Nov. 13, 2000. At 65 FR 67617, Nov. 13, 2000, the effective date was delayed until Oct. 1, 2001. For the convenience of the user, the revised and added text is set forth as follows:

§214.2 Special requirements for admission, extension, and maintenance of status.

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- (h) * * *
(2) * * *
(i) * * *

(A) General. Except as provided in this section, even in emergency situations, a United States employer seeking to classify an alien as an H-1B, H-2B, or H-3 temporary employee must file a petition on Form I-129, Petition for Nonimmigrant Worker, with the service center which has jurisdiction in the area where the alien will perform services or receive training. A United States employer seeking to classify an alien as an H-2A worker must file a petition on Department of Labor (DOL) Form ETA-9079, Application for Temporary Agricultural Labor Certification and H-2A Petition, only with the DOL Regional Administrator having jurisdiction in the area where the alien will first perform services (see 20 CFR 655, Subpart B). All petitions for temporary workers, except petitions for temporary agricultural workers (H-2As), in Guam and the Virgin Islands, and petitions involving special filing situations as determined by Service Headquarters, must be filed with the local Service office or a designated Service office. Petitions for temporary agricultural workers (H-2A) in Guam and the Virgin Islands must be filed with the

DOL Regional Administrator having jurisdiction. The petitioner may submit a legible photocopy of a document in support of the petition in lieu of the original document. However, the original document must be submitted if requested by the Service.

(B) Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office that has jurisdiction over petitions in the area where the petitioner is located, or in the case of H-2As, it must be filed with the DOL Regional Administrator having jurisdiction over the location where services will be performed first. The address that the petitioner specifies as its location on the petition must be where the petitioner is located for purposes of this paragraph.

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(D) Change of employers. (1) If the alien is in the United States and seeks to change employers, the prospective new employer (except in the case of H-2As) must file a petition on Form I-129, with the fee required in §103.7(b)(1) of this chapter, requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. The alien is not authorized to begin the employment with the new petitioner until the petition is approved.

(2) [Reserved]

(3) An H-1A nonimmigrant alien may not change employers.

(E) Amended or new petition. The petitioner must file an amended or new petition, with fee, with the Service Center or, in the case of H-2A workers, with the DOL Regional Administrator where the original petition was filed, to reflect any material changes in the terms and conditions of employment or training or the beneficiary's eligibility as specified in the original approved petition. An amended or new H-1A, H-1B, or H-2B petition must be accompanied by a current or new DOL determination. An H-2A petition must be filed with a valid labor certification or an application for the certification. In the case of an H-1B petition, this requirement includes a new labor condition application.

* * * * *

(iii) Named beneficiaries. Nonagricultural petitions must include the names of beneficiaries and other required information at

the time of filing. Under the H-2B classification, exceptions may be granted in emergency situations involving multiple beneficiaries at the discretion of the Service Center Director, and in special filing situations as determined by the Service's Headquarters. If all of the beneficiaries covered by an H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification. An H-2A petition may contain both named and unnamed beneficiaries and must agree in total number of positions with the labor certification request. The H-2A petition does not need to agree in total number when seeking an extension of stay for H-2A beneficiaries in the United States.

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. To request a substitution, the petitioner must, by letter and a copy of the petition approval notice, notify the consular office where the alien will apply for a visa or the port-of-entry where the alien will apply for admission. Where evidence of the qualifications of beneficiaries is required in petitions for unnamed beneficiaries, the petitioner must also submit such evidence to the consular office or port-of-entry prior to issuance of a visa or admission. (See paragraph (h)(5) of this section for substitution of H-2A beneficiaries.)

(v) *H-2A petitions.* Special criteria for admission, extension, maintenance of status, and substitution of beneficiaries apply to H-2A petitions and are specified in paragraph (h)(5) of this section. The other provisions of § 214.2(h) apply to H-2A only to the extent that they do not conflict with the special agricultural provisions in paragraph (h)(5) of this section.

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(5) * * *

(i) * * *

(A) *General.* An H-2A petition must be filed on Form ETA-9079 with the DOL Regional Administrator having jurisdiction over the area of employment and be accompanied by the filing fee specified in § 103.7(b)(1) of this chapter. An H-2A petition may be filed by either the employer listed on the certification application, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification application.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition must equal the number of workers indicated on the application for labor certification, except when the petitioner is seeking an extension of stay for H-2A beneficiaries in the United States. A petition can include more than one beneficiary even when all beneficiaries will not obtain a visa at the same consulate or are not required to have a visa and will not apply for admission at the same port-of-entry. A petition may also include beneficiaries seeking change of status or extension of stay.

(C) *Identification of beneficiaries.* The sole beneficiary of an H-2A petition must be named in the petition. All beneficiaries located in the United States must be named in the petition. The total number of unnamed beneficiaries must be shown on the petition. Names of beneficiaries located outside of the United States may be included on the petition, but are not required to be identified until application for visa issuance from the Department of State.

(D) *Evidence.* An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status, and that any named beneficiary satisfies any qualifications for that employment. A petition will be automatically denied if filed without the initial evidence required in paragraph (h)(5)(v) of this section for each named beneficiary.

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(ii) *Effect of the labor certification process.* The temporary agricultural labor certification process determines whether employment is for a temporary or seasonal agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements. In petition proceedings, a petitioner must establish that the employment and beneficiary meet the requirements of paragraph (h)(5) of this section.

* * * * *

(iv) * * *

(B) *Effect of permanent labor certification application.* Employment will be found not to be temporary or seasonal where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. This can be overcome only by the petitioner's demonstration that there will be at least a 6 month interruption of employment in the United States after H-2A status ends.

(v) The beneficiary's qualifications—

(A) *Eligibility requirements.* An H-2A petitioner must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. It must be established at the time of application for an H-2A visa, or for admission if a visa is not required, that any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance, or prior to admission if a visa is not required.

(B) *Initial evidence of employment/job training.* A petition must be filed with evidence that at the time of filing the named beneficiary met the certification's minimum employment and job training requirements. Initial evidence must be in the form of the past employer's detailed statement or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from people who worked with the beneficiary that demonstrate the claimed employment.

(C) *Initial evidence of education and other training.* A petition must be filed with evidence that at the time of filing each named beneficiary met the certification's minimum post-secondary education and other formal training requirements. Initial evidence must be in the form of documents, issued by the relevant institution or organization, that show periods of attendance, majors, and degrees or certificates accorded.

* * * * *

(ix) *Substitution of beneficiaries after admission.* An H-2A petition may be filed with the DOL Regional Administrator to replace H-2A workers whose employment was terminated early. The petition must be filed with a copy of the labor certification, a copy of the approval notice covering the workers for whom replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, termination date, and evidence the worker has departed the United States. A petition for a replacement may not be approved when the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notice to the Service that an H-2A worker has absconded or has ended authorized employment more than 5 days before the relating certification expires.

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(9) * * *

(i) * * *

(C) For H-2As, the Department of Labor will issue a notice of petition approval as

part of its notification of labor certification approval. The notice will conform with paragraph (h)(9)(i)(A) of this section.

(ii) * * *

(C) If the period of services or training requested by the petitioner exceeds the limit specified in paragraph (h)(5)(vii), or (h)(9)(iii) of this section, the petition will be approved only up to the limit specified in that paragraph.

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(10) * * *

(ii) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director, or the DOL Regional Administrator in the case of H-2A petitions, must notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice (7 days for H-2A petitions) in which to do so. All relevant rebuttal material will be considered in making a final decision.

(iii) *Notice of denial.* The petitioner must be notified of the reasons for the petition denial, and of the right to appeal the denial of the petition under 8 CFR part 103, and in the case of H-2A petitions, under the rules established by DOL in 20 CFR 655, subpart B. There is no appeal from a decision to deny a change of status or an extension of stay to the alien.

(11) * * *

(i) *General.*

(A) The petitioner must immediately notify the Service (or the DOL Regional Administrator for H-2As) of any changes in the terms and conditions of employment of a beneficiary that may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129, or on Form ETA-9079 in the case of H-2A workers, must be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner must send a letter notifying the director or the Regional Administrator who approved the petition.

(B) The director or the Regional Administrator who approved the petition may revoke a petition at any time, even after the expiration of the petition.

(ii) *Automatic revocation.* The approval of any petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition. No notice to the petitioner is required.

(iii) * * *

(A) *Grounds for revocation.* The director (or the DOL Regional Administrator in the case of H-2A workers) must send to the petitioner a notice of intent to revoke the petition, or

relevant part of the petition, if he or she finds that:

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(B) *Notice and decision.* The notice of intent to revoke must contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director or the DOL Regional Administrator must consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition must remain approved and a revised approval notice must be sent to the petitioner with the revocation notice.

(12) * * *

(i) *Denial.* A petition (other than an H-2A petition) denied in whole or in part by the Service may be appealed under 8 CFR part 103. In the case of an H-2A petition, the appeal must be filed with DOL concurrently with the appeal of the denial of a labor certification (or if the certification was not denied, within 30 days) under the rules established by DOL in 20 CFR 655 subpart B.

* * * * *

(13) * * *

(i) * * *

(A) A beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition. (See paragraph (h)(5)(viii) of this section for admission and limits on admission for H-2As.)

* * * * *

(14) *Extension of petition validity.* Except with respect to H-2A petitions, the petitioner must file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. A request for a petition extension may be filed only if the validity of the original petition has not expired. (See paragraph (h)(5)(x) of this section for extension requirements for H-2A petitions.)

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(16) * * *

(ii) *H-2A, H-2B, and H-3 classification.* The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner, may be a

reason, by itself, to deny a petition extension request and the alien's extension of stay.

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(18) *Use of approval notice, Form I-797 and DOL notification.* The Service must notify the petitioner on Form I-797 whenever a petition, an extension of a petition, or an alien's extension of stay is approved under the H classification (except with respect to H-2A). DOL must notify the petitioner as part of its certification notice whenever an H-2A petition or an extension of a petition is approved by a Regional Administrator. The beneficiary of an H petition who does not require a nonimmigrant visa may present a copy of the approval notice at a port-of-entry to facilitate entry into the United States. A beneficiary who is required to present a visa for admission and whose visa will have expired before the date of his or her intended return may use a copy of Form I-797 or DOL notification to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I-797 or DOL notification must be retained by the beneficiary and presented during the validity period of the petition when re-entering the United States to resume the same employment with the same petitioner.

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§ 214.3 Petitions for approval of schools.

(a) *Filing petition*—(1) *General.* A school or school system seeking approval for attendance by nonimmigrant students under sections 101(a)(15)(F)(i) or 101 (a)(15)(M)(i) of the Act, or both, shall file a petition on Form I-17 with the district director having jurisdiction over the place in which the school or school system is located. Separate petitions are required for different schools in the same school system located within the jurisdiction of different district directors. A petition by a school system must specifically identify by name and address those schools included in the petition. The petition must also state whether the school or school system is seeking approval for attendance of nonimmigrant students under section 101(a)(15)(F)(i) or 101(a)(15)(M)(i) of the Act or both.

(2) *Approval for F-1 or M-1 classification, or both*—(i) *F-1 classification.* The following schools may be approved for attendance by nonimmigrant students under section 101(a)(15)(F)(i) of the Act: