MDIVANI
CORPORATE
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H-1B VISA DEMYSTIFIED:

A STEP-BY-STEP GUIDE FOR U.S. EMPLOYERS

Mira Mdivani

&

Danielle Atchison

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MIRA MDIVANI

&

DANIELLE ATCHISON

Authors: Mira Mdivani and Danielle Atchison
Editor: Mason Ellis

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DEDICATIONS

To Carol and George Atchison
for all their tireless support throughout my life – Danielle Atchison

To my awesome colleagues
at Mdivani Corporate Immigration Law Firm – Mira Mdivani

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We would like to thank our colleagues at the firm, including Leyla McMullen and Mason Ellis for their friendship and encouragement, and also for helping us take care of clients while we took time to work on this book. We want to thank our families, Carol and George Atchison and Alexey Ayzin, and Maria Iliakova, for tolerating and supporting us through the writing and editing process. We also want to thank our colleagues and clients for giving us the opportunity to work on H-1B matters for their international personnel and for persevering with us through the process.

H-1B Visa Demystified:
A Step-by-Step Guide for U.S. Employers

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INTRODUCTION: WHY WE WROTE THIS BOOK

You interviewed a great applications developer, and you are eager to get her on board. You finally found a petroleum engineer who is a perfect fit for your project. You have recruited a mathematics professor who is willing to teach in a rural area college. The question they all ask is: "Will you file an H-1B petition for this position?" You have never gone through the H-1B process, and it sounds complicated. Is it? Yes, nothing related to employment-based visas is simple. However, you can certainly learn to navigate the H-1B process together with an experienced corporate immigration attorney who knows H-1Bs inside and out. This edition of **H-1B Visa Demystified: A Step-by-Step Guide for U.S. Employers on Hiring International Personnel** will help you lay the foundation of your knowledge and will serve as a practical guide through the process.

DID YOU KNOW?

- That Apple, Microsoft, IBM and Google are among top ten H-1B employers in the U.S.?
- That foreign workers cannot file for H-1Bs themselves?
- H-1B petition is an employer–driven process, with the employer making all the decisions, making serious promises to the U.S. government, filing all the documents, and bearing costs of the process?
- That the employer can apply to extend its employee's H-1B status beyond six years of physical presence in the U.S. if the employment-based green card process has been on file with the government for at least 365 days?

In-house lawyers and HR professionals who get involved with the H-1B process often have many questions about where to start, what hurdles to expect, and how to bring this complicated process together. This book provides answers to many questions we have heard from our business clients. In this book, we have broken down the daunting H-1B journey into a step-by-step guide in the hope that it will enable employers to be successful in their quest to bring the best talent available on the global market to their organizations.

TERMS & ABBREVIATIONS

NOTE: These definitions are not universal. They are provided in the context of our H-1B practice. This is how we explain these terms to our clients when we begin working together.

Academic Evaluation	an evaluation by an expert providing an opinion as to whether foreign education of the H-1B candidate is equivalent to a specific four-year degree from a U.S. college or university. It is not required if the candidate obtained a subsequent U.S. degree because a U.S. university is deemed to have evaluated the foreign degree. It is advisable to obtain two academic evaluations from reputable evaluators.
Benching	DOL H-1B regulation prohibits "benching" of H-1B employees. Should a U.S. employer need to employ an H-1B worker for less hours than initially stated on the H-1B petition, the employer should file a new LCA with DOL and an amended or new H-1B petition with USCIS to avoid being in violation of the law.
Beneficiary	H-1B candidate in the H-1B process.
Conflict Waiver	a document signed by the Immigration Attorney's Client (H-1B Employer) and the intended H-1B Beneficiary (foreign worker) explaining to the foreign worker that the attorney represents the H-1B employer and acts in the interests of the employer, that the attorney acts in the interests of the worker only to the extent instructed by the employer, and will engage in adverse actions such as H-1B revocation request if instructed by the H-1B employer.
Customs and Border Protection (CBP)	an agency within the Department of Homeland Security whose officers decide whether or not a foreign national will be admitted to the United States on the border such as at an airport, seaport, or land border crossing. Admissions are not automatic.

Department of Homeland Security (DHS)	DHS includes, among other agencies, the U.S. Citizenship and Immigration Services (USCIS), Immigration and Customs Enforcement (ICE), and Customs and Border Patrol (CBP).
Department of Labor (DOL)	DOL is involved in issuing Prevailing Wage determinations and adjudicating Labor Condition Applications for H-1B positions. DOL's H-1B regulation governs Labor Condition Applications, Public Access Files, prevailing wage issues, location of employment, benching, and other work-related conditions of employment, as well as records keeping. DOL audits H-1B employers and may impose penalties.
Department of State (DOS)/U.S. Consulate	DOS runs U.S. Consulates, where foreign workers, whose employers' H-1B petitions are approved by USCIS, may apply for H-1B visas. While the worker is in the United States in valid H-1B status, there is no need to apply for an H-1B visa at the consulate. However, if the worker travels outside of the United States without a valid H-1B visa, the worker must apply for an H-1B visa to be able to return to resume their employment in the U.S.
Employer H-1B Consular Package	H-1B visa approvals at U.S. consulates are not automatic. Each U.S. Consulate may have different rules on what documentation the consular officer adjudicating an H-1B visa application would like to consider in making that decision. Some of these documents need to come from the U.S. employer. H-1B worker's chances of visa approval are best if he or she carries an employer consular package with them to provide a consular officer with whatever they may need to see to approve the H-1B visa.
Experience Evaluation	an evaluation by an expert providing an opinion as to whether a combination of education, training, and/or

	experience is equivalent to a degree issued by a U.S. college or university.
H-1B Candidate	a specialty occupation foreign worker who is an intended beneficiary of a U.S. employer's H-1B petition.
H-1B Employer	a U.S. employer who has petitioned for an H-1B classification for a foreign worker to be employed in the U.S.
H-1B Dependent Employer	a U.S. employer is considered H-1B-dependent if it has: - 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or - 26 - 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or - 51 or more full-time equivalent employees of whom15 percent or more are H-1B nonimmigrant workers.
Labor Condition Application (LCA)	an application filed by a U.S. employer with the U.S. Department of Labor that describes work conditions, location, and wage for the proposed H-1B occupation, and whereby the employer agrees to abide by DOL regulations governing H-1B employment.
LCA Public Access File	a set of documents that a U.S. employer must maintain as required by the DOL mandated H-1B regulations.
Notice of Intent to Deny	a really mean Request for Evidence issued by USCIS.
Petitioner	the U.S. employer who drives the process, offers the job to the foreign national, goes through all the H-1B steps before filing, signs and submits the H-1B petition to USCIS, and is responsible for complying with H-1B requirements.

Prevailing Wage	a wage determined by the DOL through a Prevailing Wage Application process, or by the Employer through purchasing or conducting a wage survey. The employer should pay the prevailing wage or the actual wage paid to the workers in the occupation, whichever is higher. While the prevailing wage is not necessary to file the H-1B petition per se, it provides safe harbor to employers who obtain it for their H-1B positions.
Request for Evidence (RFE)	a request from USCIS sent to the H-1B petitioning employer asking the employer to provide additional information and documents to prove elements of the H-1B case. These are not to be ignored. An employer who wants their petition to be approved must treat the RFE very seriously and provide ample information and documentation in response to all requests, no matter how voluminous or whether the employer feels they previously answered the question(s) in the initial filing.
Specialty Occupation	this is an element the employer must prove to have their H-1B petition approved. The employer must show that they have offered the foreign national an occupation "requiring theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor, including but not limited to, biotechnology, chemistry, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, law, accounting, business specialties, theology, and the arts, and requiring the attainment of a bachelor's degree or its equivalent as a minimum." Examples of these occupations include: petroleum engineer, mathematics professor, applications developer, market research analyst, and many more professional positions.
United States Citizenship & Immigration Services (USCIS)	an agency within Department of Homeland Security that adjudicates H-1B petitions by employers.

Chapter 1

H-1B Basics for Employers

I. What is and is NOT covered in this book

What is Covered in this Book

We have included topics that routinely come up when we advise and represent U.S. businesses on H-1B issues. The book covers the basics, including determining when a U.S. employer should engage in the H-1B process and what roles the U.S. employer, employer's attorney, and H-1B worker play in the process. It also explains the U.S. employer's investment in the H-1B process. We provide an overview of a typical H-1B case, including elements we need to prove in order to file an approvable H-1B petition with the government and how to deal with requests for evidence. We briefly cover H-1B compliance issues. We discuss H-1B time limitations and the issue of long-term employee retention through the employment-based green card process, and related issues from the point of view of the U.S. employer.

What is NOT Covered in This Book

There is so much more that we could cover in this book, but in order to make it manageable and useful, we had to limit ourselves. In the process, we have decided not to cover several types of H-1B petitions, including:

- H-1Bs for Department of Defense;
- H-1Bs for Fashion Models;
- H-1Bs for H-1B Dependent Employers; and
- Many other H-1B issues.

While we mention motions to reopen and appeals, we have not included an in-depth discussion of these and other challenges to adverse decisions by the government, including litigation, because such matters go beyond the scope of this practical guide for employers.

We also avoid citing legal authority or providing exhaustive background to make the information truly practical. This is not an in-depth legal treatise; we will consider writing that in our next life when we are less busy with our clients' H-1B petitions.

II. When should a U.S. employer engage in the H-1B process?

Deciding Whether to Engage in the H-1B Process

H-1B is a business-driven process. Employers should engage in this process only if there is a business need to hire a specific worker for a specific position. Engaging in the H-1B process is not a favor to a foreign worker. If there is no business need, the employer should not pursue in the process.

Simply put, an employer should embark on the H-1B journey only when the employer REALLY needs the foreign worker.

Theory: "Best in Class"

U.S. employers may use the H-1B process to hire the best candidates on the market. There is no labor shortage requirement for H-1B visas. In theory, the H-1B visa enables U.S. employers to offer jobs to offer professional positions to the most talented candidates irrespective of their country of citizenship.

Reality: Addressing Professional Occupational Shortages

However, an H-1B visa cap that has created a shortage of H-1B visas has influenced how U.S. employers use H-1B visas. For example, while the employer may be eligible to file an H-1B petition for a counselor position with the educational requirement of a psychology degree, in practice, employers currently shy away from going through considerable hurdles of the H-1B process for positions that can be filled by U.S. workers.

Faced with the realities of the H-1B process, such as uncertainty of whether H-1B numbers are available, uncertainty as to whether the H-1B petition will be approved, waiting times, and considerable filing and legal fees, many U.S. employers get involved in the H-1B process when they have a hard time finding qualified U.S. workers. That is why for years now U.S. employers have been filing an overwhelming majority of H-1B petitions in shortage occupations for engineering and IT positions in specific fields.

H-1B is Not a Favor to a Friend

Employers should not use the H-1B process to help a friend or relative that is not really needed in the business. If the employer is "helping" a foreign national rather than

addressing the employer's business need, the employer might end up violating federal law. Such H-1B will likely bring nothing but trouble to the employer.

What is an H-1B: A Temporary Work Visa/Status

H-1B visa/status is a tool available to U.S. employers to temporarily employ foreign nationals in specialty occupations in the fields of computer science, engineering, teaching, finance, and other fields providing that the proposed H-1B job is a "specialty occupation." A specialty occupation in our minds begins with this question: "Does the job require at least a bachelor's degree in a specific field?"

What it is Not: A Permanent Solution to Keeping the Worker

H-1B is it not a green card, also known as permanent resident alien status. If the U.S. employer is interested in keeping the worker long-term, the employer should explore employment-based green card process for the worker. The H-1B may serve as a temporary visa allowing temporary employment of the worker while the employer is engaged in the employment-based green card process regarding the worker.

Can a Foreign Worker Apply for an H-1B?

No. Only U.S. employers may apply for H-1B classification for foreign workers.

III. Roles in the H-1B Process: Employer, Employer's Attorney, and H-1B Candidate

Employer: U.S. Employer is in the Driver Seat

Foreign nationals or entities cannot file H-1B petitions. Only U.S. employers have that right. Here is what the U.S. employer does in the H-1B process:

- makes the decision to hire a foreign worker, and makes all H-1B-related decisions;
- retains a business immigration attorney to advise the employer, and to prepare and file the H-1B petition;

- provides the attorney with information on the H-1B Checklist to enable to attorney assess whether the H-1B is feasible;
- works with the attorney to identify the true minimum requirements of the position offered to the foreign national;
- if the employer is H-1B dependent, conducts recruitment;
- if required, arranges for an academic or experience equivalency evaluations;
- if applicable, reviews, and when correct, approves the Prevailing Wage application for filing with DOL, and/or purchases or conducts a wage survey;
- reviews, and when correct, approves the Labor Condition Application for filing with DOL;
- prepares an LCA Public Access File;
- reviews, and when correct, signs the H-1B petition for filing with USCIS;
- pays filing and legal fees;
- if applicable, provides evidence and reviews Reply to Request for Evidence or Notice of Intent to Deny for filing with USCIS;
- keeps records;
- if applicable, reviews and signs Request to Revoke for filing with USCIS and engages in other DOL-mandated termination activities; and
- engages in other H-1B related activities, such as developing internal policies on how to attract and retain international personnel, and LCA Public Access File Audits.

Employer's Immigration Attorney:

U.S. law does not allow foreign nationals to file H-1B petitions. Only a U.S. employer may be an H-1B petitioner. The attorney filing the U.S. employer's petition does not represent the foreign national in the H-1B petition. The H-1B attorney represents the employer and acts in the best interest of the employer. In drafting the petition, the attorney's goal is to prepare an approvable petition while helping the employer navigate requirements and obligations imposed on employers by H-1B regulations. U.S. employer filing an H-1B petition regarding a foreign worker makes all the decisions, signs the petition, and gives all petition-related instructions to the attorney, such as to file, reply

to requests for evidence, or to withdraw the petition. This is what the employer's attorney does in the H-1B process:

- explains the H-1B process, provides answers to the employer's questions;
- may provide training to the employer and intended H-1B beneficiary regarding what to expect in the H-1B process;
- reviews and analyzes documents and information, researches applicable law and practice;
- advises the employer regarding feasibility of the H-1B petition filing;
- works with the employer to identify the true minimum requirements of the position offered to the foreign national;
- if applicable, drafts the Prevailing Wage application for the employer's review and files it with DOL, or addresses the issue of prevailing wage through other lawful means, such as wage surveys;
- drafts the Labor Condition Application for the employer's review, files it with DOL;
- prepares Labor Condition Application Public File instructions for the employer;
- drafts the employer's H-1B petition and prepares the petition with supporting documents for the employer's review, files it with USCIS;
- if USCIS issues a Request for Evidence or Notice of Intent to Deny, reviews, analyzes facts and law, determines the best approach to address the agency's challenge, and advises the employer on how best handle the reply;
- prepares replies to Requests for Evidence or Notices of Intent to Deny for the employer's review, files them with USCIS;
- if necessary, advises the employer on I-9 related issues regarding the intended H-1B worker;
- may perform internal LCA Public Access File audits;
- should the worker travel outside the U.S., prepares the employer's H-1B consular package for consular processing of the worker's H-1B visa application at the U.S. consulate;
- handles investigations or audits by DOL or USCIS on behalf of the Employer;

- helps the employer with developing a work visa strategy and polices to enable hiring and retention of necessary international personnel; and

- engages in other H-1B related activities on behalf of the employer.

Foreign Worker's Role in the H-1B Process:

In the H-1B and other employer-sponsored processes, our client is the employer. We always make it clear to the foreign worker that in the H-1B process we as lawyers represent the employer and we act for the benefit of the worker only to the extent instructed by the employer. For example, if the employer instructs the attorney to file an H-1B petition regarding a certain worker, interests of the employer and worker are aligned. However, if the employer decides to terminate the worker, the employer's attorney will act to file an H-1B revocation request with USCIS, which is adverse to the worker's interests, as it terminates the worker's H-1B status.

We explain this in the Conflict Waiver signed by both the employer and the foreign worker before we begin working on an H-1B process. So, how can a foreign worker receive the best advice if he or she has immigration questions? Once we are retained by a U.S. employer to work on an H-1B case, we are always happy to answer questions from the foreign worker regarding the H-1B process. However, if the worker asks about how to transfer his/her H-1B to a different employer, we are unable to assist and may have to report this to our client, the employer. If the foreign worker is interested in advice that puts his or her interests in conflict with the H-1B employer's, he or she should consult an attorney who does not represent his or her H-1B employer. This is what the foreign worker does in the H-1B process:

- achieves education and/or expertise that makes the foreign national such a desirable addition to the U.S. employer's workforce;

- provides documents and information regarding education, work experience, immigration status, previous visits to the U.S, and family, if any, to the employer's attorney; and

- should the foreign worker travel outside the U.S. after the H-1B petition is approved, applies for a H-1B visa at a U.S. consulate.

IV. What do various government agencies do in the H-1B process: DOL, USCIS, and DOS?

Department of Labor (DOL)

DOL is involved in the H-1B process before the employer files the H-1B petition with USCIS. DOL adjudicates employers' Prevailing Wage Application, Labor Condition Application, and may get involved in the audit/enforcement process after the petition is approved.

Prevailing Wage Application and "Safe Harbor"

Employers who desire a "safe harbor" regarding wages to be paid to the H-1B worker should obtain a Prevailing Wage Determination from DOL. The prevailing wage rate determines the minimum amount that the H-1B worker should be paid based on the job description filed with DOL by the employer. If DOL challenges the H-1B employer regarding the wage, a previously-issued prevailing wage determination provides a safe harbor to the employer, if the employer is paying the wage per determination.

DOL determines wage levels based on the information provided by the employer on the Prevailing Wage Determination Application (ETA 9141). Employer-provided information addresses the specific job duties, minimally required education, skills, and experience requirements, level of supervision, hours, and location of the job. Employers sometimes use generic job descriptions or "best-case scenario" descriptions that do not reflect the true minimum requirements for the specific job offered to the H-1B candidate. Filing the application with such general or "best-case scenario" desirable requirements often results in DOL issuing prevailing wages at a higher level than the employer actually pays to its similarly situated U.S. workers.

☞ **PRACTICE POINTER: WAGE**

Please note that the wage will depend on several factors, such as minimum requirements for the job, level of supervision, travel requirements, as well as location of the job. DOL updates prevailing wages at least once a year. Here is an example of how the wage for software developer, applications position will look for Salina, Kansas and Orange County, California.

EXAMPLE OF A WAGE ANALYSIS:

Job Title: **15-1132 Software Developers, Applications**

Job Duties: Develop, create, and modify general computer applications software or specialized utility programs. Analyze user needs and develop software solutions. Design software or customize software for client use with the aim of optimizing operational efficiency. May analyze and design databases within an application area, working individually or coordinating database development as part of a team. May supervise computer programmers.

Prevailing Wage Comparison Depending on Location of the Job:

Area Code: 2000003	**Area Code:** 11244
Area Title: Northeast Kansas nonmetropolitan area	**Area Title:** Anaheim-Santa Ana-Irvine, CA Metropolitan Division
OES/SOC Code: 15-1132	**OES/SOC Code:** 15-1132
OES/SOC Title: Software Developers, Applications	**OES/SOC Title:** Software Developers, Applications
Level 1 Wage: $27.04 hour - $56,243 year	**Level 1 Wage:** $35.01 hour - $72,821 year
Level 2 Wage: $33.16 hour - $68,973 year	**Level 2 Wage:** $43.63 hour - $90,750 year
Level 3 Wage: $39.29 hour - $81,723 year	**Level 3 Wage:** $52.26 hour - $108,701 year
Level 4 Wage: $45.41 hour - $94,453 year	**Level 4 Wage:** $60.88 hour - $126,630 year

☞ **PRACTICE POINTER: DOL TECHNICAL ASSISTANCE GUIDE**

DOL officers adjudicating prevailing wage applications use DOL's ETA Prevailing Wage Determination Policy Guidance, Revised 2009. The full text of the guidance is in the appendix.

Appendix C: Worksheet for Use in Determining OES Wage Level

Employer's Job Title:

O*NET Title: **Date:**

O*NET Code: **Reviewer:**

Indicator	Job Offer Requirements	O*NET-Usual Requirements	Comments	Wage Level Result
Step 1. Requirements				1
Step 2. Experience				
Step 3. Education				
Step 4. Special Skills and Other Requirements? (Y/N)				
Step 5. Supervisory duties (Y/N)				
			Sum:	

Note: Not all employers use a DOL issued prevailing wage. If the employer is confident in the wage, they may do without a prevailing wage determination. Some employers use industry surveys as an alternative.

Labor Condition Application (LCA)

All employers must file a Labor Condition Application with DOL specifying conditions of H-1B employment such as location, wages, work hours, level of supervision, job duties, and other conditions as required by DOL. The employer may file its H-1B Petition with USCIS only after DOL has certified the LCA, and after notice of filing of the LCA has been posted by the Employer for ten business days, and a copy of the signed, certified application has been provided to the H-1B candidate.

☞ PRACTICE POINTER: LCA

The employer's authorized representative signing the LCA on behalf of the employer should not do it casually. It is a several page document with 15 pages of instructions in which the employer sometimes promises to provide work conditions beyond what is normally provided by the same employer to U.S. workers. For example, "benching" a U.S. worker between projects may be acceptable, but the same practice is prohibited for H-1B workers with valid LCAs signed by their employer. It is important to take time to read and understand the LCA and go over the LCA with the attorney before signing it.

DOL Audits and Enforcement

DOL audits H-1B employers to make sure that employers provide conditions listed on the Labor Condition Application (LCA) to their H-1B workers. DOL often looks for LCA violations involving benching and wage and hour irregularities. Benching is a prohibited practice: it involves employers not paying workers for non-productive time between projects. Wage and hour irregularities may stem from benching, or from employers' failure to pay the prevailing wage. One of the potential violations is job misclassification where the employer fails to correctly determine the appropriate DOL classification for the job which results in the wrong wage.

☞ **PRACTICE POINTER: PUBLIC ACCESS FILE**

One of the obligations employers take upon themselves after the LCA is filed with DOL is preparing and maintaining a Public Access File. By regulation, it should be prepared within one day of filing of the LCA. We normally enable our client to prepare the LCA Public Access File immediately after filing the LCA.

EXAMPLE OF A PUBLIC ACCESS FILE EXPLANATION TO OUR CLIENTS:

"H-1B employers are required to maintain a Public Access File regarding each H-1B employee. Employers should keep the Public Access file at the designated location, which in your case is your office. ***Per the regulation, please make sure that the Public Access File is in place within one working day after the date on which the LCA is filed with DOL.*** *Any member of the public may request access to the file and the file must be available to the requester within one (1) working day of the request. USCIS has audited 25,000 H-1B employees last year; DOL has also stepped up its LCA audits. Here is the link to the DOL regulation regarding Public Access Files: http://www.gpo.gov/fdsys/pkg/CFR-2008-title20-vol3/pdf/CFR-2008-title20-vol3-sec655-760.pdf. Instructions are included below to make it simpler.*

Please include the following items in the Public Access File:

- ***Labor Condition Application, ETA 9035 LCA***

  Please place a copy of the filed LCA in the Public Access File. Once the LCA is certified, please sign it and replace the unsigned copy in the Public Access File.

- ***Wage Rate Memo***

  A statement of the Wage Rate to be paid the H-1B worker or workers admitted under the LCA. The wage rate information must be current. Please write the statement, sign it and place it in the Public Access File.

- ***Actual Wage Memo***

  An "Actual Wage" pay system memorandum. Please write this and sign it, then place it in the Public Access File.

☐ ***Prevailing Wage Documentation***

Place the DOL wage determination or other wage information in the file.

☐ ***Posted Notice***

Please place a copy of the documentation that you have provided notice of the LCA filing to your employees must be placed into the file. The documentation must also include the dates when each notice was posted, and the location where each notice was placed.

☐ ***Copy of Certified Signed LCA to H-1B Non-Immigrant***

Once it is certified, e-mail the certified and signed LCA to the incoming H-1B worker as soon as it is approved, asking the worker to acknowledge receipt by email. Print your e-mail to them and their e-mail to you, with attachment, in this file.

☐ ***A Summary of Benefits***

Include a summary of benefits offered to U.S. workers and H-1B nonimmigrants in the same occupational classifications and the benefit elections made by those employees. Please draft and sign, then place in the file. If Benefits Are Not The Same, If applicable, include a short statement explaining the differentiation of benefits where the H-1B employee is not offered the same benefits.

☐ ***Length of Time to Keep the Public Access File***

As per the regulation, the employer shall retain copies of the records required by the regulation for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the labor condition application or, if no nonimmigrants were employed under the labor condition application, one year from the date the labor condition application expired or was withdrawn.

☐ ***Material Change and/or Future Corporate Restructuring***

Any material change in employment, such as change of title, duties, location may trigger an obligation to file a new LCA and amended/new H-1B petition. Please let us know immediately. Additionally, It is my understanding that you are not expected to go through any corporate restructuring at this time. However, if you do

*go through corporate restructuring, please let me know **BEFORE** the restructuring takes place."*

United States Citizenship and Immigration Services (USCIS)

USCIS's role in the H-1B process is adjudicating the petition. USCIS accepts the petition submitted by the employer, issues a receipt, if applicable (and way too often), issues a Request for Evidence or Notice of Intent to deny in some cases, reviews evidence submitted, and makes a decision on the petition. USCIS adjudicates whether to grant the requested H-1B classification and whether to change the worker's status from another non-immigrant status (such as student F-1), extend the worker's H-1B status, or notify a U.S. consulate abroad if the petition is approved. USCIS issues new I-94s to workers for whom they grant change or extension of status.

☞ **PRACTICE POINTER: INCOMING WORKER'S IMMIGRATION STATUS**

Employers normally ask for two decisions from USCIS. First, to approve the H-1B classification. Second, if the worker is in the United States, to change the immigration status to H-1B or extend the worker's H-1B status. Before the employer proceeds with filing the H-1B petition, it is important to determine whether the foreign worker is in valid nonimmigrant status and is eligible for change or extension of status if USCIS approves the employer's H-1B petition. This is crucial because USCIS may approve the H-1B classification and deny change or extension of status. This may leave the employer with an empty victory since they may not employ the worker without status. The worker may have an option to consular process, only if the worker is not barred from returning to the United States.

This is how the bars work: If the worker has been out of status for at least 6 months and leaves the U.S., the worker is not eligible to come back for three years. If the worker has been out of status for a least a year, the worker is barred for 10 years. Determining whether the bar applies ahead of time helps employers to avoid pursuing petitions that will end in bars and inability to employ the worker, despite H-1B classification approval.

Department of State (DOS)

The Department of State runs U.S. Consulates, where H-1B candidates whose employers' petitions are approved by USCIS may apply for H-1B visas to be stamped in their passports. In most cases, if USCIS approves H-1B classification, they will also approve the change to H-1B status or extension of H-1B status. A visa is not necessary in those situations. However, if USCIS denies the change of status to H-1B or extension of H-1B status, or, if the foreign worker travels abroad after the H-1B approval, the foreign worker needs to apply for the H-1B visa to be stamped in his or her passport to be able to return to the United States. This application is made by the foreign worker before a U.S. consulate either in the worker's home country or a third country, if allowed by the U.S. consulate in that country. The worker needs to complete an online application and schedule an interview with the consulate. At the interview, the worker needs to bring specific documentation to present to the officer.

We normally enable the worker's H-1B visa application by preparing the employer H-1B consular package. The employer consular package contains information that the consular officer may find helpful in making a decision on whether to issue the H-1B visa to the applicant.

☞ **PRACTICE POINTER: EMPLOYER H-1B CONSULAR PACKAGE**

Employers should know that even if USCIS approves an H-1B petition for a specific worker that does not guarantee the U.S. consulate will issue an H-1B visa to that worker. USCIS and DOS are independent decision makers. U.S. Consulates may have specific additional requirements for the applicants. It is not advisable to send an employee to the consulate without an employer consular package, as that increases the risk of delays and denials. This, in turn, means the worker will not be able to return to work as planned.

V. What does the employer have to prove in an H-1B petition?

The law allows U.S. employers to file H-1B petitions for "specialty occupations." H-1B employers need to prove they meet all H-1B requirements. For practical purposes, we find the most important questions to ask are:

1. **Does the position normally require at least a bachelor's degree in a specific field, or does it qualify on other grounds?**

2. **Does the worker meet the minimum requirements?**

3. **Several other requirements, which can be summarized as whether there is a true business need for the worker and whether U.S. employer can pay the prevailing wage for the position.**

USCIS reviews H-1B petitions to determine if submitted evidence meets the requirements for H-1B classification. USCIS Adjudicators look for satisfactory answers to the following questions:

1. **Does the Position Normally Require At Least a Bachelor's Degree in a Specific Field or Qualify on Other Grounds?**

   - **Requirements for H-1B Qualification**

     The evidence must show that the job offered to a potential foreign employee meets one of the following criteria to qualify as a specialty occupation:

     - Bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position;

     - The degree requirement for the job is common to the industry or the job is so complex or unique that it can be performed only by an individual with a degree;

     - The employer normally requires a degree or its equivalent for the position; or

- The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.

o **Practical Considerations for H-1B Qualification**

In many cases we start the analysis by determining whether the employer requires a bachelor's degree as a minimum for the position. A Civil Engineer position may be good candidate for an H-1B classification because such positions normally require a degree in Civil Engineering. On the other hand, the position of an artist may not qualify because employers normally do not require bachelor's degrees when they hire artists. Some examples of positions that normally require at least a bachelor's degree in the field include:

- Engineers
- Architects
- Teachers
- Software developers
- Accountants
- Scientists
- Mathematicians
- Statisticians
- Designers (graphic, product, industrial)
- Marketing specialists
- Highly technical sales positions
- Other occupations

☞ **PRACTICE PONTER: DOL JOB CLASSIFICATION'S REQUIRED EDUCATION LEVEL**

Just because the employer's position title is on the above list, does not mean that USCIS will approve it for H-1B classification. It is suggested to analyze whether the position falls within the appropriate DOL classification that clearly requires a bachelor's degree or higher in a specific specialty. For example, DOL analysis of a job classification for retail salespersons clearly shows most employers do not require a bachelor's degree. By the same token, DOL job classification for specialized, highly technical sales representatives shows that 77% of employers require a bachelor's

degree. While 77% is not perfect, the employer may have a plausible case for an H-1B position.

☞ **PRACTICE PONTER: USING O*NET AND EXPERTS**

Bear in mind that just because the employer requires a bachelor's degree for the position, this does not mean that USCIS will agree that is the minimum requirement. When we prepare H-1B petitions, we look to information on DOL's O*NET (https://www.onetonline.org/) for the specific job classification. We also analyze what this employer has required of all other workers in the position at issue and what other employers in a similar industry require of similar positions. We often turn to experts in particular industries, such as university professors, to help us understand and document the true minimum requirements for the position.

H-1Bs Based on Other Grounds

Alternatively, the position may qualify for H-1B classification on other grounds. An employer may demonstrate the degree requirement for the job is common to the industry or the job is so complex or unique that it can be performed only by an individual with a degree; employer normally requires a degree or its equivalent for the position; or the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.

☞ **PRACTICE POINTER: "APPRENTICESHIP" INDUSTRIES**

Employers may have positions that do not require a degree in a specific field, even though the position is so complex that the amount of training and specialized knowledge it involves warrants an H-1B classification. This usually involves positions where a bachelor's degree in the specific field does not exist because training usually takes the form of a long-term, hands-on apprenticeship. While there are not many examples in the engineering industry, this is common in the world of the arts. For example, we have filed a successful petition on behalf of U.S. employer for a luthier/string instrument maker. We were able to show that, while there is no bachelor's degree in violin making, the knowledge required for the position is so complex that the amount

of training and specialized knowledge makes it appropriate for H-1B classification.

2. Does the Worker Meet the Requirements?

The second set of questions we ask in our analysis is whether the worker meets the requirements set by the employer.

- **Worker Requirements**

  The evidence submitted by the U.S. employer must show that the foreign worker has the requisite educational background to fill the position:

  - Has the worker completed a U.S. bachelor's or higher degree required by the specific specialty occupation from an accredited college or university?

  - Does the worker hold a foreign degree that is the equivalent to a U.S. bachelor's or higher degree in the specialty occupation?

  - If needed, does the worker have an unrestricted state license, registration, or certification which authorizes them to fully practice the specialty occupation and be engaged in that specialty in the state of intended employment?

  - Does the worker have education, training, or progressively responsible experience in the specialty that is equivalent to the completion of such a degree, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty?

- **Practical Considerations**

  The employer needs to be able to demonstrate that the worker meets the minimum educational requirements. The evidence needs to show that the bachelor's degree is in a specific major required by the employer for the position. Whether the degree was earned in the United States or not is an important consideration.

Bachelor's Degree From a U.S. University:

The employer should review copies of the worker's degrees and transcripts to determine if the worker meets the educational requirement. For example, if the offered position requires a four-year bachelor's degree in computer science, and the foreign worker has earned a bachelor's degree in Computer Science from a U.S. university, then the requirement is met. However, that is not always the case.

☞ **PRACTICE POINTER: RELATED FIELDS**

Often the worker does not have the exact degree that first comes to mind, such as a degree in computer science. However, the worker may have a degree in a related field that meets the employer's minimum requirements. For example, that degree may be in computer engineering, electronics and communications, or management information systems. If the employer in fact allows related fields, it is important that the employer indicates this on the government applications and petition.

A Degree From a Foreign University:

What if a degree is from a foreign university? The degree still may be sufficient if (1) a U.S. university admits the worker into a master's degree program or (2) if USCIS is provided with sufficient evidence that the foreign degree is equivalent to a U.S. degree through an equivalency evaluation. If the foreign worker has a U.S. master's degree, there is no need for an equivalency evaluation.

- **Academic Evaluation Requirements**

USCIS regulation states that "Equivalence to completion of a college degree. For purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(ii) Membership in a recognized foreign or United States association or society in the specialty occupation;

(iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(iv) Licensure or registration to practice the specialty occupation in a foreign country; or

(v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation."

- **Practical Considerations**

  If the worker has not been accepted in a U.S. master's degree program, then we normally look for experts in the field to issue academic evaluations. An academic evaluation is an opinion as to whether the foreign education is equivalent to at least a U.S. bachelor's degree in the field. USCIS views professors or university staff who normally award credits to students in their field of study as credible evaluators.

  - What to submit to an expert evaluating a foreign degree:

    - Degree(s) with a certified English translation, if documents are not in English; and
    - Transcript(s) with a certified English Translation, if documents are not in English

  - What should the expert provide back to the employer:

    - Evaluation;
    - Expert's CV; and
    - Copies of documents used in arriving at the evaluation

☞ **PRACTICE POINTER: TWO EVALUATIONS ARE BETTER THAN ONE!**

In cases where we expect to be challenged by USCIS, we normally work with the employer on obtaining evaluations from two or more credible evaluators. This makes our evidence more persuasive and increases our changes of approval.

No Degree: Experience Evaluation

If the worker does not have a degree, he or she may qualify based on experience alone or through a combination of education, training and experience.

- **Formal Requirement**

  According to USCIS, for purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

- **Practical considerations**

  If the worker does not have the education that the employer requires for the occupation, but is qualified based on a combination of education, training, and experience, the employer may hire experts in academia to conduct an evaluation as to whether education, training, and experience is equal to a U.S. degree in the field.

  - What should be provided to an expert evaluating a combination of education, training, and experience?

    - Evidence of any education, with a certified English translation, if documents are not in English;

    - Evidence of any training, with a certified English translation, if documents are not in English; and

- ❖ Letters from previous employers specifically describing positions and duties to demonstrate progressive experience obtained in the field with specific dates.

➢ What should the expert provide back to the employer?

- ❖ Evaluation;
- ❖ Expert's CV; and
- ❖ Copies of documents used in arriving at the evaluation.

3. Several other requirements, which can be summarized as whether there is a true business need for the worker and whether U.S. employer can pay the prevailing wage for the position.

H-1B petitioners should be able to demonstrate that they are offering a traditional employment scenario and that the position offered to the foreign worker is a real position. U.S. employers may think that the business need is obvious because they would not endure the extensive H-1B process if there was no actual need to hire the worker. However, USCIS adjudicators routinely challenge whether the position is "real." USCIS adjudicators may require proof of other similar positions, sufficient work space, and ability of employer to pay prevailing wage to the worker.

☞ **PRACTICE POINTER:**

When USCIS challenges employers on these grounds, U.S. employers should not simply shrug it off as obvious facts. Instead, employers should provide all available evidence about their company, the position, chain of command, availability of workspace, and ability to pay the wage as outlined in the Labor Condition Application.

VI. What Kind of H-1B Petition is USCIS Likely to Approve?

Petitions should meet all elements/requirements

Employers filing H-1B petitions should understand H-1B requirements and make sure that the petition clearly demonstrates that all the necessary requirements are met. This is achieved through careful analysis of the requirements and facts involved in the petition before drafting begins.

There should be well-documented evidence to meet each of the requirements

Employers should include evidence to meet the requirements with the petition. Remember that the petition forms only a summary of the evidence. Everything that is summarized in the H-1B form needs to be supported by the enclosed evidence. For example, if the employer states that the worker has a specific degree, the petition should include a copy of that degree and transcripts clearly showing the degree and major. If the petition requests change of status from F-1 student to H-1B, the petition should include clear evidence that the incoming worker has maintained F-1 status including passport, I-94, I-20s, evidence of being in good standing at school, any OPT-based employment authorization document, and evidence of employment on OPT. Under current USCIS policy, if the employer fails to meet any element through evidence, USCIS may deny the petition without issuing an RFE. It is not safe to ask the adjudicator to presume any facts.

Help the adjudicator to understand your petition

The petition should be well-organized. The employer should include an index of all the evidence and a well-drafted letter explaining how the petition meets all the requirements as well as detailing the evidence enclosed. We take time to think about how to present our case both from the law and argument point of view as well as visually. This may include using timelines, charts, etc. to reinforce statements made on the petition and in the employer support letter. We organize evidence in a way that makes it easier for the adjudicator to make a favorable decision.

VII. What is the Difference Between H-1B Classification, H-1B Visa, and H-1B Status?

H-1B classification, H-1B visa, and H-1B status are not the same things. We would like to clarify what they mean, as they often are used interchangeably, which creates confusion.

H-1B CLASSFICIATION

H-1B classification is the basis of the H-1B visa and H-1B status. U.S. employer may petition USCIS for H-1B classification. The H-1B classification, if granted by USCIS, may serve as the basis of H-1B non-immigrant status that allows foreign workers to be employed in the United States by the petitioning employer, or for H-1B visa that allows workers to ask for permission to enter the U.S. as H-1B workers.

How does a U.S. employer obtain the H-1B classification?

U.S. employers request H-1B classification by filing H-1B petitions with USCIS. USCIS reviews the petition and evidence and either approves or denies the request for H-1B classification. Employers normally also request either change of status, extension of status, or consular processing. If USCIS grants a change or extension of status to H-1B, the employer may proceed to employing the worker in the United States in H-1B status. If USCIS approves H-1B classification but denies the status request, there may be an option available to the worker to apply for an H-1B visa at a U.S. Consulate abroad.

H-1B STATUS

Status is permission to stay in the United States in a certain nonimmigrant category. H-1B status allows the H-1B worker to be employed by a specific U.S. employer who has previously obtained H-1B classification for the employee. It may be issued by two agencies. USCIS may issue an I-94 showing H-1B status if USCIS approves an H-1B petition and grants a change or extension of H-1B status. Alternatively, if the employee obtains an H-1B visa at a U.S. consulate and presents himself or herself at a U.S. port of entry asking for entry to the United States, CBP may issue an I-94 showing H-1B status.

H-1B VISA

A U.S. visa creates eligibility for its holder to present himself or herself at a U.S. port of entry to request permission to enter the United States in H-1B status. If a U.S. Consulate

approves an H-1B visa application for an employee based on a previously-approved H-1B petition, the consulate will stamp the visa in the employee's passport. A visa cannot be issued inside the U.S. Visas do not determine how long the foreign national may stay in the United States. It only determines the period for which the foreign national may present himself or herself at the border/port of entry. The length of stay in the United States is determined by an I-94 issued by CBP or USCIS. For example, an employee may enter the United States on a valid H-1B visa that expires in six months. The employer, subsequent to entry, files a petition for H-1B classification and extension of status for another three years. Once USCIS approves the H-1B classification and issues an I-94 valid for an additional three-year period, the H-1B employee may stay in the United States and work for the employer in the United States for an additional three years even though the H-1B visa in his or her passport has expired. However, if this employee now travels outside of the United States he or she must apply for a new H-1B visa at a U.S. Consulate in order to return to the United States.

VIII. H-1B Cap For New H-1Bs and What Are the Exemptions?

Should the employer determine that an H-1B petition needs to be filed regarding an international worker, the employer needs to know when the petition can be filed in order to form an idea of when the employee may begin employment. Naturally, employers prefer to file the H-1B petition without delay so that they can employ the worker as soon as possible. This creates two issues we must discuss with the employer. The first issue is determining if the employee already has H-1B status, which may mean that the new employer may file a new H-1B petition without delay. If not, then second issue is determining if the employer qualifies as H-1B cap-exempt.

What is the H-1B Cap and What is its Effect?

Congress has limited the availability of H-1B specialty occupation visas available to U.S. employers. USCIS starts accepting petitions on April 1 every year, and a lottery determines whether or not the employer's H-1B petition can proceed to adjudication. There are only 85,000 visas allotted under the H-1B cap each year. U.S. employers file more H-1B petitions than H-1B capped numbers available, so, in recent years, the cap has been met within several business days of April 1. If the employer wins an H-1B number and the employer's petition is approved, the worker is eligible to begin working on October 1 of that year. This creates hardships for U.S. employers and many employers lobby Congress to increase H-1B numbers or eliminate the cap altogether. Meanwhile, some employers and employees are exempt from the cap.

What are Possible Cap Exemptions?

There are two types of H-1B cap exemptions. First, there are exempt H-1B employees. Second, there are exempt U.S. employers.

A. Exempt Employee: Employee is already working in H-1B status

A U.S. employer may avoid participating in the H-1B cap lottery by hiring an employee who is currently employed in H-1B status by another H-1B employer. Such an employee is exempt from the H-1B cap because he or she has already been counted against the cap. However, if the current employer is itself exempt, then the H-1B worker was never counted against the cap and is not exempt. This means the new employer will need to participate in the H-1B lottery.

B. Exempt Employer: Cap exemptions based on the employing entity

The following employers are exempt from H-1B cap and may file H-1B petitions at any time:

- Not-for-profit institutions of higher education, which are usually universities and colleges;

- A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if it satisfies any one of the following conditions:

    - The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;

    - The nonprofit entity is operated by an institution of higher education;

    - The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or

    - The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education; or

- Not-for-profit research organizations or governmental research organization, which may also include hospitals and other research centers.

Clear-cut H-1B Cap Exemptions

Examples of clear-cut H-1B cap exemptions include: universities, colleges, non-profit research organizations, government research organizations, and university hospitals.

☞ PRACTICE POINTER: UNIVERSITY/COLLEGE MUST QUALIFY

Not all colleges and universities automatically qualify for cap exemption. The schools must qualify as institutions of higher education as defined in 20 U.S.C. §1001(a), including whether or not the school is both federally and state accredited as an institution of higher education, whether a high school degree or equivalent is a prerequisite to admission, and whether it offers the required range of degrees, amongst others.

☞ PRACTICE POINTER: MORE DIFFICULT CASES, "RELATED OR AFFILIATED NON-PROFIT ENTITY"

Some employers, who may not at first glance qualify as exempt under existing regulations, may nevertheless be eligible based on the employer's affiliations between the employer and a cap-exempt entity. This is often the case with hospitals or clinics employing H-1B physicians and other medical professionals.

☞ PRACTICE POINTER: THIRD-PARTY CAP EXEMPTION ANALYSIS OF BEING EMPLOYED "AT" AN EXEMPT INSTITUTION

The cap exempt regulation allows for some employers, who may not otherwise qualify, claim cap exemption if they place their H-1B employees at the cap exempt entity location. The cap-exempt regulation says the cap does not apply to H-1B petitions that benefit workers who are *"employed at"* institutions of higher education, nonprofit entities related or affiliated to institutions of higher education, or nonprofit research or government research organizations. Because of this language, USCIS has determined that traditionally non-exempt employers may qualify as cap-exempt by virtue of having their workers perform all or part of their job duties "at" a cap-exempt employer's place of business.

The employer must demonstrate that the H-1B worker directly and predominately furthers the *essential purposes of the qualifying institution*, specifically that the worker furthers the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution. The burden is on the petitioner to show that there is a **logical nexus** between the work predominately

performed by the H-1B worker and the normal mission of the qualifying institution. Additionally, petitioners must show that the place of performance of the worker's job duties is *actually* the qualifying institution. This part of the evidence need not show the worker works full-time with the qualifying institution, but that some considerable and "predominate" portion is spent at the qualifying institution.

Example of a Successful Third-Party Petitioner

We are providing an example taken directly from USCIS Aytes Memo: A medical fellow in pediatrics has been employed at a qualifying non-profit university medical center for two years in H-1B status. At the end of the fellowship, the doctor will become a member of Company C, a private pediatrics practice group which has its primary offices within the university medical center and predominantly trains medical students and treats patients in the medical center. The doctor will be doing exactly the same work that he did during his fellowship, including remaining on the university medical center's faculty, but for reasons related to hospital billing practices and medical malpractice insurance requirements, his technical, and therefore petitioning, employer will be the private pediatrics practice group.

In this case, the doctor would be exempt from the H-1B cap because the conditions of employment demonstrate that the doctor will be performing the same work that he performed while employed directly by the qualifying university medical center. Thus, the H-1B employment directly furthers the primary mission of the hospital because the doctor will remain on the university medical center's faculty and will continue to educate and train its medical students and treat patients at the medical center.

Chapter 2

What is the U.S. employer's investment in the H-1B process?

I. What are the hurdles and costs for the employer?

The H-1B process is not for the faint of heart and not a walk in the park. U.S. employers expect a reasonable process with predictable outcomes and a set timeline. Under current circumstances, while the process is somewhat predictable, the timeline and outcome are not. Business immigration lawyers often discuss that our clients are faced with a USCIS culture of "no," kitchen-sink requests for evidence, and unreasonable adjudications resulting in business-breaking delays and denials. The cost to the employer is increased operational risk and potential loss of jobs to countries that provide a more reasonable process for employing the needed personnel.

II. Time: A decision-maker will need to spend time on the H-1B process

The employer needs to designate a decision-maker to provide information, review drafts and evidence, and make all decisions in the H-1B process. Between building the petition, responding to requests for evidence, and satisfying DOL and USCIS compliance requirements, the employer needs to be prepared to spend dozens of hours on the H-1B process.

III. Money: Filing fees, expenses, legal fees

Employers need to know what budget should be allocated to the H-1B process. There are several components, including mandatory and optional government filing fees, attorney fees, and expert and other third-party fees and expenses.

Mandatory and Optional Government Filing Fees:

Mandatory fees payable to Department of Homeland Security include:

1. H-1B Petition Filing Fee, currently $460

2. ACWIA Fee, currently $1,500 for employers with over 25 employees and $750 for those with less than 25.

> ☞ **PRACTICE POINTER: ACWIA FEE**
>
> The H-1B employer does not need to pay the ACWIA fee when filing the second or subsequent H-1B extension petitions. Some employers are exempt.

3. Anti-Fraud Fee, currently $500

> ☞ **PRACTICE POINTER: ANTI-FRAUD FEE**
>
> The H-1B employer needs to pay this fee only once per worker. This fee is not required when filing H-1B extension petitions.

4. Heavy Users Fee, currently $2,000. This fee applies to those companies with more than fifty employees that have more than 50% of their employees working in H-1B or L-1 status.

Optional Fee Payable to Department of Homeland Security

Expedite Fee, currently $1,410

> ☞ **PRACTICE POINTER: PREMIUM PROCESSING**
>
> The employer may pay USCIS an additional premium processing fee of $1,410 to "expedite" the H-1B petition. Once the expedite request is filed, USCIS has 15 day to act, including issuing an approval, denial, or request for evidence. Should USCIS issue a request for evidence, the 15-day timeline is paused until the employer files the answer. Our experience is that responses to requests for evidence may take several months. With the government recently issuing requests for evidence in most H-1B cases, the effectiveness of the premium processing is greatly diminished. However, when available, using premium processing for petitions regarding cap exempt employees may be helpful.

Attorney's Fees: Employers should understand that H-1B attorney fees are a part of regular business expenses. As the driving force behind the H-1B petition, employers should not shift cost of the process to worker.

Other Expenses: Employers should budget for additional expenses such as expert fees, evaluation, translation, and other H-1B-related costs.

Chapter 3

Typical H-1B Case

I. Typical New H-1B Case: Changing from F-1 student to H-1B status

Typical scenario: One of the most common H-1B scenarios occurs when a U.S. employer hires a graduate of a U.S. university in F-1 status with employment authorization in the form of employment authorization document through optional practical training or curricular practical training. To continue employment, the U.S. employer needs to figure out how to continuously employ the F-1 student upon termination of the F-1-based employment authorization. This involves employer participating in extending optional practical training-based employment authorization for STEM (science, technology, engineering, mathematics) graduates and filing an H-1B petition.

Only U.S. employers may file H-1B petitions

Foreign nationals or foreign entities do not have the capacity to file H-1B petitions. The H-1B process is based on the employer's business need to fill a specialty occupation position, such as software engineer, architect, physician, and other positions. The U.S. employers make all the decisions involved in the H-1B petition, signs all the forms, and pays the filing fees and legal fees associated with the H-1B. Attorneys in this process represent the H-1B petitioner, which is the employer.

A bachelor's degree by itself is not enough

Whether or not the U.S. employer may file an H-1B petition depends on what the job requires. The job itself must require a bachelor's degree or higher in a specialized field relating to the occupation, such as computer science, engineering, math, statistics, accounting, education, and others. Additionally, the employer must demonstrate that the student has the required degree to be eligible for H-1B status. For example, if an employer offers an electrical engineering position requiring a bachelor's degree in electrical engineering, the foreign graduate must have achieved that degree by the time the employer files the H-1B petition.

Employers should be aware of when to file the H-1B petition

When the U.S. employer may file H-1B petitions depends on several factors. First, if H-1Bs are limited by a cap and the demand from U.S. employers exceed the cap (which is currently the case). Second, it depends on whether the employer or the H-1B worker are exempt from H-1B cap. If no exemptions apply, the employer must file on April 1 or within several days of April 1, as determined by Department of Homeland Security. If the employer or worker are cap exempt, the employer may file at any time.

Typical New H-1B Petitions are currently subject to the H-1B Cap and H-1B Lottery

Congress has put a limit on the number of new H-1B petitions U.S. employers may file every year. Currently that number is at 85,000. U.S. employers routinely file more than 85,000 new H-1B petitions every year. USCIS conducts an H-1B lottery that selects 85,000 petitions for adjudication and rejects the rest. If USCIS rejects the petition, the employer may file a new petition the following year. The employer may also analyze whether there are any other options for continued employment authorization, such as STEM-based OPT, CPT, or other visa options.

U.S. Employers should use CPT, OPT, and STEM-based OPT extension options

U.S. employers have an option to employ foreign students and graduates under CPT, OPT, and STEM-based OPT employment authorization.

- **CPT:** Curricular Practical Training is usually an alternate work/study, internship, or practicum in which the student works part-time or full-time. The CPT has to relate to the student's major and the experience must be connected to some part of the program of study.

- **OPT:** Like CPT, employment in Optional Practical Training must be related to the student's major course of study. A student may apply for twelve months of OPT at each educational level, which means that a student can apply for a year of OPT at their bachelor's degree level and another year at the master's degree level. Unlike with CPT, when a student works in OPT, they must apply for a work permit through USCIS by filing an I-765 application to accept employment.

- **STEM-based OPT:** Foreign graduates of U.S. colleges and universities with degrees in STEM may apply a 24 months extension of OPT employment. In order to qualify, the student's U.S. employer must be enrolled in the E-Verify program and prepare the I-983 Training Plan for the student to be filed with the student's Designated School Official (DSO). If the DSO approves the training program, he or she will endorse an I-20 to enable the student to apply for the 24-month extension. The current list of STEM degrees can be found at https://www.ice.gov/sites/default/files/documents/Document/2016/stem-list.pdf

II. Typical H-1B Transfer Case: Transferring from one H-1B Employer to a New H-1B Employer

Avoiding the H-1B Cap

Not all employers need to compete in the H-1B lottery. Some employers may be exempt. Others may be interested in hiring a foreign national who currently is employed for a different U.S. employer in H-1B status, that employer may be able to proceed with filing an H-1B petition without competing in the H-1B Cap. The relevant factors are:

a. Whether or not the current employer is H-1B cap exempt
b. Whether the worker is valid H-1B status
c. Whether there is sufficient time left on H-1B or the worker is eligible for extension beyond 6 years of physical presence

The previous employer should not H-1B cap exempt, unless the new employer is

First, the new employer should ascertain whether or not the current H-1B employer is H-1B cap exempt. If the current employer is cap exempt, then the new employer must participate in the H-1B cap. If the current employer is not cap exempt, then new employer may proceed with filing an H-1B petition without delay. Examples of exempt employers may include institutions of higher education, government research organizations, and other employers. It goes without saying that if the new employer is cap exempt, then the H-1B petition may be filed at any time.

Incoming H-1B worker needs to be in valid H-1B status at the time of filing of New H-1B petition

The new employer should make sure that the worker is in valid H-1B status. This means the worker is employed by the previous H-1B employer in accordance with certified LCA/approved H-1B petition or such employment has been terminated within the past 60 days.

Determine whether there is sufficient time left on H-1B or the worker is eligible for extension beyond 6 years of physical presence

The new employer should be aware of the H-1B six-year physical presence limitation. The incoming H-1B worker may not have much time left towards the six-year limit. However, the worker may be eligible for extensions beyond six years of physical

presence based on the previous employer's green card process. The new employer should be clear as to the timeline before filing the H-1B petition.

H-1B "Transfer" is a misnomer

Sometimes employers refer to this process as an H-1B transfer. In fact, the H-1B is not being transferred. The employer must prepare and file an H-1B petition from scratch. However, what is being transferred is the fact that the worker has been counted against the H-1B cap. This is a great windfall to the new employer because the employer will not need to compete with others in the H-1B lottery.

Eligibility to employ foreign national upon receipt—Portability Provisions

Under portability provisions of the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), the employer filing an H-1B petition for a foreign national in H-1B status may employ the H-1B worker upon USCIS issuing a receipt notice for the H-1B petition. In practice, H-1B workers may hesitate to work for the new employer before USCIS makes a decision. Should the worker begin employment with the new employer upon USCIS issuing a receipt and USCIS subsequently denies the petition, the worker may find himself or herself out of status and the employer is no longer eligible to employ the worker.

III. What is the earliest a potential H-1B employee can start working for the petitioning employer?

Employers have legitimate questions about when they are eligible to employ the worker in H-1B status. There are three main situations in which this question arises:

1. **Worker Abroad:** an H-1B petition is pending regarding a worker living outside the United States;

2. **H-1B "Transfer:"** an H-1B petition is pending regarding a foreign worker currently in H-1B status for a different employer; or

3. **H-1B Cap:** an H-1B petition is pending with a prospective worker changing status from student to H-1B.

Worker Abroad: An H-1B petition is pending regarding a worker living outside the United States

U.S. employers may file H-1B petitions for workers who are physically residing outside of the United States. In such cases, the U.S. employer should request that USCIS transfer the H-1B approval to a U.S. consulate in the worker's home country. The employer should prepare the H-1B Consular Package to enable the U.S. Consular Officer's review of the approved petition and have enough information to approve the worker's H-1B visa application at the consulate. The worker should apply for the H-1B visa based on the employer's approved petition. Should the U.S. Consulate approve the H-1B visa, the worker may enter the United States and immediately begin employment for the U.S. employer.

H-1B "Transfer:" an H-1B petition is pending regarding a foreign worker currently in H-1B status for a different employer

The American Competitiveness in the 21st Century Act (AC21) allows U.S. employers to begin employing in valid H-1B status, employed by a different employer, as soon as USCIS issues a receipt notice for a timely filed H-1B petition regarding the worker.

- For the worker to be eligible for H-1B portability, AC21 requires that:

    1. The H-1B worker must have entered the U.S. lawfully;

2. The new employer must have timely filed a non-frivolous H-1B petition while the prospective employee's current H-1B status is valid; and

3. The H-1B worker has not worked without authorization since the most recent, lawful entry.

H-1B Cap: An H-1B petition is pending with a prospective worker changing status from student to H-1B.

If the employer is cap exempt, the employer may file an H-1B petition at any time and may begin employing the worker in H-1B status as soon as the petition is approved, as long as USCIS also approved the change of status to H-1B request.

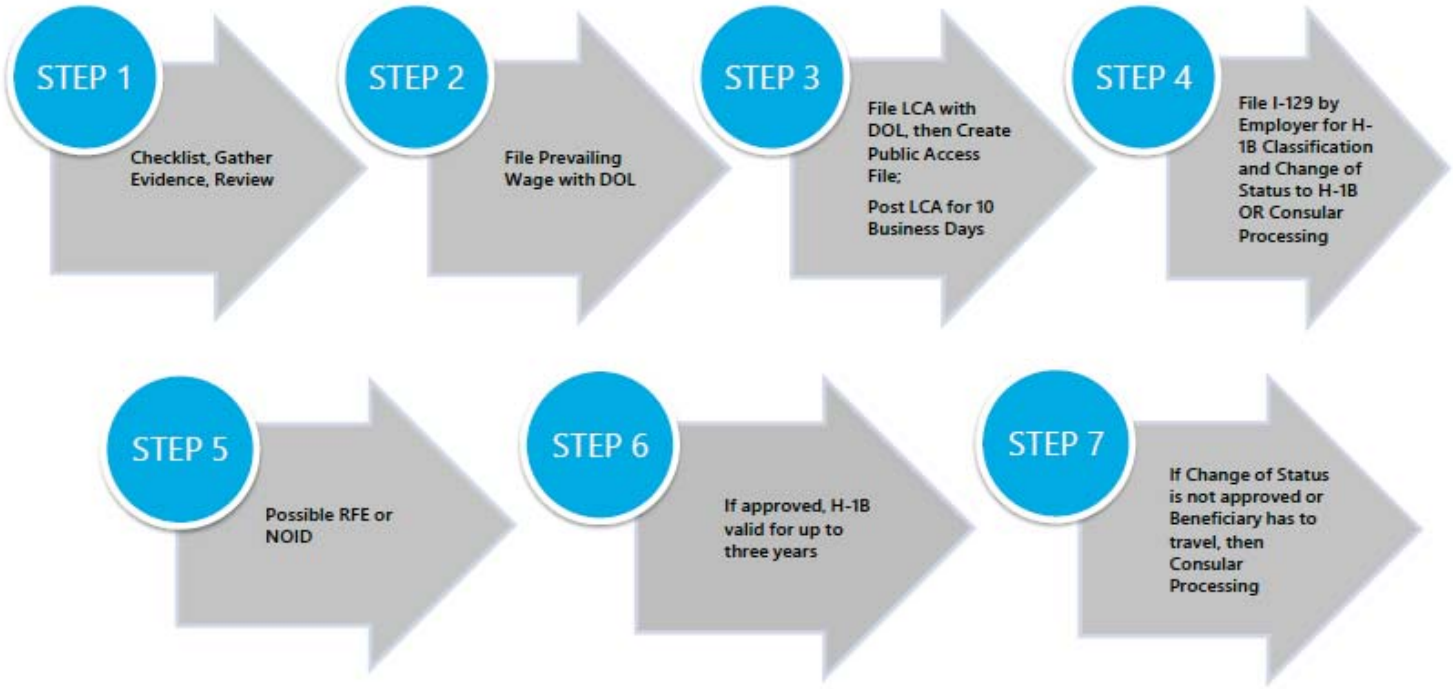
H-1B cap-subject employers currently have to wait until April 1 to file. They may continue to employ workers in F-1 student status with OPT-based employment authorization documents. If the employment authorization document is valid on April 1, employment authorization continues until October 1 of that year, or earlier date, if USCIS denies the petition. Should USCIS approve the employer's petition and approve the employer's request to change from F-1 to H-1B, the employer may employ the worker in H-1B status on October 1 or later, if the approval occurs later.

IV. H-1B Timeline

MDIVANI CORPORATE IMMIGRATION LAW FIRM

Mira Mdivani | mmdivani@uslegalimmigration.com
913.317.6200 | www.uslegalimmigration.com
7007 College Blvd. | Ste. 460 | Overland Park, KS 66211

H-1B TIMELINE



H-1B Dependents

Dependent spouses and children (unmarried, under 21) of H-1B workers are eligible to apply for H-4 status. The most efficient way to file these applications with together with the employer's H-1B petitions. However, if the dependent spouse or child are abroad at the time the employer files the H-1B petition, they are eligible to file free-standing H-4 applications while the employer's petition is still pending or after it is approved.

V. H-1B Process in Stages

Stage 1: Review and H-1B Petition Preparation

1. H-1B CHECKLIST to Employer
2. Signed LSA and CONFLICT WAIVER received
3. LEGAL FEES
4. H-1B TRAINING offered
5. REVIEW H-1B checklist information and documents received from Employer, analyze evidence, additional questions very likely
6. JOB DESCRIPTION: define minimum requirements
7. File PREVAILING WAGE (PW) request with DOL
8. File LABOR CONDITION APPLICATION (LCA) with DOL + LCA copy & instructions to employee
9. Post LCA for ten business days or Notice to Collective Bargaining Representative, if any
10. Set up an LCA PUBLIC ACCESS FILE
11. Issue FILING CHECKS payable to Department of Homeland Security – Premium Processing?

Stage 2: Petition is Filed with USCIS

1. File I-129 PETITION with USCIS for H-1B Classification + Change of Status, Extension of Status, or Consular Processing
2. Handle possible RFE/Request for Evidence or NOID/Notice of Intent to Deny

Stage 3: USCIS Has Made a Decision

1. If DENIED, consider refilling and other options

2. If APPROVED, what was approved? H-1B classification and what, if anything, else?
3. New I-94: Form I-9 Employment authorization update – Section 3

Stage 4: Consular Processing

Consular Processing: if COS/EOS denied & when employee travels abroad: prepare EMPLOYER CONSULAR PACKAGE

VI. Stage 1: Preparing to file the H-1B

The first step is figure out whether the position is H-1B-able. The employer needs to determine:

1. Position DOL Classification: Does the position require a bachelor's degree in a specific specialty or meets H-1B requires based on other facts. This is crucial in determining the DOL classification that may be assigned to the position, which in may turn may determine whether USCIS agrees that the offered position qualifies for H-1B classification;

2. Employee Meets the Requirements: Does the employee meet the minimum requirements for the position. For example, does the employee have a bachelor's degree in a specific field required for the occupation; and

3. Employer Ability to Pay Wage: Generally speaking, can the employer pay the higher of the prevailing wage or actual wage for the occupation. There are some other requirements, but these are the most crucial ones to begin the analysis.

We provide all our clients with an H-1B Checklist to garner all the needed information for successful filing of an H-1B. The checklist is made up of two parts: 1. Employer H-1B Checklist and 2. Employee H-1B Checklist. These two sections provide the attorney with the information we need to start analyzing the position.

EMPLOYER SECTION - to be completed by Employer

Information about the U.S. Employer:

1. Full legal name of the employer
2. Year business was established
3. Address of the employer
4. Employer's federal tax ID number / FEIN
5. NAICS code, if known (http://www.census.gov/cgi-bin/sssd/naics/naicsrch)
6. A short paragraph describing the business
7. Website address
8. Number of employees in the U.S
9. Number of H-1B employees
10. Last reported annual revenue, from filed tax return
11. Last reported annual net income, from filed tax return
12. Have you received any TARP funding?
13. Electronic copy of most recent corporate tax return
14. Electronic copy of 941 returns for two last quarters
15. Who will sign the petition on behalf of the employer?
    a. Full Name
    b. Title
    c. Phone Number
    d. E-Mail
    e. Mailing Address
16. Who will work with the employer's attorney on the petition
    a. Full Name
    b. Title
    c. Phone Number
    d. E-Mail
    e. Mailing Address
17. Who will the H-1B worker report to?
    a. Full Name
    b. Title
    c. Phone Number
    d. E-Mail
    e. Mailing Address
18. Please answer the following employer questions with yes or no.
    a. Are you covered by ACWIA?
    b. Is the position covered by a Collective Bargaining Agreement (CBA)?
    c. Are you requesting consideration of Davis-Beacon (DBA) or McNamara Service Contract (SCA) Act?

Information about the Job to Be Offered:

1. Proposed dates of employment
2. Proposed Job **Information**, including:
   a. Title
   b. Job Duties (Please describe job duties specifically, including any required tools/knowledge/skillset
   c. **Minimum** Educational requirements for the position
      - Please specify major required
   d. **Minimum** Experience requirements, if any

3. Will employee be closely supervised?
4. Will the H-1B employee supervise anyone?
   a. If yes, how many employees will the H-1B employee supervise, and what are the job titles of employees reporting to this position?
5. Proposed salary
6. Short paragraph describing benefits offered to the H-1B employee
7. Are benefits offered to H-1B employee different from those offered to non-H-1B employees?
8. Is this a full-time job? How many hours per week?
9. Daily hours of work, from ____ to ____.
10. Full address of the facility where employee will be employed
11. What county is the job located in?
12. Closest DOL job classification title/number, if known

EMPLOYEE SECTION (to be completed by potential H-1B Employee)

Information About the Potential H-1B Worker:

1. Full legal name
2. Any other name, if ever used
3. U.S. Social Security Number, if any
4. Contact information
   a. Phone number
   b. Cell phone number
   c. e-mail
5. Address in the U.S.
6. Address abroad
7. Date of Birth, please spell out the month
8. Town, Province, and Country of Birth

9. Country of Citizenship:
    a. If more than one citizenship, please indicate here
10. Passport Information:
    a. Passport number
    b. Date passport was issued
    c. Date passport will expire
    d. Please provide an electronic copy of your passport

If in the U.S.:

1. Visa information, if applicable:
    a. Type of Visa
    b. U.S. Consulate where visa was issued
    c. Date visa was issued
    d. Visa number
    e. Please provide an electronic copy of your visa
2. Last U.S. Entry:
    a. Date of last entry
    b. What status you entered in
    c. I-94 number
    d. I-94 expiration date
    e. Please provide an Electronic Copy of I-94: Click "Travel History" for your most recent date of entry.
3. Previous U.S. Entries:
    a. Date you entered U.S.
    b. Status/Visa?
    c. Date you left U.S.

Please list and provide documentation of EVERY H-1B you have ever had:

1. Any periods of stay in the U.S. in H-1B or L-1 status (list all), if applicable:
    a. Date H-1B or L-1 status began
    b. Date Status expired
    c. Name and address of sponsoring Employer
    d. Please provide electronic copies of all I-94s, USCIS approval notices and visas, if any were issued by the U.S. government
2. Any period of stay in F-1 student status, if applicable:
    a. Please provide copy(ies) of F-1 student visa(s)

    b. Please provide all I-20s
    c. Please provide all EADs, if any
3. Any period of stay in J-1 status, if applicable:
    a. Please provide dates
    b. Please provide all DS-2019 or AIP-66
4. Have you or anyone on your behalf ever applied for permanent resident including labor certification, I-140 or any other petitions or applications?
    a. If so, provide dates and copies

Education:

What college/university degrees do you hold? Please state name(s) of the degree(s), major(s), name of college/university, and year degree(s) was/were issued.

a. Provide an electronic copy of all college degrees
b. Provide an electronic copy of all college transcripts

Experience:

Please provide an electronic copy of you most current CV/resume.

Problems with the Law:

Have you ever had any problems with the law in the U.S. or anywhere in the world?

Denials and Removal:

1. Has the U.S. Consulate, USCIS, or U.S. Customs and Border Patrol ever denied your visa application, petition, or request for admission?
2. Have you ever been in removal (deportation proceedings) in the U.S.? Have you ever been in the U.S. out of status?

Family:

Will any family members (spouse, children) require H-4 dependent visas?
If so, provide names, dates of birth, place of birth, country of citizenship, current immigration status, copies of passports and I-94s, certificates of marriage, and birth certificates.

Job Information: DOL Job Classification and Prevailing Wage Most Important Aspect of the H-1B Checklist

We analyze all the H-1B checklist information and documents in the petition process. At the heart of the H-1B petition is information about the H-1B job. That information is used in determining potential DOL classifications and whether or not the position meets H-1B requirements. It is also relevant to prevailing wage determination. We encourage employers to develop detailed job information with specific minimum educational and experience requirements, if applicable.

Prevailing Wage provides the employer with a safe harbor against potential wage violations. The prevailing wage level is determined by the job description provided on the prevailing wage application. To make sure DOL agrees with whatever wage level you believe fits your job position, the job description must include, if any, the minimally required education, skills, and experience. Employers sometimes include the "best-case scenario" in the job descriptions versus what is truly minimally required for the job. Filing the application with such "desirable" requirements often results in DOL issuing prevailing wages at a much higher level that the employer pays to its similarly situated U.S. workers. When we prepare the Prevailing Wage Application, we work with the employer to determine the true minimum job requirements for the proposed H-1B job before the application is filed.

- **PRACTICE PONTER: WAGE LEVELS**
  Ask the employer whether the experience requirement has been uniformly applied to everyone hired in the proposed position. If it hasn't, ask the employer what the true minimum requirement is.

H-1B Worker's Qualifications

Once the employer determines what the true minimum educational and (if any) experience requirements are, the beneficiary needs to provide documents demonstrating that he or she meets the qualifications. Evidence comes in the form of degrees, transcripts, equivalencies, and letters from past employers.

- **PRACTICE PONTER: H-1B WORKER'S QUALIFICATIONS**
  Carefully review all documents submitted by the potential H-1B worker. Make sure the majors listed on the resume are supported by the specific majors listed on degrees and transcripts. If any part of the education was achieved abroad, determine whether employer needs to obtain evaluations of degrees and/or experience.

Labor Condition Application (LCA)

A DOL-certified LCA is a prerequisite to an employer's ability to file an H-1B petition with USCIS. Once the employer electronically files the LCA with DOL, it takes DOL several days (or weeks) to review and adjudicate it.

- **PRACTICE POINTER: USING ICERT**

  DOL runs an automatic check on employer information submitted on the LCA. If the information does not exist or contradicts DOL records, DOL may deny the LCA without looking at its substance. For example, if the employer has never filed an H-1B petition or used the iCert electronic filing tool before, DOL may fail to the employer's FEIN. This may result in a denial of the LCA. DOL will provide a list of documents to be filed to overcome the denial. Employers may prepare for this ahead of time and have the following documents ready: IRS EIN assignment letter; federal or State tax return (only acceptable with a pre-printed label) or a pre-printed tax coupon; official documentation from employer's financial institution showing employer's FEIN; business license, or other certifications of business existence that indicates the employer's FEIN in an official format; or Secretary of State registration that indicate the employer's FEIN in an official format.

Once the LCA is filed, the employer should create a Public Access File. All H-1B employers are required to maintain a Public Access File regarding each H-1B employee. The employer must keep the Public Access file at the location indicated on the LCA and is required to make it available for inspection to anyone who desires to see it, including the government and the public. Per the regulation, the employers must make sure that the Public Access File is in place within one working day after the date on which the LCA is filed with DOL.

Drafting of the Petition: Forms, Employer Letter, Index, Evidence

Before we begin drafting, the employer and the attorney need to analyze whether the position meets the H-1B requirements, whether the employee qualifies, and whether the employer can pay the prevailing wage, as well as status/visa issues involving the employee. Only then can drafting begin. There will be additional analysis done during the drafting phase of the petition as we receive pertinent evidence and information.

- **Index**

The index is our guide through the petition. It helps us when we prepare the petition and assists the USCIS adjudicator. A good index tells the story of the petition. A good index is not only a list of what the petition contains, but it also tells the story of the petition. We update the index as we draft to reflect realities of the petition.

SAMPLE H-1B INDEX

- ☐ Form G-28, Entry of Attorney Appearance and Filing Fees
- ☐ Attorney Cover Letter
- ☐ Form I-129 Petition for Nonimmigrant Worker
- ☐ Employer Letter in Support of Petition
- ☐ Documents Showing Beneficiary Has Maintained Valid F-1 Status Including Passport, I-94, and OPT EAD, Latest Paystubs
- ☐ Certified Labor Condition Application with Proof of Notice
- ☐ Prevailing Wage Data
- ☐ Documents Showing Beneficiary Meets Minimum Educational Requirements
- ☐ Evidence of Ability to Pay Wage

- **Forms**

Forms are summaries of the evidence. We need to collect and analyze the evidence that will be summarized in the form. Drafting the petition is much more than just filling out a

form. Currently relevant forms for H-1B are G-28, I-129, possibly I-907, ETA 9035, and possibly ETA 9141.

- **Employer Letter**

Together with employers, based on their input and guidance, we draft detailed letters summarizing the evidence. We use the letter to demonstrate that the employer meets all the H-1B elements in the hope that the summary is helpful to the adjudicator in making his or her decision. We normally address the following issues: description of the employer's business, employer's position and need for the worker, job duties, minimum requirements, how the H-1B candidate meets the minimum requirements, how the employer complies with LCA regulation, employer's ability to pay the higher of actual or prevailing wage, and a request for change/extension/consular processing. Specifically, what goes into the letter depends on the facts of the petition.

VII. Stage 2: Filing the H-1B with USCIS

What to file: The H-1B Petition

The petition is not the form. The forms are only a fraction of the 100s of pages of well-documented information and evidence that comprise the H-1B petition. The H-1B petition should include, at a minimum, Form G-28, Entry of Attorney Appearance and filing fees; attorney cover letter; Form I-129 Petition for Nonimmigrant Worker; employer letter in support of petition; documents showing beneficiary has maintained valid F-1 status including passport, I-94, and OPT EAD, latest paystubs; certified labor condition application with proof of notice; prevailing wage data; documents showing beneficiary meets minimum educational requirements; and evidence of ability to pay wage, and other applicable documents.

Where to file: Which USCIS Service Center?

Instructions for where to file H-1B petitions are confusing and sometimes change without notice. Before filing the H-1B petition, we normally have two attorneys check the filing address. This is especially crucial for time sensitive petitions, such as H-1B cap petitions or when status of the worker is at issue. Filing at the wrong service center may result in bad consequences under the circumstances, so it is good practice to double check the address.

What to expect after filing: Now We Wait

Once the H-1B petition is filed, the employer's attorney should receive a receipt notice from USCIS within several weeks. Then, the employer, foreign worker, and attorney continue to wait for USCIS to make a decision on the case. The decision may be an approval, denial, request for evidence, or a notice of intent to deny. The timeline may change depending on the type of H-1B petition.

How to deal with "What is the status of the case" questions

Communicating expectations at the beginning of the process is the best strategy. Lately, H-1B adjudications have become lengthy and unpredictable. Employers and H-1B candidates should be made aware that a quick adjudication in one case does not mean that it will be the same in the next H-1B case. The length of time USCIS adjudicators take to make a decision on a case is usually posted on the USCIS "check my case status" website.

VIII. Stage 3: Request for Evidence and Notice of Intent to Deny

What are Requests for Evidence ("RFEs")?

USCIS Adjudicators have many options when deciding how to respond to an H-1B petition. They may choose to approve, deny or issue a request for evidence after reviewing a petition. Requests for evidence usually occur when USCIS is not ready to issue an approval or denial, but rather would like to ask more questions about the situation. RFEs also serve as a warning that the submitted petition is not a "slam dunk" and that it may likely be deniable. However, if the request is answered adequately and completely, RFEs do not necessarily cripple the employer's petition.

At What Point in the H-1B Process Should Employers Expect to see an RFE?

RFEs are issued after the government adjudicator has received the petition and looked it over. Sometimes we see multiple RFEs issued in a single case because of the complexity of the case. It may happen that you've received and replied to one RFE hoping that you

were finished, but another RFE follows it. We prepare our clients for possible RFEs and the employers will have this additional information on hand to send to USCIS.

How Common are Requests for Evidence?

Currently, USCIS issues RFEs in 67% of H-1B cases.

Whether or not an RFE is issued depends on the employment situation, type of employer, and complexity of the case, and on current government policy. Certain industries receive RFEs more often than others. For instance, recruiting agencies (commonly referred to as headhunters) are traditionally targeted for RFEs because they do not participate in the traditional employment arrangement with the H-1B beneficiaries. In such cases, the H-1B candidate will be employed by the petitioner but will physically work at another company's location. USCIS adjudicators question the legitimacy of these employer-employee relationships and usually issue RFEs.

In any case, whether or not RFEs are common may not be the right question to ask. Approvals, requests for evidence, and denials are all at the discretion of the adjudicator, so guessing which petitions will receive an RFE is not all too helpful. We make sure to prepare every client for RFEs.

What are some questions or issues we often see on RFEs?

RFEs are issued to ask for more information about the petitioner, beneficiary, and/or offered position. Adjudicators look for the petition to meet every element of the H-1B regulation. First, the adjudicator wants to clearly see that there is an employer-employee relationship with a petitioning U.S. employer, and that the position offered by the petitioner to the beneficiary qualifies as a *specialty occupation*. The petitioner must also show that the employee has a specific bachelor's degree or equivalent relevant to the position offered. Finally, the petitioner must show it has the ability to pay the beneficiary the higher of the prevailing wage or the offered wage.

- **Common RFE: Prove the Position Qualifies as a Specialty Occupation**

The most prevalent type of RFE will question whether the "specialty occupation" requirement is met. To satisfy this requirement, a petitioner has to show that the position offered requires a specific bachelor's degree or equivalent and that the beneficiary has the relevant degree or equivalent. While meeting this requirement sounds simple, USCIS has recently made it extremely difficult to prove.

Regardless of whether or not the employer's original petition answered these questions, we see USCIS request additional evidence of one or more of the following:

- ☐ A bachelor's degree normally the entry-level requirement for the job;
- ☐ A bachelor's degree common in the industry among comparable employers;
- ☐ The employer normally requires a degree for the position;
- ☐ The job duties are so "specialized and complex" that you typically need a bachelor's degree to perform them; and/or
- ☐ The beneficiary is qualified for the offered position.

- **Common RFE: Prove the Need for the Employee/Position is Legitimate**

USCIS challenges smaller companies more frequently with RFEs, subjecting them to a higher level of scrutiny than other businesses. USCIS Adjudicators issues RFEs asking for an extensive amount of evidence about the company, which may include financial statements, licenses, and contracts with clients. Not only can the requests be voluminous, but the documents may not yet exist for a new company.

- **Common RFE: Neufeld Memo, Third-Party Placement Issues**

USCIS frequently targets another group of employers, perceived as "third-party placement" employers, with RFEs. Some employers place workers for projects at their client sites. USCIS adjudicators target these petitions for denial through RFEs claiming these employers do not have valid employer-employee relationships with their H-1B workers.

In 2010, USCIS issued a memorandum to give guidance to adjudicators on how to handle these cases. The memo tells them to look for evidence in the petitions that show: a) an employer-employee relationship exists and will continue to exist and b) that the employer has control over the employee in the traditional sense of an employment relationship and provided a list of factors for adjudicators to use in their decision-making. (See "Neufeld Memo" in resources).

As the petitioner's attorney, we use the factors when preparing our clients for the possibility of one of these RFEs. We advise the clients to keep detailed records of the employment relationship between them and the H-1B worker, so we have information

to submit should we receive an RFE. Some document examples include: a copy of the employment offer letter; a copy of offered benefits package to the beneficiary; and a copy of statements of work between the petitioner and the company where the H-1B worker will be placed.

Ultimately, adjudicators are looking to see that the employer has **control** over the employee. Some ways for a petitioner to show control is to demonstrate that the employer claims (or will claim) the employee on their taxes each year; the employer controls the manner and means in which the work-product is accomplished by conducting periodic reviews of the H-1B worker; or showing it issues tools for the trade to the H-1B worker, such as laptops and cell phones, and there is clear evidence of supervision of the H-1B worker by the H-1B employer.

How We Handle RFEs—Step-by-Step

We first receive the request and digest what the adjudicator is requesting. Most of the time, the RFE does not overtly say, "We are looking for evidence of control because your situation looks like a Neufeld memo case." In fact, the RFE requests are usually a copy-and-paste of the regulation and provide little guidance on the specific issues that the adjudicator is struggling with in the petition.

We next sift through the requests to decide which evidence is possible to obtain and which evidence simply does not exist in our situation. As I have stated, we always want to provide every piece of evidence that is requested in an RFE, but sometimes it is just impossible. For instance, an RFE can request "Statements of work showing the relationship between the petitioner and the end-client", but there may be no "statement of work." So, in this case, we either provide the evidence that gives the same effect or nothing at all.

The next stage is collecting the evidence for the RFE, which includes compiling the evidence the employer-petitioner has been collecting and gathering new evidence from the client. This is the part where we turn to the person we are working with on the case, usually the HR professional or other personnel of the petition employer and ask them for evidence. This is also the point in time where that company liaison starts to get annoyed with us because we require a lot of attention in obtaining the evidence we need for the RFE.

What are the Practical Results of Receiving an RFE?

The practical effects of receiving an RFE can be a strong deterrent for many employers to continue in the H-1B process, especially for those employers who are more likely than not to receive an RFE.

Time. With all RFEs, but especially lengthy ones, many, many hours go into drafting a reply and collecting its supporting evidence. Even though the lawyer is the one spending the most direct time with the RFE and its reply, personnel from the petitioning company and the beneficiary are also bogged down by collecting evidence for the RFE.

Emotions. The RFE reply process is exhausting for HR, legal, and supervisors. Dealing with immigration attorneys and the back and forth communication required to transfer and obtain all of the evidence requested by the government is annoying, to say the least.

Money. Not only do employers spend precious time and emotion on the RFE process, but also the company is forced to spend more money on attorney's fees and any other fees associated with taking up the time and resources of the HR professionals, in-house legal counsel, or other company employees.

RFEs should be one of the factors considered at the very beginning of the H-1B process because recognizing their effect can help an employer to make a fully-informed business decision on whether hiring an H-1B employee is worth the risk of an RFE and/or denial.

What is a NOID and How Does it Relate to an RFE?

A NOID is a Notice of Intent to Deny and it differs from an RFE in that a NOID is issued by USCIS when they have decided that a petition is deniable based on the evidence submitted. It simultaneously acts as a warning to the petitioner that a preliminary decision has been made on the petition (denial) and as an opportunity for the petitioner to submit information to make the case approvable.

What do NOIDs entail?

NOIDs are the employer's "last shot" at providing enough evidence to make a petition approvable; therefore, they are issued at the end of the H-1B process. NOIDs entail the same types of requests as RFEs, but if they go unanswered, the result will be a denial instead of another RFE. The petitioner is only given 30 days to respond to this preliminary decision on the case, whereas with RFEs, employers usually get 10-12 weeks to respond. NOIDs, however, include essentially the same information as RFEs in that

they ask the petitioner to provide more evidence demonstrating some aspect of the petition that is lacking information.

For example, the NOID may ask the petitioner to provide more evidence demonstrating that the position requires a bachelor's degree as a minimum educational requirement. If the petitioner does not respond sufficiently, the H-1B petition will likely be denied.

IX. Stage 4: Post-Approval Steps and Consular Processing

Post-Approval Steps: What to do with the approval notice?

If the employer requested change of status to H-1B or extension of H-1B status in addition to H-1B classification, and, if USCIS granted it, the approval notice will be issued with an I-94 giving the worker H-1B status until a certain date. The original I-94 should be given to the H-1B worker and the employer should retain a copy of the approval notice and I-94.

- **Completing/Updating the Worker's Form I-9:**

  The employer should either complete a new I-9 or update Section 3 of the I-9 using the new I-94.

  ☞ **PRACTICE POINTER**

  It is helpful if the employer calendars the extension petition should be prepared within six months of the expiration of the approved I-94.

- **The H-1B Worker Should Maintain Valid Documents While in Status**

  It is important that H-1B visa holders and their employers keep an eye on the employee's passport expiration date. USCIS requires a nonimmigrant's passport to be valid for six months beyond the nonimmigrant's anticipated date of stay. If the passport rule is not met, then the validity of the H-1B visa will be subject to the expiration date on the employee's foreign passport, which can be shorter than the typical three-year increments.

Consular Processing: Employer H-1B Consular Package

If the H-1B worker does not have a valid H-1B visa in his or her passport authorizing employment for the petitioning employer, the employee should prepare the Employer H-1B Consular Package before the worker leaves the United States. The worker should carry the Employer H-1B Consular Package with him or her to the H-1B visa application interview at a U.S. consulate abroad. At a minimum, The Employer H-1B Consular Package should include: evidence of the H-1B petition approval, employer's confirmation of offered employment, a complete copy of the petition, evidence that the worker has maintained valid nonimmigrant status while in the United States, and other applicable evidence. Consular officers are not bound by USCIS decisions. We take great care in preparing Employer Consular Packages to enable consular officers to approve the H-1B visa application.

X. H-1B Employee Has Been Terminated: What Now?

While the H-1B process does not create a contractual employment agreement. Employment continues to be at-will. However, by signing both the LCA and H-1B petition, the U.S. employer takes upon itself certain obligations that are applicable only to the relationship with the H-1B worker(s). For example, if the H-1B employment relationship is terminated for any reason, the employer is obligated to provide reasonable notice to the employee of the last date of employment, to offer to pay for a return ticket to the home country, and should request the petition revocation from USCIS to avoid being on the hook for wages for the remaining duration of the H-1B. This framework applies whether or not termination is voluntary, as in whether the worker quits on his or her own volition or the employer terminates the relationship.

☞ PRACTICE POINTER: USCIS REVOCATION REQUEST

As soon as the H-1B employer notifies us of the employee termination, we prepare the H-1B petition revocation request for the employer's review. This should be done expeditiously to lessen the risk of back wages exposure.

☞ PRACTICE POINTER: WITHDRAWING LCA WITH DOL

While the LCA regulation does not require employers to notify DOL to terminate the employer's LCA, it is advisable to do so because

the employer's liability under the LCA continues for a period of one year after the earlier of either the end date on the LCA or the termination of the LCA.

XII. Denials, Motions to Reopen, Motions to Reconsider, and Appeals

If USCIS issues a denial of the H-1B petition, there are a few avenues to consider moving forward. The employer may appeal the decision, file a motion to reconsider, file a motion to reopen, or re-file the H-1B petition.

Motion to Reconsider

No new evidence can be filed with a motion to reconsider. This motion must be filed with the same USCIS service center in which the original H-1B petition was filed. It is usually reviewed by the same officer that issued the denial. The motion to reconsider should explain to the officer why the denial was *legally* incorrect. The motion should include arguments that discuss the officer's misinterpretation of the law or fact.

Motion to Reopen

In contrast, the petitioner may present new facts or arguments if filing a motion to reopen. This may apply if key evidence was not available at the time of filing or if there is a new court decision or government policy that allows the petitioner to go back and ask the government for relief that was not available at the time of filing the petition.

Appealing a Denial

In considering whether to appeal or not, the employer should bear in mind that similar to motion to reconsider, no new evidence or argument can be advanced on appeal. Appeals are lengthy and are not a quick fix for H-1B employers.

Re-Filing

Sometimes refiling the H-1B petition is the right way to go because motions to reopen, motions to reconsider, and appeals take such a long time. If the employer is looking for a practical solution rather than to prove a point to USCIS, refiling may be the right choice for such employer.

Chapter 4

H-1B Compliance

I. H-1B Employer Compliance and Government Enforcement

A. Who Enforces What?

Several federal agencies intersect in the H-1B process. The Department of Homeland Security, comprised of USCIS and ICE, deals with the approval or denial of the H-1B petition. USCIS Fraud Detection and National Security (FDNS) Officers investigate employers for potential H-1B violations. ICE plays a part in policing employers for immigration compliance. Sometimes ICE uses DOL and USCIS' personnel and information in investigations against employers. The Department of Labor certifies and enforces the petitioning employer's labor condition application (LCA) and prevailing wage determinations.

B. Who is responsible for compliance with H-1B Regulations?

The U.S. Employer is responsible for complying with H-1B regulations. DOL has promulgated regulations which make it clear that is the U.S. employer, and not the H-1B employee, who is in the driver seat during all the stages of the H-1B process. The employer makes all H-1B-related decisions, certifies to the government that it will comply with H-1B regulations, hires the attorney, pays the government filing fees and the attorney's fees, and maintains compliance documentation.

For each H-1B employee, **the employer** must comply with certain obligations, to name a few:

- Determine the correct job classification and the prevailing wage for the proposed employment either through filing with DOL or by using alternative means allowed by DOL regulation;
- File a Labor Condition Application ("LCA") outlining conditions of employment and certifying to the government under penalty of perjury not to be in violation of the LCA requirements;
- Post an LCA filing notice at the H-1B employee's work location;
- Provide copy of certified LCA to H-1B worker;
- Maintain the LCA public access file;
- Maintain compliance throughout H-1B employee's authorized term of employment, including, e.g. paying the higher of prevailing wage or actual wage; and
- File new LCA and amended or new H-1B petitions in cases of material change of employment.

Some employers may not realize the extent of the promises they are making when signing the LCA. The ***employer*** makes promises to the government that include: paying a prevailing wage (or the actual wage, whichever is higher), employing the worker at the specific location for a specific number of hours per week, providing notice of the LCA to the foreign worker and the rest of the workforce, and other promises. Additionally, during the process, the employer must maintain a public access file containing a signed copy of the certified LCA, copy of posted notice, and other appropriate information available for inspection by the DOL. If the employer is not willing to continue with employment as certified on the LCA, the employer must file a new LCA, amend the H-1B petition, or withdraw it. Failure to do so exposes the employer to very serious liability.

C. What Consequences do Employer's Face for H-1B Non-Compliance?

U.S. employers need to understand consequences of H-1B noncompliance.

☞ Civil Penalties

The government has the authority to impose civil penalties on U.S. employers for H-1B violations. In civil cases DOL can ask for back wages with interest, if the government finds that the employer has not paid the LCA wage to H-1B employees, or, if the employer shifted the H-1B process cost to the worker. DOL may also assess civil penalties/fines for "willful" disregard for the regulations. "We didn't know about the H-1B regulations" is not a defense.

Additionally, civil penalties assessed against an employer may be accompanied by an H-1B bar prohibiting the employer from filing H-1B petitions in the future. Employers often do not realize the complexity of H-1B regulations, as a result of which, they may be unprepared when DOL comes to inspect LCAs. It is important to know employers may be found *personally liable*.

☞ Criminal Penalties

The government may also pursue employers in a criminal manner. At the heart of the matter is the fact that the Labor Condition Application is a federal document in which employers certify specific conditions of employment. Failure to comply with these conditions may be considered criminal fraud. Conduct such as "benching" or moving employees without required notice to the government may result in a criminal indictment. Employers should not sign the LCA without carefully reviewing it and fully understanding what conditions of H-1B employment they certify to the government.

D. H-1B Enforcement Trends: DOL Audits

DOL aggressively audits H-1B employers' LCA Public Access Files. DOL has vowed to audit tens of thousands of H-1B employers annually, and we have seen that they are keeping their promise. The audit begins with an audit notice from DOL to the H-1B employer. Next, the DOL auditor requests to see the Public Access File. This file should be readily available to the auditor to demonstrate the H-1B employer's preparedness and compliance. The DOL auditor reviews the file for technical and substantive violations. The auditor may also interview the employer and the workers in making a determination if there are violations. The auditor's job is to verify that the employer is, in fact, employing the H-1B worker under the conditions promised in the LCA. For example, if the LCA certified for employment in Kansas, but the auditor determines that the worker is in fact employed in California, that is a serious violation. Benching and reduced pay are also examples of serious violations. Employers who are in violation may face fines and, in egregious cases, jail.

Case Example: Kutty v. United States Department of Labor: A lesson in the H-1B process for employers and the importance of the Labor Condition Application

A 2014 decision from the Sixth Circuit of the United States Court of Appeals reinforced the rule that the H-1B process is driven by the employer and that liability for missteps in employing H-1B workers stays with the employer. In this case, the defendant, Dr. Mohan Kutty ("Kutty"), allegedly disregarded H-1B and Department of Labor ("DOL") regulations. Dr. Kutty was ordered to pay over $1 million in back wages to his previous H-1B employees and over $100,000 in civil penalties to the government.

Kutty was found noncompliant with immigration and DOL regulations. Dr. Kutty had opened medical clinics in rural Tennessee and Florida. Dr. Kutty employed many H-1B physicians. On the LCAs, Kutty certified to DOL that he would pay specific salaries to H-1B employees. DOL determined that Kutty did not comply with LCA obligations.

Kutty claimed that the H-1B physicians were not working the required hours and not seeing enough patients. Kutty stopped paying H-1B physicians the LCA wage demanding they see more patients. Not long after Kutty quit paying salaries, the physicians filed a complaint with DOL's Wage and Hour Division, which prompted an on-site record inspection of one of the medical facilities owned by Kutty in Tennessee. The Administrator of the Wage and Hour Division determined that Kutty and his clinics had violated numerous provisions of the Immigration and Nationality Act ("INA") by withholding payment to his employees, failing to maintain available records of the employee's LCAs and payroll, and by retaliating against the employees for engaging in a

protected activity under the INA. In addition, DOL found that Dr. Kutty shifted the cost of the H-1B process to the physicians, in violation of law.

Ultimately, Dr. Kutty was ordered to pay back wages and cost of obtaining work visas, totaling more than $1 million, in addition to civil penalties of more than $100,000.

Chapter 5

H-1B Time Limitations and Employee Retention

I. Six Years of Physical Presence

A U.S. employer's ability to employ an H-1B worker in the United States is limited to six years, unless the employer has sufficiently advanced in the employment-based green card process regarding the worker.

The six-year limitation is detrimental to the U.S. employer because the H-1B worker has to depart the United States after six years in H-1B status. After that, he or she must spend one year outside the United States before a U.S. employer may file another I-129 petition for H-1B classification befitting the worker. Under current conditions, this means that there will be at least a two-year gap in employment or, if the employer does not win a number in the H-1B lottery, that the U.S. employer cannot have the worker return at all.

There are two issues of which employers should be mindful:

- Recapturing of the H-1B time to include time the H-1B worker may have spent outside of the United States, and
- Extending the H-1B status beyond the initial six years of physical presence based on employer driven green card process.

II. Recapture of H-1B Time

U.S. employers may file petitions to recapture any time spent by H-1B workers abroad to the full extent of six years of physical presence in the United States. For example, an H-1B worker may spend a total of 45 days outside of the United States during his or her H-1B employment. The U.S. employer may file a petition with USCIS asking to add/recapture these 45 days to the six year that began when the first H-1B for the worker was approved. The following evidence is relevant and should be submitted to USCIS:

- ☐ I-94 and Travel History available at www.cbp.gov;
- ☐ Exit and entry stamps from the H-1B worker's passport;
- ☐ Current and previously issued (relevant) passports;
- ☐ Summary of the evidence in the form of a timeline that may be helpful to the USCIS adjudicator; and
- ☐ Other relevant evidence.

III. What About the Green Card?

Green Card Process Serves as US Employer's Retention Tool for H-1B Workers

Temporary H-1B presence does not translate into any permanent status in the United States. If the employer in interested in employing the H-1B worker long-term, past six years of H-1B physical presence, U.S. employers may pursue the employment-based Lawful Permanent Resident status (green card) process. Many H-1B workers are interested in stable future for themselves and their families in the United States, and they often look for employers who are willing to begin the employment-based green card process. Employers willing to engage in the green card process for their H-1B workers have access to this important retention tool as far as keeping their H-1B workers on board long-term. The most important significance of the process is in that it serves as a retention tool available to the U.S. employer. Employers who do not engage in the employment-based green card process for their workers often lose employees to competition.

Employers Should Be Aware of Fifth Year Deadline

US has placed a six-year physical presence limit on H-1B employment, which is detrimental to U.S. employers because after six years of employment, H-1B employees are experienced and capable of contributing leadership and expertise to the business. However, the law allows U.S. employers to file petitions to extend H-1B status beyond six years of physical presence in cases where the U.S. employers have filed a Permanent Labor Certification Application for their worker(s) and it has been at least a year since filing the application. For some positions, that rule applies to the I-140 Petition for Alien worker filing.

With that in mind, U.S. employers interested in retaining their H-1B workers beyond the six-year limit should begin the employment-based green card process way ahead of one year prior to the H-1B employee's sixth year of physical presence in the United States. To do this, the employer should file a PERM Labor Certification Application with DOL (or, in applicable cases, the I-140 with USCIS) before the worker's sixth year of H-1B presence begins. Initially, USCIS may grant these H-1B extensions in one-year increments. As the green card process moves along and the employer's I-140 Alien Worker Petitions is approved, USCIS may grant H-1B extensions in three year increments

for employees who are unable to proceed to adjustment of status or consular processing for the green card because their country of origin is backlogged due to per country limit.

☞ **Practice Pointer:**

Permanent Labor Certification Application for Labor Certs is NOT the same Labor Condition Application for H-1B

Do not confuse the PERM Labor Certification Application (often referred to as "Labor Cert") with a Labor Conditions Application (LCA). Labor Cert/PERM is the first step toward an employment-based green card. Labor Cert/PERM requires the employer to go through a recruitment process that may take several months. Labor Cert/PERM shows that the employer has tested the U.S. market and that the minimally qualified U.S. workers are not available for the position offered to the foreign worker. It takes DOL months (and in some sad cases, years) to adjudicate Labor Certs/PERM.

By contrast, Labor Condition Application (LCA) is a first step towards an H-1B petition. The LCA lists conditions of employment, such as wage, location and other conditions. At this time, it does not require a test of the labor market. Once the employer files the LCA, DOL usually adjudicates it within weeks.

☞ **Practice Pointer:**

Do Not Wait Too Long to Begin the Employment-based Green Card Process

Employers should be aware that the relevant time to file a PERM Labor Certification is before the sixth year of H-1B physical presence begins. Employers also should be aware that it takes months (and sometimes years) to go through the pre-filing advertising/recruitment to test the labor

market before the employer may file the Labor Cert/PERM with DOL. At the very least, we suggest that we add twelve months to the timeline and begin the employment-based green card process no later than the beginning of the fifth year in H-1B status. Employers should remember that if the labor test shows that US workers are available for the position, the employer cannot proceed to filing of the Labor Cert/PERM and must wait six months to begin the process from scratch. If DOL denies the Labor Cert/PERM and we are close to expiration of the six years of H-1B physical presence, the employer may not have enough time to do the test of the labor market again. Our rule of thumb to begin the employment-based green card process is this: take the first year or two to figure out if the H-1B worker is a good fit for your company. If he or she is a "keeper," then begin the employment-based green card process without delay.

Conclusion

CONCLUSION

H-1B Are Not Right For Every Employer

The H-1B process is driven by the business need. If the business need to employ the worker is not there, there is no point in engaging in this process. This is because the process is arduous, time consuming, and expensive. Additionally, the path to obtaining an H-1B can be confusing, so the petitioning employer will need to work with the immigration attorney to learn enough about the process to be able to understand all of the steps that must be taken. If, upon consideration of these things, the employer is not ready to commit the time and financial resources needed for an H-1B process compliant with the H-1B regulations, then the employer should not engage in sponsoring H-1B employees.

Employer is in the H-1B Driver Seat

Immigration regulations are very clear that the H-1B process is employer-driven. It is the employer, and not the foreign employee, that is responsible for the H-1B process and *all fees related to the process*. It is also the employer who risks dealing with potential repercussions of noncompliance with USCIS and DOL regulations. Employers always should be calling the shots during the process.

H-1B Employer's Roadmap

Once the employer decides to begin the H-1B process, the employer should find competent immigration counsel to represent them. Next, the employer should appoint someone to make decisions, lead the H-1B process, and act as a contact person for the immigration attorney and H-1B candidate. This is usually an HR manager or an in-house attorney. For smaller businesses, this may be a supervisor or manager. It is a good idea to go through the H-1B Visa training for both the employer's representative and the foreign worker so everyone involved in the process knows exactly what to expect and the steps that will be taken. Once the process is underway all involved should remember approval is not guaranteed, but if we want qualified people to fill jobs in the United States instead of sending those jobs overseas we should persevere and do the best we can to win.

Resources

USCIS RESOURCES

- USCIS: www.uscis.gov
- 8 C.F.R. 214.2(h): https://www.govinfo.gov/content/pkg/CFR-2018-title8-vol1/pdf/CFR-2018-title8-vol1-sec214-2.pdf **Starting on pg. 308
- G-28 Notice of Entry of Appearance as Attorney https://www.uscis.gov/g-28
- I-129, Petition for Nonimmigrant Worker https://www.uscis.gov/i-129,
- M-746 Dictionary of Occupational Titles https://www.uscis.gov/i-129
- Policy Memoranda/Guidance:
    - January 2010 Neufeld Memo re. Third Party Placements, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf
    - Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf
    - USCIS Final Guidance on When to File an Amended or New H-1B Petition After Matter of Simeio Solutions, LLC, https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf

USCIS Resources

8 C.F.R. 214.2(h):

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Act, has substantially failed to meet a condition of paragraphs (C) or (D) of section 212(n)(1) of the Act, has willfully failed to meet a condition of paragraph (A) of section 212(n)(1) of the Act, or has misrepresented any material fact in the application, the Service shall not approve petitions filed with respect to that employer under section 204 or 214(c) of the Act for a period of at least one year from the date of receipt of such notice.

(*6*) If the employer's labor condition application is suspended or invalidated by the Department of Labor, the Service will not suspend or revoke the employer's approved petitions for aliens already employed in specialty occupations if the employer has certified to the Department of Labor that it will comply with the terms of the labor condition application for the duration of the authorized stay of aliens it employs.

(C) *General requirements for petitions involving an alien of distinguished merit and ability in the field of fashion modeling.* H–1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. An alien of distinguished merit and ability in the field of fashion modeling is one who is prominent in the field of fashion modeling. The alien must also be coming to the United States to perform services which require a fashion model of prominence.

(ii) *Definitions.*

Prominence means a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling.

Regonized authority means a person or an organization with expertise in a particular field, special skills or knowledge in that field, and the expertise to render the type of opinion requested. Such an opinion must state:

(*1*) The writer's qualifications as an expert;

(*2*) The writer's experience giving such opinions, citing specific instances where past opinions have been accepted as authoritative and by whom;

(*3*) How the conclusions were reached; and

(*4*) The basis for the conclusions supported by copies or citations of any research material used.

Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

(*1*) Engages a person to work within the United States;

(*2*) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

(*3*) Has an Internal Revenue Service Tax identification number.

(iii) *Criteria for H–1B petitions involving a specialty occupation*—(A) *Standards for specialty occupation position.* To qualify as a specialty occupation, the position must meet one of the following criteria:

(*1*) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(*2*) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(*3*) The employer normally requires a degree or its equivalent for the position; or

(*4*) The nature of the specific duties are so specialized and complex that

knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

(B) *Petitioner requirements.* The petitioner shall submit the following with an H–1B petition involving a specialty occupation:

(*1*) A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,

(*2*) A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

(*3*) Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section, and

(C) *Beneficiary qualifications.* To qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

(*1*) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*2*) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(*3*) Hold an unrestricted State license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(*4*) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

(D) *Equivalence to completion of a college degree.* For purposes of paragraph (h)(4)(iii)(C)(*4*) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

(*1*) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

(*2*) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);

(*3*) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

(*4*) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

(*5*) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience. For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty. If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was

gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

(*i*) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

(*ii*) Membership in a recognized foreign or United States association or society in the specialty occupation;

(*iii*) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

(*iv*) Licensure or registration to practice the specialty occupation in a foreign country; or

(*v*) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

(E) *Liability for transportation costs.* The employer will be liable for the reasonable costs of return transportation of the alien abroad if the alien is dismissed from employment by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term ''abroad'' refers to the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for an alien obtaining or continuing H–1B status.

(iv) *General documentary requirements for H–1B classification in a specialty occupation.* An H–1B petition involving a specialty occupation shall be accompanied by:

(A) Documentation, certifications, affidavits, declarations, degrees, diplomas, writings, reviews, or any other required evidence sufficient to establish that the beneficiary is qualified to perform services in a specialty occupation as described in paragraph (h)(4)(i) of this section and that the services the beneficiary is to perform are in a specialty occupation. The evidence shall conform to the following:

(*1*) School records, diplomas, degrees, affidavits, declarations, contracts, and similar documentation submitted must reflect periods of attendance, courses of study, and similar pertinent data, be executed by the person in charge of the records of the educational or other institution, firm, or establishment where education or training was acquired.

(*2*) Affidavits or declarations made under penalty of perjury submitted by present or former employers or recognized authorities certifying as to the recognition and expertise of the beneficiary shall specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

(B) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

(v) *Licensure for H classification*—(A) *General.* If an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H–1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation.

(B) *Temporary licensure.* If a temporary license is available and the alien is allowed to perform the duties of the occupation without a permanent license, the director shall examine the nature of the duties, the level at which the duties are performed, the degree of supervision received, and any limitations placed on the alien. If an analysis of the facts demonstrates that the alien under supervision is authorized to fully perform the duties of the occupation, H classification may be granted.

(C) *Duties without licensure.* (*1*) In certain occupations which generally require licensure, a state may allow an individual without licensure to fully practice the occupation under the supervision of licensed senior or supervisory personnel in that occupation. In such cases, USCIS shall examine the nature of the duties and the level at which they are performed, as well as evidence provided by the petitioner as to the identity, physical location, and credentials of the individual(s) who will supervise the alien, and evidence that the petitioner is complying with state requirements. If the facts demonstrate that the alien under supervision will fully perform the duties of the occupation, H classification may be granted.

(*2*) An H–1B petition filed on behalf of an alien who does not have a valid state or local license, where a license is otherwise required to fully perform the duties in that occupation, may be approved for a period of up to 1 year if:

(*i*) The license would otherwise be issued provided the alien was in possession of a valid Social Security number, was authorized for employment in the United States, or met a similar technical requirement; and

(*ii*) The petitioner demonstrates, through evidence from the state or local licensing authority, that the only obstacle to the issuance of a license to the beneficiary is the lack of a Social Security number, a lack of employment authorization in the United States, or a failure to meet a similar technical requirement that precludes the issuance of the license to an individual who is not yet in H–1B status. The petitioner must demonstrate that the alien is fully qualified to receive the state or local license in all other respects, meaning that all educational, training, experience, and other substantive requirements have been met. The alien must have filed an application for the license in accordance with applicable state and local rules and procedures, provided that state or local rules or procedures do not prohibit the alien from filing the license application without provision of a Social Security number or proof of employment authorization or without meeting a similar technical requirement.

(*3*) An H–1B petition filed on behalf of an alien who has been previously accorded H–1B classification under paragraph (h)(4)(v)(C)(*2*) of this section may not be approved unless the petitioner demonstrates that the alien has obtained the required license, is seeking to employ the alien in a position requiring a different license, or the alien will be employed in that occupation in a different location which does not require a state or local license to fully perform the duties of the occupation.

(D) *H–1C nurses.* For purposes of licensure, H–1C nurses must provide the evidence required in paragraph (h)(3)(iii) of this section.

(E) *Limitation on approval of petition.* Where licensure is required in any occupation, including registered nursing, the H petition may only be approved for a period of one year or for the period that the temporary license is valid, whichever is longer, unless the alien already has a permanent license to practice the occupation. An alien who is accorded H classification in an occupation which requires licensure may not be granted an extension of stay or accorded a new H classification after the one year unless he or she has obtained a permanent license in the state of intended employment or continues to hold a temporary license valid in the same state for the period of the requested extension.

(vi) *Criteria and documentary requirements for H–1B petitions involving DOD cooperative research and development projects or coproduction projects*—(A) *General.* (*1*) For purposes of H–1B classification, services of an exceptional nature relating to DOD cooperative research and development projects or coproduction projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties. The existence of this special program does not preclude the DOD from utilizing the regular H–1B provisions provided the required guidelines are met.

(*2*) The requirements relating to a labor condition application from the Department of Labor shall not apply to petitions involving DOD cooperative research and development projects or coproduction projects.

(B) *Petitioner requirements.* (*1*) The petition must be accompanied by a verification letter from the DOD project manager for the particular project stating that the alien will be working on a cooperative research and development project or a coproduction project under a reciprocal Government-to-Government agreement administered by DOD. Details about the specific project are not required.

(*2*) The petitioner shall provide a general description of the alien's duties on the particular project and indicate the actual dates of the alien's employment on the project.

(*3*) The petitioner shall submit a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner shall also indicate the names of aliens whose employment on the project ended within the past year.

(C) *Beneficiary requirement.* The petition shall be accompanied by evidence that the beneficiary has a baccalaureate or higher degree or its equivalent in the occupational field in which he or she will be performing services in accordance with paragraph (h)(4)(iii)(C) and/or (h)(4)(iii)(D) of this section.

(vii) *Criteria and documentary requirements for H–1B petitions for aliens of distinguished merit and ability in the field of fashion modeling*—(A) *General.* Prominence in the field of fashion modeling may be established in the case of an individual fashion model. The work which a prominent alien is coming to perform in the United States must require the services of a prominent alien. A petition for an H–1B alien of distinguished merit and ability in the field of fashion modeling shall be accompanied by:

(*1*) Documentation, certifications, affidavits, writings, reviews, or any other required evidence sufficient to establish that the beneficiary is a fashion model of distinguished merit and ability. Affidavits submitted by present or former employers or recognized experts certifying to the recognition and distinguished ability of the beneficiary shall specifically describe the beneficiary's recognition and ability in factual terms and must set forth the expertise of the affiant and the manner in which the affiant acquired such information.

(*2*) Copies of any written contracts between the petitioner and beneficiary, or a summary of the terms of the oral agreement under which the beneficiary will be employed, if there is no written contract.

(B) *Petitioner's requirements.* To establish that a position requires prominence, the petitioner must establish that the position meets one of the following criteria:

(*1*) The services to be performed involve events or productions which have a distinguished reputation;

(*2*) The services are to be performed for an organization or establishment that has a distinguished reputation for, or record of, employing prominent persons.

(C) *Beneficiary's requirements.* A petitioner may establish that a beneficiary is a fashion model of distinguished merit and ability by the submission of two of the following forms of documentation showing that the alien:

(*1*) Has achieved national or international recognition and acclaim for outstanding achievement in his or her field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material;

(*2*) Has performed and will perform services as a fashion model for employers with a distinguished reputation;

(*3*) Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field; or

(*4*) Commands a high salary or other substantial remuneration for services evidenced by contracts or other reliable evidence.

(viii) *Criteria and documentary requirements for H–1B petitions for physicians*—(A) *Beneficiary's requirements.* An H–1B petition for a physician shall be accompanied by evidence that the physician:

(*1*) Has a license or other authorization required by the state of intended employment to practice medicine, or is exempt by law therefrom, if the physician will perform direct patient care and the state requires the license or authorization, and

(*2*) Has a full and unrestricted license to practice medicine in a foreign state

or has graduated from a medical school in the United States or in a foreign state.

(B) *Petitioner's requirements.* The petitioner must establish that the alien physician:

(*1*) Is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research; or

(*2*) The alien has passed the Federation Licensing Examination (or an equivalent examination as determined by the Secretary of Health and Human Services) or is a graduate of a United States medical school; and

(*i*) Has competency in oral and written English which shall be demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical Graduates; or

(*ii*) Is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

(C) *Exception for physicians of national or international renown.* A physician who is a graduate of a medical school in a foreign state and who is of national or international renown in the field of medicine is exempt from the requirements of paragraph (h)(4)(viii)(B) of this section.

(5) *Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H–2A)*—(i) *Filing a petition*—(A) *General.* An H–2A petition must be filed on Form I–129 with a single valid temporary agricultural labor certification. The petition may be filed by either the employer listed on the temporary labor certification, the employer's agent, or the association of United States agricultural producers named as a joint employer on the temporary labor certification.

(B) *Multiple beneficiaries.* 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. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating temporary labor certification.

(C) [Reserved]

(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 qualifies for that employment. A petition will be automatically denied if filed without the certification evidence required in paragraph (h)(5)(i)(A) of this section and, for each named beneficiary, the initial evidence required in paragraph (h)(5)(v) of this section.

(E) *Special filing requirements.* Where a certification shows joint employers, a petition must be filed with an attachment showing that each employer has agreed to the conditions of H–2A eligibility. A petition filed by an agent must be filed with an attachment in which the employer has authorized the agent to act on its behalf, has assumed full responsibility for all representations made by the agent on its behalf, and has agreed to the conditions of H–2A eligibility.

(F) *Eligible Countries.* (*1*)(*i*) H–2A petitions may only be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the FEDERAL REGISTER, taking into account factors, including but not limited to:

(*A*) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(*B*) The number of final and unexecuted orders of removal against citizens, subjects, nationals and residents of that country;

(*C*) The number of orders of removal executed against citizens, subjects, nationals and residents of that country; and

(*D*) Such other factors as may serve the U.S. interest.

(*ii*) A national from a country not on the list described in paragraph (h)(5)(i)(F)(*1*)(*i*) of this section may be a beneficiary of an approved H–2A petition upon the request of a petitioner or potential H–2A petitioner, if the Secretary of Homeland Security, in his

sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(*A*) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list described in paragraph (h)(5)(i)(F)(*1*)(*i*) of this section;

(*B*) Evidence that the beneficiary has been admitted to the United States previously in H–2A status;

(*C*) The potential for abuse, fraud, or other harm to the integrity of the H–2A visa program through the potential admission of a beneficiary from a country not currently on the list; and

(*D*) Such other factors as may serve the U.S. interest.

(*2*) Once published, any designation of participating countries pursuant to paragraph (h)(5)(i)(F)(*1*)(*i*) of this section shall be effective for one year after the date of publication in the FEDERAL REGISTER and shall be without effect at the end of that one-year period.

(ii) *Effect of the labor certification process.* The temporary agricultural labor certification process determines whether employment is as an 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.

(iii) *Ability and intent to meet a job offer*—(A) *Eligibility requirements.* An H–2A petitioner must establish that each beneficiary will be employed in accordance with the terms and conditions of the certification, which includes that the principal duties to be performed are those on the certification, with other duties minor and incidental.

(B) *Intent and prior compliance.* Requisite intent cannot be established for two years after an employer or joint employer, or a parent, subsidiary or affiliate thereof, is found to have violated section 274(a) of the Act or to have employed an H–2A worker in a position other than that described in the relating petition.

(C) *Initial evidence.* Representations required for the purpose of labor certification are initial evidence of intent.

(iv) *Temporary and seasonal employment*—(A) *Eligibility requirements.* An H–2A petitioner must establish that the employment proposed in the certification is of a temporary or seasonal nature. Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.

(B) *Effect of Department of Labor findings.* In temporary agricultural labor certification proceedings the Department of Labor separately tests whether employment qualifies as temporary or seasonal. Its finding that employment qualifies is normally sufficient for the purpose of an H–2A petition, However, notwithstanding that finding, 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 only be overcome by the petitioner's demonstration that there will be at least a six month interruption of employment in the United States after H–2A status ends. Also, eligibility will not be found, notwithstanding the issuance of a temporary agricultural labor certification, where there is substantial evidence that the employment is not temporary or seasonal.

(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 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) *Evidence of employment/job training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met the certification's minimum employment and job training requirements, if any are prescribed, as of the date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of the past employer or employers' detailed statement(s) 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 persons who worked with the beneficiary that demonstrate the claimed employment or job training.

(C) *Evidence of education and other training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met all of the certification's post-secondary education and other formal training requirements, if any are prescribed in the labor certification application as of date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of documents, issued by the relevant institution(s) or organization(s), that show periods of attendance, majors and degrees or certificates accorded.

(vi) *Petitioner consent and notification requirements*—(A) *Consent.* In filing an H–2A petition, a petitioner and each employer consents to allow access to the site by DHS officers where the labor is being performed for the purpose of determining compliance with H–2A requirements.

(B) *Agreements.* The petitioner agrees to the following requirements:

(*1*) To notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the FEDERAL REGISTER if:

(*i*) An H–2A worker fails to report to work within 5 workdays of the employment start date on the H–2A petition or within 5 workdays of the start date established by his or her employer, whichever is later;

(*ii*) The agricultural labor or services for which H–2A workers were hired is completed more than 30 days earlier than the employment end date stated on the H–2A petition; or

(*iii*) The H–2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired.

(*2*) To retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification. To retain evidence of a different employment start date if it is changed from that on the petition by the employer and make it available for inspection by DHS officers for the 1-year period beginning on the newly-established employment start date.

(*3*) To pay $10 in liquidated damages for each instance where the employer cannot demonstrate that it has complied with the notification requirements, unless, in the case of an untimely notification, the employer demonstrates with such notification that good cause existed for the untimely notification, and DHS, in its discretion, waives the liquidated damages amount.

(C) *Process.* If DHS has determined that the petitioner has violated the notification requirements in paragraph (h)(5)(vi)(B)(1) of this section and has not received the required notification, the petitioner will be given written notice and 30 days to reply before being given written notice of the assessment of liquidated damages.

(D) *Failure to pay liquidated damages.* If liquidated damages are not paid within 10 days of assessment, an H–2A petition may not be processed for that petitioner or any joint employer shown

on the petition until such damages are paid.

(E) *Abscondment.* 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.

(vii) *Validity.* An approved H–2A petition is valid through the expiration of the relating certification for the purpose of allowing a beneficiary to seek issuance of an H–2A nonimmigrant visa, admission or an extension of stay for the purpose of engaging in the specific certified employment.

(viii) *Admission*—(A) *Effect of violations of status.* An alien may not be accorded H–2A status who, at any time during the past 5 years, USCIS finds to have violated, other than through no fault of his or her own (e.g., due to an employer's illegal or inappropriate conduct), any of the terms or conditions of admission into the United States as an H–2A nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(B) *Period of admission.* An alien admissible as an H–2A nonimmigrant shall be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a 30-day period following the expiration of the H–2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12 or section 214(n) of the Act, the beneficiary may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H–2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, 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. An absence from the United States 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 for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. Eligibility under paragraph (h)(5)(viii)(C) of this section will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H–2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) of this section shall only be admitted for that abbreviated period.

(ix) *Substitution of beneficiaries after admission.* An H–2A petition may be filed 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 fail to report to work within five days of the employment start date on the H–2A petition or within five days of the start date established by his or her employer, whichever is later; or who abscond from the worksite. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which 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 or absconded worker's name, date and country of birth, termination date, and the reason for termination, and the date that USCIS was notified that the alien was terminated or absconded, if applicable. A petition for a replacement will not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(*1*) of this section.

(x) *Extensions in emergent circumstances.* In emergent circumstances, as determined by USCIS, a single H–2A petition may be extended for a period not to exceed 2 weeks without an additional approved labor certification if

filed on behalf of one or more beneficiaries who will continue to be employed by the same employer that previously obtained an approved petition on the beneficiary's behalf, so long as the employee continues to perform the same duties and will be employed for no longer than 2 weeks after the expiration of previously-approved H–2A petition. The previously approved H–2A petition must have been based on an approved temporary labor certification, which shall be considered to be extended upon the approval of the extension of H–2A status.

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries*—(A) *Denial or revocation of petition*. As a condition to approval of an H–2A petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H–2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of H–2A employment (other than the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations, unless the employer agent, facilitator, recruiter, or employment service has agreed with the alien to pay such costs and fees).

(*1*) If USCIS determines that the petitioner has collected, or entered into an agreement to collect, such prohibited fee or compensation, the H–2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner has reimbursed the alien in full for such fees or compensation, or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(*2*) If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H–2A employment, the H–2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner or the facilitator, recruiter, or similar employment service has reimbursed the alien in full for such fees or compensation or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(*3*) If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of obtaining the H–2A employment after the filing of the H–2A petition, the petition will be denied or revoked on notice.

(*4*) If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H–2A employment after the filing of the H–2A petition and with the knowledge of the petitioner, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated, or notifies DHS within 2 workdays of obtaining knowledge in a manner specified in a notice published in the FEDERAL REGISTER.

(B) *Effect of petition revocation*. Upon revocation of an employer's H–2A petition based upon paragraph (h)(5)(xi)(A) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)) for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

(C) *Reimbursement as condition to approval of future H–2A petitions*—(*1*) *Filing subsequent H–2A petitions within 1 year of denial or revocation of previous H–2A petition*. A petitioner filing an H–2A petition within 1 year after the decision denying or revoking on notice an H–2A petition filed by the same petitioner on the basis of paragraph (h)(5)(xi)(A) of

this section must demonstrate to the satisfaction of USCIS, as a condition of approval of such petition, that the petitioner or agent, facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or that the petitioner has failed to locate the beneficiary. If the petitioner demonstrates to the satisfaction of USCIS that the beneficiary was reimbursed in full, such condition of approval shall be satisfied with respect to any subsequently filed H–2A petitions, except as provided in paragraph (h)(5)(xi)(C)(*2*). If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate the beneficiary with respect to each H–2A petition filed within 1 year after the decision denying or revoking the previous H–2A petition on the basis of paragraph (h)(5)(xi)(A) of this section but has failed to do so, such condition of approval shall be deemed satisfied with respect to any H–2A petition filed 1 year or more after the denial or revocation. Such reasonable efforts shall include contacting any of the beneficiary's known addresses.

(*2*) *Effect of subsequent denied or revoked petitions.* An H–2A petition filed by the same petitioner subsequent to a denial under paragraph (h)(5)(xi)(A) of this section shall be subject to the condition of approval described in paragraph (h)(5)(xi)(C)(*1*) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(xii) *Treatment of alien beneficiaries upon revocation of labor certification.* The approval of an employer's H–2A petition is immediately and automatically revoked if the Department of Labor revokes the labor certification upon which the petition is based. Upon revocation of an H–2A petition based upon revocation of labor certification, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

(6) *Petition for alien to perform temporary nonagricultural services or labor (H–2B)*—(i) *Petition*—(A) *H–2B nonagricultural temporary worker.* An H–2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without displacing qualified United States workers available to perform such services or labor and whose employment is not adversely affecting the wages and working conditions of United States workers.

(B) *Denial or revocation of petition upon a determination that fees were collected from alien beneficiaries.* As a condition of approval of an H–2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H–2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H–2B employment (other than the lower of the actual cost or fair market value of transportation to such employment and any government-mandated passport, visa, or inspection fees, to the extent that the passing of such costs to the beneficiary is not prohibited by statute, unless the employer, agent, facilitator, recruiter, or similar employment service has agreed with the beneficiary that it will pay such costs and fees).

(*1*) If USCIS determines that the petitioner has collected or entered into an agreement to collect such fee or compensation, the H–2B petition will be denied or revoked on notice, unless the petitioner demonstrates that, prior to the filing of the petition, either the petitioner reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(*2*) If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any agent, facilitator, recruiter, or similar employment service as a condition of an offer of the H–2B employment, the H–2B petition will be denied

or revoked on notice unless the petitioner demonstrates that, prior to filing the petition, either the petitioner or the agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(*3*) If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of an offer of H–2B employment after the filing of the H–2B petition, the petition will be denied or revoked on notice.

(*4*) If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation after the filing of the H–2B petition and that the petitioner knew or had reason to know of the payment or agreement to pay, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full, that the parties terminated any agreement to pay before the beneficiary paid the fees or compensation, or that the petitioner has notified DHS within 2 work days of obtaining knowledge, in a manner specified in a notice published in the FEDERAL REGISTER.

(C) *Effect of petition revocation.* Upon revocation of an employer's H–2B petition based upon paragraph (h)(6)(i)(B) of this section, the alien beneficiary's stay will be authorized and the beneficiary will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)) for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer shall be liable for the alien beneficiary's reasonable costs of return transportation to his or her last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved H–2B petition filed by a different employer.

(D) *Reimbursement as condition to approval of future H–2B petitions*—(1) *Filing subsequent H–2B petitions within 1 year of denial or revocation of previous H–2B petition.* A petitioner filing an H–2B petition within 1 year after a decision denying or revoking on notice an H–2B petition filed by the same petitioner on the basis of paragraph (h)(6)(i)(B) of this section must demonstrate to the satisfaction of USCIS, as a condition of the approval of the later petition, that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed in full each beneficiary of the denied or revoked petition from whom a prohibited fee was collected or that the petitioner has failed to locate each such beneficiary despite the petitioner's reasonable efforts to locate them. If the petitioner demonstrates to the satisfaction of USCIS that each such beneficiary was reimbursed in full, such condition of approval shall be satisfied with respect to any subsequently filed H–2B petitions, except as provided in paragraph (h)(6)(i)(D)(*2*) of this section. If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate but has failed to locate each such beneficiary within 1 year after the decision denying or revoking the previous H–2B petition on the basis of paragraph (h)(6)(i)(B) of this section, such condition of approval shall be deemed satisfied with respect to any H–2B petition filed 1 year or more after the denial or revocation. Such reasonable efforts shall include contacting all of each such beneficiary's known addresses.

(*2*) *Effect of subsequent denied or revoked petitions.* An H–2B petition filed by the same petitioner subsequent to a denial under paragraph (h)(6)(i)(B) of this section shall be subject to the condition of approval described in paragraph (h)(6)(i)(D)(*1*) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(E) *Eligible countries.* (*1*) H–2B petitions may be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the FEDERAL REGISTER, taking into account factors, including but not limited to:

(*i*) The country's cooperation with respect to issuance of travel documents

for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(*ii*) The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;

(*iii*) The number of orders of removal executed against citizens, subjects, nationals and residents of that country; and

(*iv*) Such other factors as may serve the U.S. interest.

(*2*) A national from a country not on the list described in paragraph (h)(6)(i)(E)(*1*) of this section may be a beneficiary of an approved H–2B petition upon the request of a petitioner or potential H–2B petitioner, if the Secretary of Homeland Security, in his sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(*i*) 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 described in paragraph (h)(6)(i)(E)(*1*) of this section;

(*ii*) Evidence that the beneficiary has been admitted to the United States previously in H–2B status;

(*iii*) The potential for abuse, fraud, or other harm to the integrity of the H–2B visa program through the potential admission of a beneficiary from a country not currently on the list; and

(*iv*) Such other factors as may serve the U.S. interest.

(*3*) Once published, any designation of participating countries pursuant to paragraph (h)(6)(i)(E)(*1*) of this section shall be effective for one year after the date of publication in the FEDERAL REGISTER and shall be without effect at the end of that one-year period.

(F) *Petitioner agreements and notification requirements—(1) Agreements.* The petitioner agrees to notify DHS, within 2 work days, and beginning on a date and in a manner specified in a notice published in the FEDERAL REGISTER if: An H–2B worker fails to report for work within 5 work days after the employment start date stated on the petition; the nonagricultural labor or services for which H–2B workers were hired were completed more than 30 days early; or an H–2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired. The petitioner also agrees to retain evidence of such notification and make it available for inspection by DHS officers for a one-year period beginning on the date of the notification.

(*2*) *Abscondment.* An H–2B worker has absconded if he or she has not reported for work for a period of 5 consecutive work days without the consent of the employer.

(ii) *Temporary services or labor*—(A) *Definition.* Temporary services or labor under the H–2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.

(B) *Nature of petitioner's need.* 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 event could last up to 3 years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

(*1*) *One-time occurance.* The petitioner must establish that it 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 that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

(*2*) *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 is 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 petitioner's permanent employees.

(*3*) *Peakload need.* The petitoner must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and that it needs to supplement its permanent staff at the place of employment on a temporary basis due to a seasonal or short-term demand and that the temporary additions to staff will not become a part of the petitioner's regular operation.

(*4*) *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.

(iii) *Procedures.* (A) Prior to filing a petition with the director to classify an alien as an H–2B worker, the petitioner shall apply for a temporary labor certification with the Secretary of Labor for all areas of the United States, except the Territory of Guam. In the Territory of Guam, the petitioning employer shall apply for a temporary labor certification with the Governor of Guam. The labor certification shall be advice to the director on whether or not United States workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed United States workers.

(B) An H–2B petitioner shall be a United States employer, a United States agent, or a foreign employer filing through a United States agent. For purposes of paragraph (h) of this section, a foreign employer is any employer who is not amenable to service of process in the United States. A foreign employer may not directly petition for an H–2B nonimmigrant but must use the services of a United States agent to file a petition for an H–2B nonimmigrant. A United States agent petitioning on behalf of a foreign employer must be authorized to file the petition, and to accept service of process in the United States in proceedings under section 274A of the Act, on behalf of the employer. The petitioning employer shall consider available United States workers for the temporary services or labor, and shall offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the United States.

(C) The petitioner may not file an H–2B petition unless the United States petitioner has applied for a labor certification with the Secretary of Labor or the Governor of Guam within the time limits prescribed or accepted by each, and has obtained a favorable labor certification determination as required by paragraph (h)(6)(iv) or (h)(6)(v) of this section.

(D) The Governor of Guam shall separately establish procedures for administering the temporary labor program under his or her jurisdiction. The Secretary of Labor shall separately establish for the temporary labor program under his or her jurisdiction, by regulation at 20 CFR 655, procedures for administering that temporary labor program under his or her jurisdiction, and shall determine the prevailing wage applicable to an application for temporary labor certification for that temporary labor program in accordance with the Secretary of Labor's regulation at 20 CFR 655.10.

(E) After obtaining a favorable determination from the Secretary of Labor or the Governor of Guam, as appropriate, the petitioner shall file a petition on I–129, accompanied by the labor certification determination and supporting documents, with the director having jurisdiction in the area of intended employment.

(iv) *Labor certifications, except Guam—*(A) *Secretary of Labor's determination.* An H–2B petition for temporary employment in the United States, except for temporary employment on Guam, shall be accompanied by an approved temporary labor certification from the Secretary of Labor stating 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.

(B) *Validity of the labor certification.* The Secretary of Labor may issue a temporary labor certification for a period of up to one year.

(C) *U.S. Virgin Islands.* Temporary labor certifications filed under section 101(a)(15)(H)(ii)(b) of the Act for employment in the United States Virgin Islands may be approved only for entertainers and athletes and only for periods not to exceed 45 days.

(D) *Employment start date.* Beginning with petitions filed for workers for fiscal year 2010, an H–2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification. A petitioner filing an amended H–2B petition due to the unavailability of originally requested workers may state an employment start date later than the date of need stated on the previously approved temporary labor certification accompanying the amended H–2B petition.

(v) *Labor certification for Guam*—(A) *Governor of Guam's determination.* An H–2B petition for temporary employment on Guam shall be accompanied by an approved temporary labor certification issued by the Governor of Guam stating that qualified workers in the United States are not available to perform the required services, and that the alien's employment will not adversely affect the wages and working conditions of United States resident workers who are similarly employed on Guam.

(B) *Validity of labor certification.* The Governor of Guam may issue a temporary labor certification for a period up to one year.

(C)–(D) [Reserved]

(E) *Criteria for Guam labor certifications.* The Governor of Guam shall, in consultation with the Service, establish systematic methods for determining the prevailing wage rates and working conditions for individual occupations on Guam and for making determinations as to availability of qualified United States residents.

(*1*) *Prevailing wage and working conditions.* The system to determine wages and working conditions must provide for consideration of wage rates and employment conditions for occupations in both the private and public sectors, in Guam and/or in the United States (as defined in section 101(a)(38) of the Act), and may not consider wages and working conditions outside of the United States. If the system includes utilitzation of advisory opinions and consultations, the opinions must be provided by officially sanctioned groups which reflect a balance of the interests of the private and public sectors, government, unions and management.

(*2*) *Availability of United States workers.* The system for determining availability of qualified United States workers must require the prospective employer to:

(*i*) Advertise the availability of the position for a minimum of three consecutive days in the newspaper with the largest daily circulation on Guam;

(*ii*) Place a job offer with an appropriate agency of the Territorial Government which operates as a job referral service at least 30 days in advance of the need for the services to commence, except that for applications from the armed forces of the United States and those in the entertainment industry, the 30-day period may be reduced by the Governor to 10 days;

(*iii*) Conduct appropriate recruitment in other areas of the United States and its territories if sufficient qualified United States construction workers are not available on Guam to fill a job. The Governor of Guam may require a job order to be placed more than 30 days in advance of need to accommodate such recruitment;

(*iv*) Report to the appropriate agency the names of all United States resident workers who applied for the position, indicating those hired and the job-related reasons for not hiring;

(*v*) Offer all special considerations, such as housing and transportation expenses, to all United States resident workers who applied for the position, indicating those hired and the job-related reasons for not hiring;

(*vi*) Meet the prevailing wage rates and working conditions determined under the wages and working conditions system by the Governor; and

(*vii*) Agree to meet all Federal and Territorial requirements relating to employment, such as nondiscrimination, occupational safety, and minimum wage requirements.

(F) *Approval and publication of employment systems on Guam—(1) Systems.* The Commissioner of Immigration and

Naturalization must approve the system to determine prevailing wages and working conditions and the system to determine availability of United States resident workers and any future modifications of the systems prior to implementation. If the Commissioner, in consultation with the Secretary of Labor, finds that the systems or modified systems meet the requirements of this section, the Commissioner shall publish them as a notice in the FEDERAL REGISTER and the Governor shall publish them as a public record in Guam.

(*2*) *Approval of construction wage rates.* The Commissioner must approve specific wage data and rates used for construction occupations on Guam prior to implementation of new rates. The Governor shall submit new wage survey data and proposed rates to the Commissioner for approval at least eight weeks before authority to use existing rates expires. Surveys shall be conducted at least every two years, unless the Commissioner prescribes a lesser period.

(G) *Reporting.* The Governor shall provide the Commissioner statistical data on temporary labor certification workload and determinations. This information shall be submitted quarterly no later than 30 days after the quarter ends.

(H) *Invalidation of temporary labor certification issued by the Governor of Guam—*(*1*) *General.* A temporary labor certification issued by the Governor of Guam may be invalidated by a director if it is determined by the director or a court of law that the certification request involved fraud or willful misrepresentation. A temporary labor certification may also be invalidated if the director determines that the certification involved gross error.

(*2*) *Notice of intent to invalidate.* If the director intends to invalidate a temporary labor certification, a notice of intent shall be served upon the employer, detailing the reasons for the intended invalidation. The employer shall have 30 days in which to file a written response in rebuttal to the notice of intent. The director shall consider all evidence submitted upon rebuttal in reaching a decision.

(*3*) *Appeal of invalidation.* An employer may appeal the invalidation of a temporary labor certification in accordance with part 103 of this chapter.

(vi) *Evidence for H–2B petitions.* An H–2B petition shall be accompanied by:

(A) *Labor certification.* An approved temporary labor certification issued by the Secretary of Labor or the Governor of Guam, as appropriate;

(B) [Reserved]

(C) *Alien's qualifications.* In petitions where the temporary labor certification application requires certain education, training, experience, or special requirements of the beneficiary who is present in the United States, documentation that the alien qualifies for the job offer as specified in the application for such temporary labor certification. This requirement also applies to the named beneficiary who is abroad on the basis of special provisions stated in paragraph (h)(2)(iii) of this section;

(D) *Statement of need.* A statement describing in detail the temporary situation or conditions which make it necessary to bring the alien to the United States and whether the need is a one-time occurrence, seasonal, peakload, or intermittent. If the need is seasonal, peakload, or intermittent, the statement shall indicate whether the situation or conditions are expected to be recurrent; or

(E) *Liability for transportation costs.* The employer will be liable for the reasonable costs of return transportation of the alien abroad, if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term ''abroad'' means the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the

basis for the alien obtaining or continuing H–2B status.

(vii) *Traded professional H–2B athletes.* In the case of a professional H–2B athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after the player's acquisition by the new organization, within which time the new organization is expected to file a new Form I–129 for H–2B nonimmigrant classification. If a new Form I–129 is not filed within 30 days, employment authorization will cease. If a new Form I–129 is filed within 30 days, the professional athlete shall be deemed to be in valid H–2B status, and employment shall continue to be authorized, until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

(viii) *Substitution of beneficiaries.* Beneficiaries of H–2B petitions that are approved for named or unnamed beneficiaries who have not been admitted may be substituted only if the employer can demonstrate that the total number of beneficiaries will not exceed the number of beneficiaries certified in the original temporary labor certification. Beneficiaries who were admitted to the United States may not be substituted without a new petition accompanied by a newly approved temporary labor certification.

(A) To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are outside of the United States, the petitioner shall, by letter and a copy of the petition approval notice, notify the consular office at which the alien will apply for a visa or the port of entry where the alien will apply for admission. The petitioner shall also submit evidence of the qualifications of beneficiaries to the consular office or port of entry prior to issuance of a visa or admission, if applicable.

(B) To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are currently in the United States, the petitioner shall file an amended petition with fees at the USCIS Service Center where the original petition was filed, with a copy of the original petition approval notice, a statement explaining why the substitution is necessary, evidence of the qualifications of beneficiaries, if applicable, evidence of the beneficiaries' current status in the United States, and evidence that the number of beneficiaries will not exceed the number allocated on the approved temporary labor certification, such as employment records or other documentary evidence to establish that the number of visas sought in the amended petition were not already issued. The amended petition must retain a period of employment within the same half of the same fiscal year as the original petition. Otherwise, a new temporary labor certification issued by DOL or the Governor of Guam and subsequent H–2B petition are required.

(ix) *Enforcement.* The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification to admit or otherwise provide status to an H–2B worker.

(7) *Petition for alien trainee or participant in a special education exchange visitor program (H–3)*—(i) *Alien trainee.* The H–3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment. This category shall not apply to physicians, who are statutorily ineligible to use H–3 classification in order to receive any type of graduate medical education or training.

(A) *Externs.* A hospital approved by the American Medical Association or the American Osteopathic Association for either an internship or residency program may petition to classify as an H–3 trainee a medical student attending a medical school abroad, if the alien will engage in employment as an extern during his/her medical school vacation.

(B) *Nurses.* A petitioner may seek H–3 classification for a nurse who is not H–1 if it can be established that there

is a genuine need for the nurse to receive a brief period of training that is unavailable in the alien's native country and such training is designed to benefit the nurse and the overseas employer upon the nurse's return to the country of origin, if:

(*1*) The beneficiary has obtained a full and unrestricted license to practice professional nursing in the country where the beneficiary obtained a nursing education, or such education was obtained in the United States or Canada; and

(*2*) The petitioner provides a statement certifying that the beneficiary is fully qualified under the laws governing the place where the training will be received to engage in such training, and that under those laws the petitioner is authorized to give the beneficiary the desired training.

(ii) *Evidence required for petition involving alien trainee*—(A) *Conditions.* The petitioner is required to demonstrate that:

(*1*) The proposed training is not available in the alien's own country;

(*2*) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;

(*3*) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

(*4*) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) *Description of training program.* Each petition for a trainee must include a statement which:

(*1*) Describes the type of training and supervision to be given, and the structure of the training program;

(*2*) Sets forth the proportion of time that will be devoted to productive employment;

(*3*) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(*4*) Describes the career abroad for which the training will prepare the alien;

(*5*) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(*6*) Indicates the source of any remuneration received by the trainee and any benefit which will accrue to the petitioner for providing the training.

(iii) *Restrictions on training program for alien trainee.* A training program may not be approved which:

(A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(B) Is incompatible with the nature of the petitioner's business or enterprise;

(C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(E) Will result in productive employment beyond that which is incidental and necessary to the training;

(F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

(iv) *Petition for participant in a special education exchange visitor program*—(A) *General Requirements.* (*1*) The H–3 participant in a special education training program must be coming to the United States to participate in a structured program which provides for practical training and experience in the education of children with physical, mental, or emotional disabilities.

(*2*) The petition must be filed by a facility which has professionally trained staff and a structured program for providing education to children with disabilities, and for providing training and hands-on experience to participants in the special education exchange visitor program.

(*3*) The requirements in this section for alien trainees shall not apply to petitions for participants in a special education exchange visitor program.

(B) *Evidence.* An H–3 petition for a participant in a special education exchange visitor program shall be accompanied by:

(*1*) A description of the training program and the facility's professional staff and details of the alien's participation in the training program (any custodial care of children must be incidental to the training), and

(*2*) Evidence that the alien participant is nearing completion of a baccalaureate or higher degree in special education, or already holds such a degree, or has extensive prior training and experience in teaching children with physical, mental, or emotional disabilities.

(8) *Numerical limits*—(i) *Limits on affected categories.* During each fiscal year, the total number of aliens who can be provided nonimmigrant classification is limited as follows:

(A) Aliens classified as H–1B nonimmigrants, excluding those involved in Department of Defense research and development projects or coproduction projects, may not exceed the limits identified in section 214(g)(1)(A) of the Act.

(B) Aliens classified as H–1B nonimmigrants to work for DOD research and development projects or coproduction projects may not exceed 100 at any time.

(C) Aliens classified as H–2B nonimmigrants may not exceed 66,000.

(D) Aliens classified as H–3 nonimmigrant participants in a special education exchange visitor program may not exceed 50.

(E) Aliens classified as H–1C nonimmigrants may not exceed 500 in a fiscal year.

(ii) *Procedures.* (A) Each alien issued a visa or otherwise provided nonimmigrant status under sections 101(a)(15)(H)(i)(b), 101(a)(15)(H)(i)(c), or 101(a)(15)(H)(ii) of the Act shall be counted for purposes of any applicable numerical limit, unless otherwise exempt from such numerical limit. Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the numerical limit. The spouse and children of principal H aliens are classified as H–4 nonimmigrants and shall not be counted against numerical limits applicable to principals.

(B) When calculating the numerical limitations or the number of exemptions under section 214(g)(5)(C) of the Act for a given fiscal year, USCIS will make numbers available to petitions in the order in which the petitions are filed. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of beneficiaries requested when necessary) received and will notify the public of the date that USCIS has received the necessary number of petitions (the ''final receipt date''). The day the news is published will not control the final receipt date. When necessary to ensure the fair and orderly allocation of numbers in a particular classification subject to a numerical limitation or the exemption under section 214(g)(5)(C) of the Act, USCIS may randomly select from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection as validated by the Office of Immigration Statistics. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt date will be rejected. Petitions filed on behalf of aliens otherwise eligible for the exemption under section 214(g)(5)(C) of the Act not randomly selected or that were received after the final receipt date will be rejected if the numerical limitation under 214(g)(1) of the Act has been reached for that fiscal year. Petitions indicating that they are exempt from the numerical limitation but that are determined by USCIS after the final receipt date to be subject to the numerical limit will be denied and filing fees will not be returned or refunded. If the final receipt date is any of the first five business days on which petitions subject to the applicable numerical limit may be received (*i.e.*, if the numerical limit is reached on any one of the first five business days that filings can be

made), USCIS will randomly apply all of the numbers among the petitions received on any of those five business days, conducting the random selection among the petitions subject to the exemption under section 214(g)(5)(C) of the Act first.

(C) When an approved petition is not used because the beneficiary(ies) does not apply for admission to the United States, the petitioner shall notify the Service Center Director who approved the petition that the number(s) has not been used. The petition shall be revoked pursuant to paragraph (h)(11)(ii) of this section and USCIS will take into account the unused number during the appropriate fiscal year.

(D) If the total numbers available in a fiscal year are used, new petitions and the accompanying fee shall be rejected and returned with a notice that numbers are unavailable for the particular nonimmigrant classification until the beginning of the next fiscal year. Petitions received after the total numbers available in a fiscal year are used stating that the alien beneficiaries are exempt from the numerical limitation will be denied and filing fees will not be returned or refunded if USCIS later determines that such beneficiaries are subject to the numerical limitation.

(E) The 500 H–1C nonimmigrant visas issued each fiscal year shall be allocated in the following manner:

(*1*) For each fiscal year, the number of visas issued to the states of California, Florida, Illinois, Michigan, New York, Ohio, Pennsylvania, and Texas shall not exceed 50 each (except as provided for in paragraph (h)(8)(ii)(F)(*3*) of this section).

(*2*) For each fiscal year, the number of visas issued to the states not listed in paragraph (h)(8)(ii)(F)(*1*) of this section shall not exceed 25 each (except as provided for in paragraph (h)(8)(ii)(F)(*3*) of this section).

(*3*) If the total number of visas available during the first three quarters of a fiscal year exceeds the number of approvable H–1C petitions during those quarters, visas may be issued during the last quarter of the fiscal year to nurses who will be working in a state whose cap has already been reached for that fiscal year.

(*4*) When an approved H–1C petition is not used because the alien(s) does not obtain H–1C classification, e.g., the alien is never admitted to the United States, or the alien never worked for the facility, the facility must notify the Service according to the instructions contained in paragraph (h)(11)(ii) of this section. The Service will subtract H–1C petitions approved in the current fiscal year that are later revoked from the total count of approved H–1C petitions, provided that the alien never commenced employment with the facility.

(*5*) If the number of alien nurses included in an H–1C petition exceeds the number available for the remainder of a fiscal year, the Service shall approve the petition for the beneficiaries to the allowable amount in the order that they are listed on the petition. The remaining beneficiaries will be considered for approval in the subsequent fiscal year.

(*6*) Once the 500 cap has been reached, the Service will reject any new petitions subsequently filed requesting a work start date prior to the first day of the next fiscal year.

(F) *Cap exemptions under sections 214(g)(5)(A) and (B) of the Act.* An alien is not subject to the numerical limitations identified in section 214(g)(1)(A) of the Act if the alien qualifies for an exemption under section 214(g)(5) of the Act. For purposes of section 214(g)(5)(A) and (B) of the Act:

(*1*) ''Institution of higher education'' has the same definition as described at section 101(a) of the Higher Education Act of 1965 (20 U.S.C. 1001(a)).

(*2*) A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if it satisfies any one of the following conditions:

(*i*) The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;

(*ii*) The nonprofit entity is operated by an institution of higher education;

(*iii*) The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or

(*iv*) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education.

(*3*) An entity is considered a ''nonprofit entity'' if it meets the definition described at paragraph (h)(19)(iv) of this section. ''Nonprofit research organization'' and ''governmental research organization'' have the same definitions as described at paragraph (h)(19)(iii)(C) of this section.

(*4*) An H–1B beneficiary who is not directly employed by a qualifying institution, organization or entity identified in section 214(g)(5)(A) or (B) of the Act shall qualify for an exemption under such section if the H–1B beneficiary will spend the majority of his or her work time performing job duties at a qualifying institution, organization or entity and those job duties directly and predominately further the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity, namely, either higher education, nonprofit research or government research. The burden is on the H–1B petitioner to establish that there is a nexus between the duties to be performed by the H–1B beneficiary and the essential purpose, mission, objectives or functions of the qualifying institution, organization or entity.

(*5*) If cap-exempt employment ceases, and if the alien is not the beneficiary of a new cap-exempt petition, then the alien will be subject to the cap if not previously counted within the 6-year period of authorized admission to which the cap-exempt employment applied. If cap-exempt employment converts to cap-subject employment subject to the numerical limitations in section 214(g)(1)(A) of the Act, USCIS may revoke the petition authorizing such employment consistent with paragraph (h)(11)(iii) of this section.

(*6*) Concurrent H–1B employment in a cap-subject position of an alien that qualifies for an exemption under section 214(g)(5)(A) or (B) of the Act shall not subject the alien to the numerical limitations in section 214(g)(1)(A) of the Act. When petitioning for concurrent cap-subject H–1B employment, the petitioner must demonstrate that the H–1B beneficiary is employed in valid H–1B status under a cap exemption under section 214(g)(5)(A) or (B) of the Act, the beneficiary's employment with the cap-exempt employer is expected to continue after the new cap-subject petition is approved, and the beneficiary can reasonably and concurrently perform the work described in each employer's respective positions.

(*i*) Validity of a petition for concurrent cap-subject H–1B employment approved under paragraph (h)(8)(ii)(F)(*6*) of this section cannot extend beyond the period of validity specified for the cap-exempt H–1B employment.

(*ii*) If H–1B employment subject to a cap exemption under section 214(g)(5)(A) or (B) of the Act is terminated by a petitioner, or otherwise ends before the end of the validity period listed on the approved petition filed on the alien's behalf, the alien who is concurrently employed in a cap-subject position becomes subject to the numerical limitations in section 214(g)(1)(A) of the Act, unless the alien was previously counted with respect to the 6-year period of authorized H–1B admission to which the petition applies or another exemption applies. If such an alien becomes subject to the numerical limitations in section 214(g)(1)(A) of the Act, USCIS may revoke the cap-subject petition described in paragraph (h)(8)(ii)(F)(*6*) of this section consistent with paragraph (h)(11)(iii) of this section.

(9) *Approval and validity of petition*—(i) *Approval.* The director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication. The director shall notify the petitioner of the approval of the petition on Form I–797, Notice of Action. The approval shall be as follows:

(A) The approval notice shall include the beneficiary's(ies') name(s) and classification and the petition's period of validity. A petition for more than one beneficiary and/or multiple services may be approved in whole or in part.

The approval notice shall cover only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

(B) The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services or training, except that an H–2B petition for a temporary nonagricultural worker may not be filed or approved more than 120 days before the date of the actual need for the beneficiary's temporary nonagricultural services that is identified on the temporary labor certification.

(ii) *Recording the validity of petitions.* Procedures for recording the validity period of petitions are:

(A) If a new H petition is approved before the date the petitioner indicates that the services or training will begin, the approved petition and approval notice shall show the actual dates requested by the petitoner as the validity period, not to exceed the limits specified by paragraph (h)(9)(iii) of this section or other Service policy.

(B) If a new H petition is approved after the date the petitioner indicates that the services or training will begin, the aproved petition and approval notice shall show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed either the limits specified by paragraph (h)(9)(iii) of this section or other Service policy.

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

(iii) *Validity.* The initial approval period of an H petition shall conform to the limits prescribed as follows:

(A)(*1*) *H–1B petition in a specialty occupation.* An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application.

(*2*) *H–1B petition involving a DOD research and development or coproduction project.* An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien involved in a DOD research and development project or a coproduction project shall be valid for a period of up to five years.

(*3*) *H–1B petition involving an alien of distinguished merit and ability in the field of fashion modeling.* An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien of distinguished merit and ability in the field of fashion modeling shall be valid for a period of up to three years.

(B) *H–2B petition.* The approval of the petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act shall be valid for the period of the approved temporary labor certification.

(C)(*1*) *H–3 petition for alien trainee.* An approved petition for an alien trainee classified under section 101(a)(15)(H)(iii) of the Act shall be valid for a period of up to two years.

(*2*) *H–3 petition for alien participant in a special education training program.* An approved petition for an alien classified under section 101(a)(15)(H)(iii) of the Act as a participant in a special education exchange visitor program shall be valid for a period of up to 18 months.

(D) *H–1C petition for a registered nurse.* An approved petition for an alien classified under section 101(a)(15)(H)(i)(c) of the Act shall be valid for a period of 3 years.

(iv) *H–4 dependents.* The spouse and children of an H nonimmigrant, if they are accompanying or following to join such H nonimmigrant in the United States, may be admitted, if otherwise admissible, as H–4 nonimmigrants for the same period of admission or extension as the principal spouse or parent. H–4 nonimmigrant status does not confer eligibility for employment authorization incident to status. An H–4 nonimmigrant spouse of an H–1B nonimmigrant may be eligible for employment authorization only if the H–1B nonimmigrant is the beneficiary of an approved Immigrant Petition for Alien Worker, or successor form, or the H–1B nonimmigrant's period of stay in H–1B status is authorized in the United States under sections 106(a) and (b) of the American Competitiveness in the Twenty-first Century Act of 2000 (AC21), Public Law 106–313, as amended

by the 21st Century Department of Justice Appropriations Authorization Act, Public Law 107–273 (2002). To request employment authorization, an eligible H–4 nonimmigrant spouse must file an Application for Employment Authorization, or a successor form, in accordance with 8 CFR 274a.13 and the form instructions. An Application for Employment Authorization must be accompanied by documentary evidence establishing eligibility, including evidence of the spousal relationship and that the principal H–1B is the beneficiary of an approved Immigrant Petition for Alien Worker or has been provided H–1B status under sections 106(a) and (b) of AC21, as amended by the 21st Century Department of Justice Appropriations Authorization Act, the H–1B beneficiary is currently in H–1B status, and the H–4 nonimmigrant spouse is currently in H–4 status.

(10) *Denial of petition*—(i) *Multiple beneficiaries.* A petition for multiple beneficiaries may be denied in whole or in part.

(ii) *Notice of denial.* The petitioner shall be notified of the reasons for the denial and of the right to appeal the denial of the petition under 8 CFR part 103. The petition will be denied if it is determined that the statements on the petition were inaccurate, fraudulent, or misrepresented a material fact. There is no appeal from a decision to deny an extension of stay to the alien.

(11) *Revocation of approval of petition*—(i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which 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 should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the director who approved the petition. However, H–2A and H–2B petitioners must send notification to DHS pursuant to paragraphs (h)(5)(vi) and (h)(6)(i)(F) of this section respectively.

(B) The director may revoke a petition at any time, even after the expiration of the petition.

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

(iii) *Revocation on notice*—(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition, or if the beneficiary is no longer receiving training as specified in the petition; or

(*2*) The statement of facts contained in the petition or on the application for a temporary labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact; or

(*3*) The petitioner violated terms and conditions of the approved petition; or

(*4*) The petitioner violated requirements of section 101(a)(15)(H) of the Act or paragraph (h) of this section; or

(*5*) The approval of the petition violated pargraph (h) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall 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 shall 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 shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

(12) *Appeal of a denial or a revocation of a petition*—(i) *Denial.* A petition denied in whole or in part may be appealed under part 103 of this chapter.

(ii) *Revocation.* A petition that has been revoked on notice in whole or in part may be appealed under part 103 of this chapter. Automatic revocations may not be appealed.

(13) *Admission*—(i) *General.* (A) Except as set forth in 8 CFR 214.1(l) with respect to H–1B beneficiaries and their

dependents and paragraph (h)(5)(viii)(B) of this section with respect to H–2A beneficiaries, a beneficiary shall 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.

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. A certain period of absence from the United States of H–2A and H–2B aliens can interrupt the accrual of time spent in such status against the 3-year limit set forth in 8 CFR 214.2(h)(13)(iv). The petitioner shall provide information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to reside abroad.

(ii) *H–1C limitation on admission*. The maximum period of admission for an H–1C nonimmigrant alien is 3 years. The maximum period of admission for an H–1C alien begins on the date the H–1C alien is admitted to the United and ends on the third anniversary of the alien's admission date. Periods of time spent out of the United States for business or personal reasons during the validity period of the H–1C petition count towards the alien's maximum period of admission. When an H–1C alien has reached the 3-year maximum period of admission, the H–1C alien is no longer eligible for admission to the United States as an H–1C nonimmigrant alien.

(iii) *H–1B limitation on admission*—(A) *Alien in a specialty occupation or an alien of distinguished merit and ability in the field of fashion modeling*. An H–1B alien in a specialty occupation or an alien of distinguished merit and ability who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

(B) *Alien involved in a DOD research and development or coproduction project*. An H–1B alien involved in a DOD research and development or coproduction project who has spent 10 years in the United States under section 101(a)(15) (H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15) (H) or (L) of the Act to perform services involving a DOD research and development project or coproduction project. A new petition or change of status under section 101(a)(15) (H) or (L) of the Act may not be approved for such an alien unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.

(C) *Calculating the maximum H–1B admission period*. Time spent physically outside the United States exceeding 24 hours by an alien during the validity of an H–1B petition that was approved on the alien's behalf shall not be considered for purposes of calculating the alien's total period of authorized admission under section 214(g)(4) of the Act, regardless of whether such time meaningfully interrupts the alien's stay in H–1B status and the reason for the alien's absence. Accordingly, such remaining time may be recaptured in a subsequent H–1B petition on behalf of the alien, at any time before the alien uses the full period of H–1B admission described in section 214(g)(4) of the Act.

(*1*) It is the H–1B petitioner's burden to request and demonstrate the specific amount of time for recapture on behalf of the beneficiary. The beneficiary may provide appropriate evidence, such as copies of passport stamps, Arrival-Departure Records (Form I–94), or airline tickets, together with a chart, indicating the dates spent outside of the

United States, and referencing the relevant independent documentary evidence, when seeking to recapture the alien's time spent outside the United States. Based on the evidence provided, USCIS may grant all, part, or none of the recapture period requested.

(*2*) If the beneficiary was previously counted toward the H–1B numerical cap under section 214(g)(1) of the Act with respect to the 6-year maximum period of H–1B admission from which recapture is sought, the H–1B petition seeking to recapture a period of stay as an H–1B nonimmigrant will not subject the beneficiary to the H–1B numerical cap, whether or not the alien has been physically outside the United States for 1 year or more and would be otherwise eligible for a new period of admission under such section of the Act. An H–1B petitioner may either seek such recapture on behalf of the alien or, consistent with paragraph (h)(13)(iii) of this section, seek a new period of admission on behalf of the alien under section 214(g)(1) of the Act.

(D) *Lengthy adjudication delay exemption from 214(g)(4) of the Act.* (*1*) An alien who is in H–1B status or has previously held H–1B status is eligible for H–1B status beyond the 6-year limitation under section 214(g)(4) of the Act, if at least 365 days have elapsed since:

(*i*) The filing of a labor certification with the Department of Labor on the alien's behalf, if such certification is required for the alien to obtain status under section 203(b) of the Act; or

(*ii*) The filing of an immigrant visa petition with USCIS on the alien's behalf to accord classification under section 203(b) of the Act.

(*2*) H–1B approvals under paragraph (h)(13)(iii)(D) of this section may be granted in up to 1-year increments until either the approved permanent labor certification expires or a final decision has been made to:

(*i*) Deny the application for permanent labor certification, or, if approved, to revoke or invalidate such approval;

(*ii*) Deny the immigrant visa petition, or, if approved, revoke such approval;

(*iii*) Deny or approve the alien's application for an immigrant visa or application to adjust status to lawful permanent residence; or

(*iv*) Administratively or otherwise close the application for permanent labor certification, immigrant visa petition, or application to adjust status.

(*3*) *No final decision while appeal available or pending.* A decision to deny or revoke an application for labor certification, or to deny or revoke the approval of an immigrant visa petition, will not be considered final under paragraph (h)(13)(iii)(D)(*2*)(*i*) or (*ii*) of this section during the period authorized for filing an appeal of the decision, or while an appeal is pending.

(*4*) *Substitution of beneficiaries.* An alien who has been replaced by another alien, on or before July 16, 2007, as the beneficiary of an approved permanent labor certification may not rely on that permanent labor certification to establish eligibility for H–1B status based on this lengthy adjudication delay exemption. Except for a substitution of a beneficiary that occurred on or before July 16, 2007, an alien establishing eligibility for this lengthy adjudication delay exemption based on a pending or approved labor certification must be the named beneficiary listed on the permanent labor certification.

(*5*) *Advance filing.* A petitioner may file an H–1B petition seeking a lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section within 6 months of the requested H–1B start date. The petition may be filed before 365 days have elapsed since the labor certification application or immigrant visa petition was filed with the Department of Labor or USCIS, respectively, provided that the application for labor certification or immigrant visa petition must have been filed at least 365 days prior to the date the period of admission authorized under this exemption will take effect. The petitioner may request any time remaining to the beneficiary under the maximum period of admission described at section 214(g)(4) of the Act along with the exemption request, but in no case may the approved H–1B period of validity exceed the limits specified by paragraph (h)(9)(iii) of this section. Time remaining to the beneficiary under the maximum period of admission described at section 214(g)(4) of the Act may include any request to

recapture unused H–1B, L–1A, or L–1B time spent outside of the United States.

(*6*) *Petitioners seeking exemption*. The H–1B petitioner need not be the employer that filed the application for labor certification or immigrant visa petition that is used to qualify for this exemption.

(*7*) *Subsequent exemption approvals after the 7th year*. The qualifying labor certification or immigrant visa petition need not be the same as that used to qualify for the initial exemption under paragraph (h)(13)(iii)(D) of this section.

(*8*) *Aggregation of time not permitted*. A petitioner may not aggregate the number of days that have elapsed since the filing of one labor certification or immigrant visa petition with the number of days that have elapsed since the filing of another such application or petition to meet the 365-day requirement.

(*9*) *Exemption eligibility*. Only a principal beneficiary of a nonfrivolous labor certification application or immigrant visa petition filed on his or her behalf may be eligible under paragraph (h)(13)(iii)(D) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

(*10*) *Limits on future exemptions from the lengthy adjudication delay*. An alien is ineligible for the lengthy adjudication delay exemption under paragraph (h)(13)(iii)(D) of this section if the alien is the beneficiary of an approved petition under section 203(b) of the Act and fails to file an adjustment of status application or apply for an immigrant visa within 1 year of an immigrant visa being authorized for issuance based on his or her preference category and country of chargeability. If the accrual of such 1-year period is interrupted by the unavailability of an immigrant visa, a new 1-year period shall be afforded when an immigrant visa again becomes immediately available. USCIS may excuse a failure to file in its discretion if the alien establishes that the failure to apply was due to circumstances beyond his or her control. The limitations described in this paragraph apply to any approved immigrant visa petition under section 203(b) of the Act, including petitions withdrawn by the petitioner or those filed by a petitioner whose business terminates 180 days or more after approval.

(E) *Per-country limitation exemption from section 214(g)(4) of the Act*. An alien who currently maintains or previously held H–1B status, who is the beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act, and who is eligible to be granted that immigrant status but for application of the per country limitation, is eligible for H–1B status beyond the 6-year limitation under section 214(g)(4) of the Act. The petitioner must demonstrate such visa unavailability as of the date the H–1B petition is filed with USCIS.

(*1*) *Validity periods*. USCIS may grant validity periods for petitions approved under this paragraph in increments of up to 3 years for as long as the alien remains eligible for this exemption.

(*2*) H–1B approvals under paragraph (h)(13)(iii)(E) of this section may be granted until a final decision has been made to:

(*i*) Revoke the approval of the immigrant visa petition; or

(*ii*) Approve or deny the alien's application for an immigrant visa or application to adjust status to lawful permanent residence.

(*3*) *Current H–1B status not required*. An alien who is not in H–1B status at the time the H–1B petition on his or her behalf is filed, including an alien who is not in the United States, may seek an exemption of the 6-year limitation under 214(g)(4) of the Act under this clause, if otherwise eligible.

(*4*) *Subsequent petitioners may seek exemptions*. The H–1B petitioner need not be the employer that filed the immigrant visa petition that is used to qualify for this exemption. An H–1B petition may be approved under paragraph (h)(13)(iii)(E) of this section with respect to any approved immigrant visa petition, and a subsequent H–1B petition may be approved with respect to a different approved immigrant visa petition on behalf of the same alien.

(*5*) *Advance filing*. A petitioner may file an H–1B petition seeking a per-country limitation exemption under paragraph (h)(13)(iii)(E) of this section within 6 months of the requested H–1B start date. The petitioner may request

any time remaining to the beneficiary under the maximum period of admission described in section 214(g)(4) of the Act along with the exemption request, but in no case may the H–1B approval period exceed the limits specified by paragraph (h)(9)(iii) of this section.

(*6*) *Exemption eligibility*. Only the principal beneficiary of an approved immigrant visa petition for classification under section 203(b)(1), (2), or (3) of the Act may be eligible under paragraph (h)(13)(iii)(E) of this section for an exemption to the maximum period of admission under section 214(g)(4) of the Act.

(iv) *H–2B and H–3 limitation on admission*. An H–2B alien who has spent 3 years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediately preceding 3 months. An H–3 alien participant in a special education program who has spent 18 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act; and an H–3 alien trainee who has spent 24 months in the United States under sections 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

(v) *Exceptions*. The limitations in paragraphs (h)(13)(iii) through (h)(13)(iv) of this section shall not apply to H–1B, H–2B, and H–3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of 6 months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. An absence from the United States can interrupt the accrual of time spent as an H–2B nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least two months. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

(14) *Extension of visa petition validity*. The petitioner shall 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.

(15) *Extension of stay*—(i) *General*. The petitioner shall apply for extension of an alien's stay in the United States by filing a petition extension on Form I–129 accompanied by the documents described for the particular classification in paragraph (h)(15)(ii) of this section. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time of the filing of the extension of stay. Even though the requests to extend the petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa. When the total period of stay in an H classification has been reached, no further extensions may be granted.

(ii) *Extension periods*—(A) *H–1C extension of stay*. The maximum period of admission for an H–1C alien is 3 years. An H–1C alien who was initially admitted to the United States for less than 3 years may receive an extension of stay up to the third anniversary date of his

or her initial admission. An H–1C nonimmigrant may not receive an extension of stay beyond the third anniversary date of his or her initial admission to the United States.

(B) *H–1B extension of stay—(1) Alien in a specialty occupation or an alien of distinguished merit and ability in the field of fashion modeling.* An extension of stay may be authorized for a period of up to three years for a beneficiary of an H–1B petition in a specialty occupation or an alien of distinguished merit and ability. The alien's total period of stay may not exceed six years. The request for extension must be accompanied by either a new or a photocopy of the prior certification from the Department of Labor that the petitioner continues to have on file a labor condition application valid for the period of time requested for the occupation.

(*2*) *Alien in a DOD research and development or coproduction project.* An extension of stay may be authorized for a period up to five years for the beneficiary of an H–1B petition involving a DOD research and development project or coproduction project. The total period of stay may not exceed 10 years.

(C) *H–2A or H–2B extension of stay.* An extension of stay for the beneficiary of an H–2A or H–2B petition may be authorized for the validity of the labor certification or for a period of up to one year, except as provided for in paragraph (h)(5)(x) of this section. The alien's total period of stay as an H–2A or H–2B worker may not exceed three years, except that in the Virgin Islands, the alien's total period of stay may not exceed 45 days.

(D) *H–3 extension of stay.* An extension of stay may be authorized for the length of the training program for a total period of stay as an H–3 trainee not to exceed two years, or for a total period of stay as a participant in a special education training program not to exceed 18 months.

(16) *Effect of approval of a permanent labor certification or filing of a preference petition on H classification*—(i) *H–1B or H–1C classification.* The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an H–1C or H–1B petition or a request to extend such a petition, or the alien's admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as an H–1C or H–1B nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

(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, shall be a reason, by itself, to deny the alien's extension of stay.

(17) *Effect of a strike.* (i) If the Secretary of Labor certifies to the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation and at the place where the beneficiary is to be employed or trained, and that the employment of training of the beneficiary would adversely affect the wages and working conditions of U.S. citizens and lawful resident workers:

(A) A petition to classify an alien as a nonimmigrant as defined in section 101(a)(15)(H) of the Act shall be denied.

(B) If a petition has already been approved, but the alien has not yet entered the United States, or has entered the United States but has not commenced the employment, the approval of the petition is automatically suspended, and the application for admission on the basis of the petition shall be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (h)(17)(i), the Commissioner shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commenced employment in the United States under an approved petition and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future

participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other H nonimmigrants;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(C) Although participation by an H nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(18) *Use of approval notice, Form I–797.* The Service shall notify the petitioner on Form I–797 whenever a visa petition, an extension of a visa petition, or an alien's extension of stay is approved under the H classification. 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 to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I–797 shall be retained by the beneficiary and presented during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

(19) *Additional fee for filing certain H–1B petitions.* (i) A United States employer (other than an exempt employer defined in paragraph (h)(19)(iii) of this section, or an employer filing a petition described in paragraph (h)(19)(v) of this section) who files a Petition for Nonimmigrant Worker (Form I–129) must include the additional American Competitiveness and Workforce Improvement Act (ACWIA) fee referenced in §103.7(b)(1) of this chapter, if the petition is filed for any of the following purposes:

(A) An initial grant of H–1B status under section 101(a)(15)(H)(i)(b) of the Act;

(B) An initial extension of stay, as provided in paragraph (h)(15)(i) of this section; or

(C) Authorization for a change in employers, as provided in paragraph (h)(2)(i)(D) of this section.

(ii) A petitioner must submit with the petition the ACWIA fee, and any other applicable fees, in accordance with §103.7 of this chapter, and form instructions. Payment of all applicable fees must be made at the same time, but the petitioner may submit separate checks. USCIS will accept payment of the ACWIA fee only from the United States employer or its representative of record, as defined in 8 CFR 103.2(a) and 8 CFR part 292.

(iii) The following exempt organizations are not required to pay the additional fee:

(A) *An institution of higher education,* as defined in section 101(a) of the Higher Education Act of 1965;

(B) *An affiliated or related nonprofit entity.* A nonprofit entity shall be considered to be related to or affiliated with an institution of higher education if it satisfies any one of the following conditions:

(*1*) The nonprofit entity is connected to or associated with an institution of higher education through shared ownership or control by the same board or federation;

(*2*) The nonprofit entity is operated by an institution of higher education;

(*3*) The nonprofit entity is attached to an institution of higher education as a member, branch, cooperative, or subsidiary; or

(*4*) The nonprofit entity has entered into a formal written affiliation agreement with an institution of higher education that establishes an active working relationship between the nonprofit entity and the institution of higher education for the purposes of research or education, and a fundamental activity of the nonprofit entity is to directly contribute to the research or education mission of the institution of higher education;

(C) *A nonprofit research organization or governmental research organization.* A nonprofit research organization is an organization that is primarily engaged in basic research and/or applied research. A governmental research organization is a federal, state, or local entity whose primary mission is the performance or promotion of basic research and/or applied research. Basic research is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind. Basic research is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest. It may include research and investigation in the sciences, social sciences, or humanities. Applied research is research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met. Applied research includes investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services. It may include research and investigation in the sciences, social sciencies, or humanities;

(D) A primary or secondary education institution; or

(E) A nonprofit entity which engages in an established curriculum-related clinical training of students registered at an institution of higher education.

(iv) *Non-profit or tax exempt organizations.* For purposes of paragraphs (h)(19)(iii) (B) and (C) of this section, a nonprofit organization or entity is:

(A) Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6), and

(B) Has been approved as a tax exempt organization for research or educational purposes by the Internal Revenue Service.

(v) *Filing situations where the* American Competitiveness and Workforce Improvement Act of 1998 (*ACWIA) fee is not required.* The ACWIA fee is not required if:

(A) The petition is an amended H–1B petition that does not contain any requests for an extension of stay;

(B) The petition is an H–1B petition filed for the sole purpose of correcting a Service error; or

(C) The petition is the second or subsequent request for an extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the ACWIA fee was paid on the initial petition or the first extension of stay.

(vi) *ACWIA fee exemption evidence.* (A) Employer claiming to be exempt. An employer claiming to be exempt from the ACWIA fee must file a Petition for Nonimmigrant Worker (Form I–129), in accordance with the form instructions, including supporting evidence establishing that it meets one of the exemptions described at paragraph (h)(19)(iii) of this section. A United States employer claiming an exemption from the ACWIA fee on the basis that it is a non-profit research organization must submit evidence that it has tax exempt status under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6), 26 U.S.C. 501(c)(3), (c)(4) or (c)(6). All other employers claiming an exemption must submit a statement describing why the organization or entity is exempt.

(B) Exempt filing situations. Any non-exempt employer who claims that the ACWIA fee does not apply with respect to a particular filing for one of the reasons described in paragraph (h)(19)(v) of this section must indicate why the ACWIA fee is not required.

(20) *Retaliatory action claims.* If credible documentary evidence is provided in support of a petition seeking an extension of H–1B stay in or change of status to another classification indicating that the beneficiary faced retaliatory action from his or her employer based on a report regarding a violation of that employer's labor condition application obligations under section 212(n)(2)(C)(iv) of the Act, USCIS may consider a loss or failure to maintain H–1B status by the beneficiary related to such violation as due to, and commensurate with, ''extraordinary circumstances'' as defined by § 214.1(c)(4) and 8 CFR 248.1(b).

(i) *Representatives of information media.* The admission of an alien of the class defined in section 101(a)(15)(I) of the Act constitutes an agreement by

the alien not to change the information medium or his or her employer until he or she obtains permission to do so from the district director having jurisdiction over his or her residence. An alien classified as an information media nonimmigrant (I) may be authorized admission for the duration of employment.

(j) *Exchange aliens*—(1) *General*—(i) *Eligibility for admission*. A nonimmigrant exchange visitor and his or her accompanying spouse and minor children may be admitted into the United States in J–1 and J–2 classifications under section 101(a)(15)(J) of the Act, if the exchange visitor and his or her accompanying spouse and children each presents a SEVIS Form DS–2019 issued in his or her own name by a program approved by the Department of State for participation by J–1 exchange visitors. Prior to August 1, 2003, if exigent circumstances are demonstrated, the Service will allow the dependent of an exchange visitor possessing a SEVIS Form DS–2019 to enter the United States using a copy of the exchange visitor's SEVIS Form DS–2019. However, where the exchange visitor presents a properly completed Form DS–2019, Certificate of Eligibility for Exchange Visitor (J–1) Status, which was issued to the J–1 exchange visitor by a program approved by the Department of State for participation by exchange visitors and which remains valid for the admission of the exchange visitor, the accompanying spouse and children may be admitted on the basis of the J–1's non-SEVIS Form DS–2019.

(ii) *Admission period*. An exchange alien, and J–2 spouse and children, may be admitted for a period up to 30 days before the report date or start of the approved program listed on Form DS–2019. The initial admission of an exchange visitor, spouse and children may not exceed the period specified on Form DS–2019, plus a period of 30 days for the purposes of travel or for the period designated by the Commissioner as provided in paragraph (j)(1)(vi) of this section. Regulations of the Department of State published at 22 CFR part 62 give general limitations on the stay of the various classes of exchange visitors. A spouse or child may not be admitted for longer than the principal exchange visitor.

(iii) *Readmission*. An exchange alien may be readmitted to the United States for the remainder of the time authorized on Form I–94, without presenting Form IAP–66, if the alien is returning from a visit solely to foreign contiguous territory or adjacent islands after an absence of less than 30 days and if the original Form I–94 is presented. All other exchange aliens must present a valid Form IAP–66. An original Form IAP–66 or copy three (the pink copy) of a previously issued form presented by an exchange alien returning from a temporary absence shall be retained by the exchange alien for re-entries during the balance of the alien's stay.

(iv) *Extensions of Stay*. If an exchange alien requires an extension beyond the initial admission period, the alien shall apply by submitting a new Form DS–2019 which indicates the date to which the alien's program is extended. The extension may not exceed the period specified on Form DS–2019, plus a period of 30 days for the purpose of travel. Extensions of stay for the alien's spouse and children require, as an attachment to Form DS–2019, Form I–94 for each dependent, and a list containing the names of the applicants, dates and places of birth, passport numbers, issuing countries, and expiration dates. An accompanying spouse or child may not be granted an extension of stay for longer than the principal exchange alien.

(v) *Employment*. (A) The accompanying spouse and minor children of a J–1 exchange visitor may accept employment only with authorization by the Immigration and Naturalization Service. A request for employment authorization must be made on Form I–765, Application for Employment Authorization, with fee, as required by the Service, to the district director having jurisdiction over the J–1 exchange visitor's temporary residence in the United States. Income from the spouse's or dependent's employment may be used to support the family's customary recreational and cultural activities and related travel, among other things. Employment will not be

authorized if this income is needed to support the J–1 principal alien.

(B) J–2 employment may be authorized for the duration of the J–1 principal alien's authorized stay as indicated on Form I–94 or a period of four years, whichever is shorter. The employment authorization is valid only if the J–1 is maintaining status. Where a J–2 spouse or dependent child has filed a timely application for extension of stay, only upon approval of the request for extension of stay may he or she apply for a renewal of the employment authorization on a Form I–765 with the required fee.

(vi) *Extension of duration of status.* The Commissioner may, by notice in the FEDERAL REGISTER, at any time she determines that the H–1B numerical limitation as described in section 214(g)(1)(A) of the Act will likely be reached prior to the end of a current fiscal year, extend for such a period of time as the Commissioner deems necessary to complete the adjudication of the H–1B application, the duration of status of any J–1 alien on behalf of whom an employer has timely filed an application for change of status to H–1B. The alien, in accordance with 8 CFR part 248, must not have violated the terms of his or her nonimmigrant stay and is not subject to the 2-year foreign residence requirement at 212(e) of the Act. Any J–1 student whose duration of status has been extended shall be considered to be maintaining lawful nonimmigrant status for all purposes under the Act, provided that the alien does not violate the terms and conditions of his or her J nonimmigrant stay. An extension made under this paragraph also applies to the J–2 dependent aliens.

(vii) *Use of SEVIS.* At a date to be established by the Department of State, the use of the Student and Exchange Visitor Information System (SEVIS) will become mandatory for designated program sponsors. After that date, which will be announced by publication in the FEDERAL REGISTER, all designated program sponsors must begin issuance of the SEVIS Form DS–2019.

(viii) *Current name and address.* A J–1 exchange visitor must inform the Service and the responsible officer of the exchange visitor program of any legal changes to his or her name or of any change of address, within 10 days of the change, in a manner prescribed by the program sponsor. A J–1 exchange visitor enrolled in a SEVIS program can satisfy the requirement in 8 CFR 265.1 of notifying the Service by providing a notice of a change of address within 10 days to the responsible officer, who in turn shall enter the information in SEVIS within 21 days of notification by the exchange visitor. A J–1 exchange visitor enrolled at a non-SEVIS program must submit a change of address to the Service, as provided in 8 CFR 265.1, within 10 days of the change. Except in the case of an exchange visitor who cannot receive mail where he or she resides, the address provided by the exchange visitor must be the actual physical location where the exchange visitor resides rather than a mailing address. In cases where an exchange visitor provides a mailing address, the exchange visitor program must maintain a record of, and must provide upon request from the Service, the actual physical location where the exchange visitor resides.

(2) *Special reporting requirement.* Each exchange alien participating in a program of graduate medical education or training shall file Form I–644 (Supplementary Statement for Graduate Medical Trainees) annually with the Service attesting to the conditions as specified on the form. The exchange alien shall also submit Form I–644 as an attachment to a completed Form DS–2019 when applying for an extension of stay.

(3) *Alien in cancelled programs.* When the approval of an exchange visitor program is withdrawn by the Director of the United States Information Agency, the district director shall send a notice of the withdrawal to each participant in the program and a copy of each such notice shall be sent to the program sponsor. If the exchange visitor is currently engaged in activities authorized by the cancelled program, the participant is authorized to remain in the United States to engage in those activities until expiration of the period of stay previously authorized. The district director shall notify participants in cancelled programs that permission to remain in the United States as an exchange visitor, or extension of stay

may be obtained if the participant is accepted in another approved program and a Form DS–2019, executed by the new program sponsor, is submitted. In this case, a release from the sponsor of the cancelled program will not be required.

(4) *Eligibility requirements for section 101(a)(15)(J) classification for aliens desiring to participate in programs under which they will receive graduate medical education or training*—(i) *Requirements.* Any alien coming to the United States as an exchange visitor to participate in a program under which the alien will receive graduate medical education or training, or any alien seeking to change nonimmigrant status to that of an exchange visitor on Form I–506 for that purpose, must have passed parts of I and II of the National Board of Medical Examiners Examination (or an equivalent examination as determined by the Secretary of Health and Human Services), and must be competent in oral and written English, and shall submit a completely executed and valid Form DS–2019.

(ii) *Exemptions.* From January 10, 1978 until December 31, 1983, any alien who has come to or seeks to come to the United States as an exchange visitor to participate in an accredited program of graduate medical education or training, or any alien who seeks to change nonimmigrant status for that purpose, may be admitted to participate in such program without regard to the requirements stated in subparagraphs (A) and (B)(ii)(I) of section 212(j)(1) of the Act if a substantial disruption in the health services provided by such program would result from not permitting the alien to participate in the program: *Provided* that the exemption will not increase the total number of aliens then participating in such programs to a level greater than that participating on January 10, 1978.

(5) *Remittance of the fee.* An alien who applies for J–1 nonimmigrant status in order to commence participation in a Department of State-designated exchange visitor program is required to pay the SEVIS fee to DHS, pursuant to 8 CFR 214.13, except as otherwise provided in that section.

(k) *Spouses, Fiancées, and Fiancés of United States Citizens*—(1) *Petition and supporting documents.* To be classified as a fiance or fiancee as defined in section 101(a)(15)(K)(i) of the Act, an alien must be the beneficiary of an approved visa petition filed on Form I–129F. A copy of a document submitted in support of a visa petition filed pursuant to section 214(d) of the Act and this paragraph may be accepted, though unaccompanied by the original, if the copy bears a certification by an attorney, typed or rubber-stamped, in the language set forth in § 204.2(j) of this chapter. However, the original document shall be submitted if requested by the Service.

(2) *Requirement that petitioner and K–1 beneficiary have met.* The petitioner shall establish to the satisfaction of the director that the petitioner and K–1 beneficiary have met in person within the two years immediately preceding the filing of the petition. As a matter of discretion, the director may exempt the petitioner from this requirement only if it is established that compliance would result in extreme hardship to the petitioner or that compliance would violate strict and long-established customs of the K–1 beneficiary's foreign culture or social practice, as where marriages are traditionally arranged by the parents of the contracting parties and the prospective bride and groom are prohibited from meeting subsequent to the arrangement and prior to the wedding day. In addition to establishing that the required meeting would be a violation of custom or practice, the petitioner must also establish that any and all other aspects of the traditional arrangements have been or will be met in accordance with the custom or practice. Failure to establish that the petitioner and K–1 beneficiary have met within the required period or that compliance with the requirement should be waived shall result in the denial of the petition. Such denial shall be without prejudice to the filing of a new petition once the petitioner and K–1 beneficiary have met in person.

(3) *Children of beneficiary.* Without the approval of a separate petition on his or her behalf, a child of the beneficiary (as defined in section 101(b)(1)(A), (B), (C), (D), or (E) of the

Act) may be accorded the same nonimmigrant classification as the beneficiary if accompanying or following to join him or her.

(4) *Notification*. The petitioner shall be notified of the decision and, if the petition is denied, of the reasons therefor and of the right to appeal in accordance with the provisions of part 103 of this chapter.

(5) *Validity*. The approval of a petition under this paragraph shall be valid for a period of four months. A petition which has expired due to the passage of time may be revalidated by a director or a consular officer for a period of four months from the date of revalidation upon a finding that the petitioner and K–1 beneficiary are free to marry and intend to marry each other within 90 days of the beneficiary's entry into the United States. The approval of any petition is automatically terminated when the petitioner dies or files a written withdrawal of the petition before the beneficiary arrives in the United States.

(6) *Adjustment of status from nonimmigrant to immigrant*.

(i) [Reserved]

(ii) *Nonimmigrant visa issued on or after November 10, 1986*. Upon contracting a valid marriage to the petitioner within 90 days of his or her admission as a nonimmigrant pursuant to a valid K–1 visa issued on or after November 10, 1986, the K–1 beneficiary and his or her minor children may apply for adjustment of status to lawful permanent resident under section 245 of the Act. Upon approval of the application the director shall record their lawful admission for permanent residence in accordance with that section and subject to the conditions prescribed in section 216 of the Act.

(7) *Eligibility, petition and supporting documents for K–3/K–4 classification*. To be classified as a K–3 spouse as defined in section 101(a)(15)(k)(ii) of the Act, or the K–4 child of such alien defined in section 101(a)(15)(K)(iii) of the Act, the alien spouse must be the beneficiary of an immigrant visa petition filed by a U.S. citizen on Form I–130, Petition for Alien Relative, and the beneficiary of an approved petition for a K–3 nonimmigrant visa filed on Form I–129F.

(8) *Period of admission for K3/K–4 status*. Aliens entering the United States as a K–3 shall be admitted for a period of 2 years. Aliens entering the United States as a K–4 shall be admitted for a period of 2 years or until that alien's 21st birthday, whichever is shorter.

(9) *Employment authorization*. An alien admitted to the United States as a nonimmigrant under section 101(a)(15)(K) of the Act shall be authorized to work incident to status for the period of authorized stay. K–1/K–2 aliens seeking work authorization must apply, with fee, to the Service for work authorization pursuant to § 274a.12(a)(6) of this chapter. K–3/K–4 aliens must apply to the Service for a document evidencing employment authorization pursuant to § 274a.12(a)(9) of this chapter. Employment authorization documents issued to K–3/K–4 aliens may be renewed only upon a showing that the applicant has an application or petition awaiting approval, equivalent to the showing required for an extension of stay pursuant to § 214.2(k)(10).

(10) *Extension of stay for K–3/K–4 status*—(i) *General*. A K–3/K–4 alien may apply for extension of stay, on Form I–539, Application to Extend/Change Nonimmigrant Status, 120 days prior to the expiration of his or her authorized stay. Extensions for K–4 status must be filed concurrently with the alien's parent's K–3 status extension application. In addition, the citizen parent of a K–4 alien filing for extension of K status should file Form I–130 on their behalf. Extension will be granted in 2-year intervals upon a showing of eligibility pursuant to section 101(a)(15)(K)(ii) or (iii) of the Act. Aliens wishing to extend their period of stay as a K–3 or K–4 alien pursuant to § 214.1(c)(2) must show that one of the following has been filed with the Service or the Department of State, as applicable, and is awaiting approval:

(A) The Form I–130, Petition for Alien Relative, filed by the K–3's U.S. citizen spouse who filed the Form I–129F;

(B) An application for an immigrant visa based on a Form I–130 described in § 214.2(K)(10)(i);

(C) A Form I–485, Application for Adjustment to that of Permanent Residence, based on a Form I–130 described in § 214.2(k)(10)(i);

(ii) *''Good Cause'' showing.* Aliens may file for an extension of stay as a K–3/K–4 nonimmigrant after a Form I–130 filed on their behalf has been approved, without filing either an application for adjustment of status or an immigrant visa upon a showing of ''good cause.'' A showing of ''good cause'' may include an illness, a job loss, or some other catastrophic event that has prevented the filing of an adjustment of status application by the K–3/K–4 alien. The event or events must have taken place since the alien entered the United States as a K–3/K–4 nonimmigrant. The burden of establishing ''good cause'' rests solely with the applicant. Whether the applicant has shown ''good cause'' is a purely discretionary decision by the Service from which there is no appeal.

(11) *Termination of K–3/K–4 status.* The status of an alien admitted to the United States as a K–3/K–4 under section 101(a)(15)(K)(ii) or (iii) of the Act, shall be automatically terminated 30 days following the occurrence of any of the following:

(i) The denial or revocation of the Form I–130 filed on behalf of that alien;

(ii) The denial or revocation of the immigrant visa application filed by that alien;

(iii) The denial or revocation of the alien's application for adjustment of status to that of lawful permanent residence;

(iv) The K–3 spouse's divorce from the U.S. citizen becomes final;

(v) The marriage of an alien in K–4 status.

(vi) The denial of any of these petitions or applications to a K–3 also results in termination of a dependent K–4's status. For purposes of this section, there is no denial or revocation of a petition or application until the administrative appeal applicable to that application or petition has been exhausted.

(l) *Intracompany transferees*—(1) *Admission of intracompany transferees*—(i) *General.* Under section 101(a)(15)(L) of the Act, an alien who within the preceding three years has been employed abroad for one continuous year by a qualifying organization may be admitted temporarily to the United States to be employed by a parent, branch, affiliate, or subsidiary of that employer in a managerial or executive capacity, or in a position requiring specialized knowledge. An alien transferred to the United States under this nonimmigrant classification is referred to as an intracompany transferee and the organization which seeks the classification of an alien as an intracompany transferee is referred to as the petitioner. The Service has responsibility for determining whether the alien is eligible for admission and whether the petitioner is a qualifying organization. These regulations set forth the standards applicable to these classifications. They also set forth procedures for admission of intracompany transferees and appeal of adverse decisions. Certain petitioners seeking the classification of aliens as intracompany transferees may file blanket petitions with the Service. Under the blanket petition process, the Service is responsible for determining whether the petitioner and its parent, branches, affiliates, or subsidiaries specified are qualifying organizations. The Department of State or, in certain cases, the Service is responsible for determining the classification of the alien.

(ii) *Definitions*—(A) *Intracompany transferee* means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

(B) *Managerial capacity* means an assignment within an organization in which the employee primarily:

(*1*) Manages the organization, or a department, subdivision, function, or component of the organization;

(*2*) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(*3*) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(*4*) Exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(C) *Executive capacity* means an assignment within an organization in which the employee primarily:

(*1*) Directs the management of the organization or a major component or function of the organization;

(*2*) Establishes the goals and policies of the organization, component, or function;

(*3*) Exercises wide latitude in discretionary decision-making; and

(*4*) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(D) *Specialized knowledge* means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

(E) *Specialized knowledge professional* means an individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the Immigration and Nationality Act.

(F) *New office* means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year.

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(*1*) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(*2*) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

(H) *Doing business* means the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad.

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

(J) *Branch* means an operating division or office of the same organization housed in a different location.

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50–50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means (*1*) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(*2*) One of two legal entities owned and controlled by the same group of individuals, each individual owning and

controlling approximately the same share or proportion of each entity, or

(*3*) In the case of a partnership that is organized in the United States to provide accounting services along with managerial and/or consulting services and that markets its accounting services under an internationally recognized name under an agreement with a worldwide coordinating organization that is owned and controlled by the member accounting firms, a partnership (or similar organization) that is organized outside the United States to provide accounting services shall be considered to be an affiliate of the United States partnership if it markets its accounting services under the same internationally recognized name under the agreement with the worldwide coordinating organization of which the United States partnership is also a member.

(M) *Director* means a Service Center director with delegated authority at 8 CFR 103.1.

(2) *Filing of petitions.* (i) Except as provided in paragraph (l)(2)(ii) and (l)(17) of this section, a petitioner seeking to classify an alien as an intracompany transferee must file a petition on Form I–129, Petition for Nonimmigrant Worker. The petitioner shall advise USCIS whether a previous petition for the same beneficiary has been filed, and certify that another petition for the same beneficiary will not be filed unless the circumstances and conditions in the initial petition have changed. Failure to make a full disclosure of previous petitions filed may result in a denial of the petition.

(ii) A United States petitioner which meets the requirements of paragraph (l)(4) of this section and seeks continuing approval of itself and its parent, branches, specified subsidiaries and affiliates as qualifying organizations and, later, classification under section 101(a)(15)(L) of the Act multiple numbers of aliens employed by itself, its parent, or those branches, subsidiaries, or affiliates may file a blanket petition on Form I–129. The blanket petition shall be maintained at the adjudicating office. The petitioner shall be the single representative for the qualifying organizations with which USCIS will deal regarding the blanket petition.

(3) *Evidence for individual petitions.* An individual petition filed on Form I–129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

(v) If the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and

(C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii) (B) or (C) of this section, supported by information regarding:

(*1*) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;

(*2*) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and

(*3*) The organizational structure of the foreign entity.

(vi) If the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

(vii) If the beneficiary is an owner or major stockholder of the company, the petition must be accompanied by evidence that the beneficiary's services are to be used for a temporary period and evidence that the beneficiary will be transferred to an assignment abroad upon the completion of the temporary services in the United States.

(viii) Such other evidence as the director, in his or her discretion, may deem necessary.

(4) *Blanket petitions.* (i) A petitioner which meets the following requirements may file a blanket petition seeking continuing approval of itself and some or all of its parent, branches, subsidiaries, and affiliates as qualifying organizations if:

(A) The petitioner and each of those entities are engaged in commercial trade or services;

(B) The petitioner has an office in the United States that has been doing business for one year or more;

(C) The petitioner has three or more domestic and foreign branches, subsidiaries, or affiliates; and

(D) The petitioner and the other qualifying organizations have obtained approval of petitions for at least ten ''L'' managers, executives, or specialized knowledge professionals during the previous 12 months; or have U.S. subsidiaries or affiliates with combined annual sales of at least $25 million; or have a United States work force of at least 1,000 employees.

(ii) Managers, executives, and specialized knowledge professionals employed by firms, corporations, or other entities which have been found to be qualifying organizations pursuant to an approved blanket petition may be classified as intracompany transferees and admitted to the United States as provided in paragraphs (l) (5) and (11) of this section.

(iii) When applying for a blanket petition, the petitioner shall include in the blanket petition all of its branches, subsidiaries, and affiliates which plan to seek to transfer aliens to the United States under the blanket petition. An individual petition may be filed by the petitioner or organizations in lieu of using the blanket petition procedure. However, the petitioner and other qualifying organizations may not seek L classification for the same alien under both procedures, unless a consular officer first denies eligibility. Whenever a petitioner which has blanket L approval files an individual petition to seek L classification for a manager, executive, or specialized knowledge professional, the petitioner shall advise the Service that it has blanket L approval and certify that the beneficiary has not and will not apply to a consular officer for L classification under the approved blanket petition.

(iv) *Evidence.* A blanket petition filed on Form I–129 shall be accompanied by:

(A) Evidence that the petitioner meets the requirements of paragraph (l)(4)(i) of this section.

(B) Evidence that all entities for which approval is sought are qualifying organizations as defined in subparagraph (l)(1)(ii)(G) of this section.

(C) Such other evidence as the director, in his or her discretion, deems necessary in a particular case.

(5) *Certification and admission procedures for beneficiaries under blanket petition*—(i) *Jurisdiction.* United States consular officers shall have authority to determine eligibility of individual beneficiaries outside the United States seeking L classification under blanket petitions, except for visa-exempt nonimmigrants. An application for a visa-exempt nonimmigrant seeking L classification under a blanket petition or

by an alien in the United States applying for change of status to L classification under a blanket petition shall be filed with the Service office at which the blanket petition was filed.

(ii) *Procedures.* (A) When one qualifying organization listed in an approved blanket petition wishes to transfer an alien outside the United States to a qualifying organization in the United States and the alien requires a visa to enter the United States, that organization shall complete Form I–129S, Certificate of Eligibility for Intracompany Transferee under a Blanket Petition, in an original and three copies. The qualifying organization shall retain one copy for its records and send the original and two copies to the alien. A copy of the approved Form I–797 must be attached to the original and each copy of Form I–129S.

(B) After receipt of Form I–797 and Form I–129S, a qualified employee who is being transferred to the United States may use these documents to apply for visa issuance with the consular officer within six months of the date on Form I–129S.

(C) When the alien is a visa-exempt nonimmigrant seeking L classification under a blanket petition, or when the alien is in the United States and is seeking a change of status from another nonimmigrant classification to L classification under a blanket petition, the petitioner shall submit Form I–129S, Certificate of Eligibility, and a copy of the approval notice, Form I–797, to the USCIS office with which the blanket petition was filed.

(D) The consular or Service officer shall determine whether the position in which the alien will be employed in the United States is with an organization named in the approved petition and whether the specific job is for a manager, executive, or specialized knowledge professional. The consular or Service officer shall determine further whether the alien's immediate prior year of continuous employment abroad was with an organization named in the petition and was in a position as manager, executive, or specialized knowledge professional.

(E) Consular officers may grant ''L'' classification only in clearly approvable applications. If the consular officer determines that the alien is eligible for L classification, the consular officer may issue a nonimmigrant visa, noting the visa classification ''Blanket L–1'' for the principal alien and ''Blanket L–2'' for any accompanying or following to join spouse and children. The consular officer shall also endorse all copies of the alien's Form I–129S with the blanket L–1 visa classification and return the original and one copy to the alien. When the alien is inspected for entry into the United States, both copies of the Form I–129S shall be stamped to show a validity period not to exceed three years and the second copy collected and sent to the appropriate Regional Service Center for control purposes. Service officers who determine eligibility of aliens for L–1 classification under blanket petitions shall endorse both copies of Form I–129S with the blanket L–1 classification and the validity period not to exceed three years and retain the second copy for Service records.

(F) If the consular officer determines that the alien is ineligible for L classification under a blanket petition, the consular officer's decision shall be final. The consular officer shall record the reasons for the denial on Form I–129S, retain one copy, return the original of I–129S to the USCIS office which approved the blanket petition, and provide a copy to the alien. In such a case, an individual petition may be filed for the alien on Form I–129, Petition for Nonimmigrant Worker. The petition shall state the reason the alien was denied L classification and specify the consular office which made the determination and the date of the determination.

(G) An alien admitted under an approved blanket petition may be reassigned to any organization listed in the approved petition without referral to the Service during his/her authorized stay if the alien will be performing virtually the same job duties. If the alien will be performing different job duties, the petitioner shall complete a new Certificate of Eligibility and send it for approval to the director who approved the blanket petition.

(6) *Copies of supporting documents.* The petitioner may submit a legible photocopy of a document in support of the visa petition, in lieu of the original document. However, the original document shall be submitted if requested by the Service.

(7) *Approval of petition*—(i) *General.* The director shall notify the petitioner of the approval of an individual or a blanket petition within 30 days after the date a completed petition has been filed. If additional information is required from the petitioner, the 30 day processing period shall begin again upon receipt of the information. The original Form I–797 received from the USCIS with respect to an approved individual or blanket petition may be duplicated by the petitioner for the beneficiary's use as described in paragraph (l)(13) of this section.

(A) *Individual petition*—(*1*) Form I–797 shall include the beneficiary's name and classification and the petition's period of validity.

(*2*) An individual petition approved under this paragraph shall be valid for the period of established need for the beneficiary's services, not to exceed three years, except where the beneficiary is coming to the United States to open or to be employed in a new office.

(*3*) If the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year, after which the petitioner shall demonstrate as required by paragraph (l)(14)(ii) of this section that it is doing business as defined in paragraph (l)(1)(ii)(H) of this section to extend the validity of the petition.

(B) *Blanket petition.* (*1*) Form I–797 shall identify the approved organizations included in the petition and the petition's period of validity.

(*2*) A blanket petition approved under this paragraph shall be valid initially for a period of three years and may be extended indefinitely thereafter if the qualifying organizations have complied with these regulations.

(*3*) A blanket petition may be approved in whole or in part and shall cover only qualifying organizations.

(C) *Amendments.* The petitioner must file an amended petition, with fee, at the USCIS office where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (*i.e.,* from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

(ii) *Spouse and dependents.* The spouse and unmarried minor children of the beneficiary are entitled to L nonimmigrant classification, subject to the same period of admission and limits as the beneficiary, if the spouse and unmarried minor children are accompanying or following to join the beneficiary in the United States. Neither the spouse nor any child may accept employment unless he or she has been granted employment authorization.

(8) *Denial of petition*—(i) *Individual petition.* If an individual is denied, the petitioner shall be notified within 30 days after the date a completed petition has been filed of the denial, the reasons for the denial, and the right to appeal the denial.

(ii) *Blanket petition.* If a blanket petition is denied in whole or in part, the petitioner shall be notified within 30 days after the date a completed petition has been filed of the denial, the reasons for the denial, and the right to appeal the denial. If the petition is denied in part, the USCIS office issuing the denial shall forward to the petitioner, along with the denial, a Form I–797 listing those organizations which were found to quality. If the decision to deny is reversed on appeal, a new Form I–797 shall be sent to the petitioner to reflect the changes made as a result of the appeal.

(9) *Revocation of approval of individual and blanket petitions*—(i) *General.* The director may revoke a petition at any time, even after the expiration of the petition.

(ii) *Automatic revocation.* The approval of any individual or blanket petition is automatically revoked if the petitioner withdraws the petition or the petitioner fails to request indefinite validity of a blanket petition.

(iii) *Revocation on notice.* (A) The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he/she finds that:

(*1*) One or more entities are no longer qualifying organizations;

(*2*) The alien is no longer eligible under section 101(a)(15)(L) of the Act;

(*3*) A qualifying organization(s) violated requirements of section 101(a)(15)(L) and these regulations;

(*4*) The statement of facts contained in the petition was not true and correct; or

(*5*) Approval of the petition involved gross error; or

(*6*) None of the qualifying organizations in a blanket petition have used the blanket petition procedure for three consecutive years.

(B) The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. Upon receipt of this notice, the petitioner may submit evidence in rebuttal within 30 days of the notice. The director shall consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If a blanket petition is revoked in part, the remainder of the petition shall remain approved, and a revised Form I–797 shall be sent to the petitioner with the revocation notice.

(iv) *Status of beneficiaries.* If an individual petition is revoked, the beneficiary shall be required to leave the United States, unless the beneficiary has obtained other work authorization from the Service. If a blanket petition is revoked and the petitioner and beneficiaries already in the United States are otherwise eligible for L classification, the director shall extend the blanket petition for a period necessary to support the stay of those blanket L beneficiaries. The approval notice, Form I–171C, shall include only the names of qualifying organizations and covered beneficiaries. No new beneficiaries may be classified or admitted under this limited extension.

(10) *Appeal of denial or revocation of individual or blanket petition.* (i) A petition denied in whole or in part may be appealed under 8 CFR part 103. Since the determination on the Certificate of Eligibility, Form I–129S, is part of the petition process, a denial or revocation of approval of an I–129S is appealable in the same manner as the petition.

(ii) A petition that has been revoked on notice in whole or in part may be appealed under part 103 of this chapter. Automatic revocations may not be appealed.

(11) *Admission.* A beneficiary may apply for admission to the United States only while the individual or blanket petition is valid. The beneficiary of an individual petition shall not be admitted for a date past the validity period of the petition. The beneficiary of a blanket petition may be admitted for three years even though the initial validity period of the blanket petition may expire before the end of the three-year period. If the blanket petition will expire while the alien is in the United States, the burden is on the petitioner to file for indefinite validity of the blanket petition or to file an individual petition in the alien's behalf to support the alien's status in the United States. The admission period for any alien under section 101(a)(15)(L) shall not exceed three years unless an extension of stay is granted pursuant to paragraph (l)(15) of this section.

(12) *L–1 limitation on period of stay*—(i) *Limits.* An alien who has spent five years in the United States in a specialized knowledge capacity or seven years in the United States in a managerial or executive capacity under section 101(a)(15) (L) and/or (H) of the Act may not be readmitted to the United States under section 101(a)(15) (L) or (H) of the Act unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year. Such visits do not interrupt the one year abroad, but do not count towards fulfillment of that requirement. In view of this restriction, a new individual petition may not be approved for an alien who has spent the maximum time period in the United States under section 101(a)(15) (L) and/or (H) of the Act, unless the alien has resided and been physically present outside the United States, except for brief visits for business or pleasure, for the immediate prior year. The petitioner shall provide information about

the alien's employment, place of residence, and the dates and purpose of any trips to the United States for the previous year. A consular or Service officer may not grant L classification under a blanket petition to an alien who has spent five years in the United States as a professional with specialized knowledge or seven years in the United States as a manager or executive, unless the alien has met the requirements contained in this paragraph.

(ii) *Exceptions.* The limitations of paragraph (l)(12)(i) of this section shall not apply to aliens who do not reside continually in the United States and whose employment in the United States is seasonal, intermittent, or consists of an aggregate of six months or less per year. In addition, the limitations will not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. The petitioner and the alien must provide clear and convincing proof that the alien qualifies for an exception. Clear and convincing proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

(13) *Beneficiary's use of Form I–797 and Form I–129S*—(i) *Beneficiary of an individual petition.* The beneficiary of an individual petition who does not require a nonimmigrant visa may present a copy of Form I–797 at a port of entry to facilitate entry into the United States. The copy of Form I–797 shall be retained by the beneficiary and presented during the validity of the petition (provided that the beneficiary is entering or reentering the United States) for entry and reentry to resume the same employment with the same petitioner (within the validity period of the petition) and to apply for an extension of stay. 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 an original Form I–797 to apply for a new or revalidated visa during the validity period of the petition and to apply for an extension of stay.

(ii) *Beneficiary of a blanket petition.* Each alien seeking L classification and admission under a blanket petition shall present a copy of Form I–797 and a Form I–129S from the petitioner which identifies the position and organization from which the employee is transferring, the new organization and position to which the employee is destined, a description of the employee's actual duties for both the new and former positions, and the positions, dates, and locations of previous L stays in the United States. A current copy of Form I–797 and Form I–129S should be retained by the beneficiary and used for leaving and reentering the United States to resume employment with a qualifying organization during his/her authorized period of stay, for applying for a new or revalidated visa, and for applying for readmission at a port of entry. The alien may be readmitted even though reassigned to a different organization named on the Form I–797 than the one shown on Form I–129S if the job duties are virtually the same.

(14) *Extension of visa petition validity*—(i) *Individual petition.* The petitioner shall file a petition extension on Form I–129 to extend an individual petition under section 101(a)(15)(L) of the Act. Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director. A petition extension may be filed only if the validity of the original petition has not expired.

(ii) *New offices.* A visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I–129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of

wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

(iii) *Blanket petitions*—(A) *Extension procedure.* A blanket petition may only be extended indefinitely by filing a new Form I–129 with a copy of the previous approval notice and a report of admissions during the preceding three years. The report of admissions shall include a list of the aliens admitted under the blanket petition during the preceding three years, including positions held during that period, the employing entity, and the dates of initial admission and final departure of each alien. The petitioner shall state whether it still meets the criteria for filing a blanket petition and shall document any changes in approved relationships and additional qualifying organizations.

(B) *Other conditions.* If the petitioner in an approved blanket petition fails to request indefinite validity or if indefinite validity is denied, the petitioner and its other qualifying organizations shall seek L classification by filing individual petitions until another three years have expired; after which the petitioner may seek approval of a new blanket petition.

(15) *Extension of stay.* (i) In individual petitions, the petitioner must apply for the petition extension and the alien's extension of stay concurrently on Form I–129. When the alien is a beneficiary under a blanket petition, a new certificate of eligibility, accompanied by a copy of the previous approved certificate of eligibility, shall be filed by the petitioner to request an extension of the alien's stay. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The beneficiary must be physically present in the United States at the time the extension of stay is filed. Even though the requests to extend the visa petition and the alien's stay are combined on the petition, the director shall make a separate determination on each. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may request the director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa.

(ii) An extension of stay may be authorized in increments of up to two years for beneficiaries of individual and blanket petitions. The total period of stay may not exceed five years for aliens employed in a specialized knowledge capacity. The total period of stay for an alien employed in a managerial or executive capacity may not exceed seven years. No further extensions may be granted. When an alien was initially admitted to the United States in a specialized knowledge capacity and is later promoted to a managerial or executive position, he or she must have been employed in the managerial or executive position for at least six months to be eligible for the total period of stay of seven years. The change to managerial or executive capacity must have been approved by the Service in an amended, new, or extended petition at the time that the change occurred.

(16) *Effect of filing an application for or approval of a permanent labor certification, preference petition, or filing of an application for adjustment of status on L–1 classification.* An alien may legitimately come to the United States for a temporary period as an L–1 nonimmigrant and, at the same time, lawfully seek to become a permanent resident of the United States provided he or she intends to depart voluntarily at the end of his or her authorized stay. The filing of an application for or approval of a permanent labor certification, an immigrant visa preference petition, or the filing of an application of readjustment of status for an L–1 nonimmigrant shall not be the basis for denying:

(i) An L–1 petition filed on behalf of the alien,

(ii) A request to extend an L–1 petition which had previously been filed on behalf of the alien;

(iii) An application for admission as an L–1 nonimmigrant by the alien, or as an L–2 nonimmigrant by the spouse or child of such alien;

(iv) An application for change of status to H–1 or L–2 nonimmigrant filed

by the alien, or to H–1, H–4, or L–1 status filed by the L–2 spouse or child of such alien;

(v) An application for change of status to H–4 nonimmigrant filed by the L–1 nonimmigrant, if his or her spouse has been approved for classification as an H–1; or

(vi) An application for extension of stay filed by the alien, or by the L–2 spouse or child of such alien.

(17) *Filing of individual petitions and certifications under blanket petitions for citizens of Canada under the North American Free Trade Agreement (NAFTA)*—(i) *Individual petitions.* Except as provided in paragraph (1)(2)(ii) of this section (filing of blanket petitions), a United States or foreign employer seeking to classify a citizen of Canada as an intracompany transferee may file an individual petition in duplicate on Form I–129 in conjunction with an application for admission of the citizen of Canada. Such filing may be made with an immigration officer at a Class A port of entry located on the United States-Canada land border or at a United States pre-clearance/pre-flight station in Canada. The petitioning employer need not appear, but Form I–129 must bear the authorized signature of the petitioner.

(ii) *Certification of eligibility for intracompany transferree under the blanket petition.* An immigration officer at a location identified in paragraph (1)(17)(i) of this section may determine eligibility of individual citizens of Canada seeking L classification under approved blanket petitions. At these locations, such citizens of Canada shall present the original and two copies of Form I–129S, Intracompany Transferee Certificate of Eligibility, prepared by the approved organization, as well as three copies of Form I–797, Notice of Approval of Nonimmigrant Visa Petition.

(iii) Nothing in this section shall preclude or discourage the advance filing of petitions and certificates of eligibility in accordance with paragraph (l)(2) of this section.

(iv) *Deficient or deniable petitions or certificates of eligibility.* If a petition or certificate of eligibility submitted concurrently with an application for admission is lacking necessary supporting documentation or is otherwise deficient, the inspecting immigration officer shall return it to the applicant for admission in order to obtain the necessary documentation from the petitioner or for the deficiency to be overcome. The fee to file the petition will be remitted at such time as the documentary or other deficiency is overcome. If the petition or certificate of eligibility is clearly deniable, the immigration officer will accept the petition (with fee) and the petitioner shall be notified of the denial, the reasons for denial, and the right of appeal. If a formal denial order cannot be issued by the port of entry, the petition with a recommendation for denial shall be forwarded to the appropriate Service Center for final action. For the purposes of this provision, the appropriate Service Center will be the one within the same Service region as the location where the application for admission is made.

(v) *Spouse and dependent minor children accompanying or following to join.* (A) The Canadian citizen spouse and Canadian citizen unmarried minor children of a Canadian citizen admitted under this paragraph shall be entitled to the same nonimmigrant classification and same length of stay subject to the same limits as the principal alien. They shall not be required to present visas, and they shall be admitted under the classification symbol L–2.

(B) A non-Canadian citizen spouse or non-Canadian citizen unmarried minor child shall be entitled to the same nonimmigrant classification and the same length of stay subject to the same limits as the principal, but shall be required to present a visa upon application for admission as an L–2 unless otherwise exempt under §212.1 of this chapter.

(C) The spouse and dependent minor children shall not accept employment in the United States unless otherwise authorized under the Act.

(18) *Denial of intracompany transferee status to citizens of Canada or Mexico in the case of certain labor disputes.* (i) If the Secretary of Labor certifies to or otherwise informs the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress where the beneficiary is to

be employed, and the temporary entry of the beneficiary may affect adversely the settlement of such labor dispute or the employment of any person who is involved in such dispute, a petition to classify a citizen of Mexico or Canada as an L–1 intracompany transferee may be denied. If a petition has already been approved, but the alien has not yet entered the United States, or has entered the United States but not yet commenced employment, the approval of the petition may be suspended, and an application for admission on the basis of the petition may be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (l)(18)(i) of this section, or the Service has not otherwise been informed by the Secretary that such a strike or labor dispute is in progress, the Commissioner shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commended employment in the United States under an approved petition and is participating in a strike or other labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Department of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers, but is subject to the following terms and conditions.

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act, and regulations promulgated in the same manner as all other L nonimmigrants;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving work stoppage of workers; and

(C) Although participation by an L nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(m) *Students in established vocational or other recognized nonacademic institutions, other than in language training programs*—(1) *Admission of student*—(i) *Eligibility for admission.* A nonimmigrant student may be admitted into the United States in nonimmigrant status under section 101(a)(15)(M) of the Act, if:

(A) The student presents a SEVIS Form I–20 issued in his or her own name by a school approved by the Service for attendance by M–1 foreign students. (In the alternative, for a student seeking admission prior to August 1, 2003, the student may present a currently-valid Form I–20M–N/I–20ID, if that form was issued by the school prior to January 30, 2003);

(B) The student has documentary evidence of financial support in the amount indicated on the SEVIS Form I–20 (or the Form I–20M–N/I–20ID); and

(C) For students seeking initial admission only, the student intends to attend the school specified in the student's visa (or, where the student is exempt from the requirement for a visa, the school indicated on the SEVIS Form I–20 (or the Form I–20M–N/I–20ID)).

(ii) *Disposition of Form I–20M–N.* When a student is admitted to the United States, the inspecting officer shall forward Form I–20M–N to the Service's processing center. The processing center shall forward Form I–20N to the school which issued the form to notify the school of the student's admission.

(iii) *Use of SEVIS.* On January 30, 2003, the use of the Student and Exchange Visitor Information System (SEVIS) will become mandatory for the issuance of any new Form I–20. A student or dependent who presents a non-SEVIS Form I–20 issued on or after January 30, 2003, will not be accepted for admission to the United States. Non-SEVIS Forms I–20 issued prior to January 30, 2003, will continue to be accepted for admission to the United States until August 1, 2003. However, schools must issue a SEVIS Form I–20 to any current student requiring a reportable action (e.g., extension of status, practical training, and requests for employment authorization) or a new

Form I–20, or for any aliens who must obtain a new nonimmigrant student visa. As of August 1, 2003, the records of all current or continuing students must be entered in SEVIS.

(2) *Form I–20 ID copy.* The first time an M–1 student comes into contact with the Service for any reason, the student must present to the Service a Form I–20M–N properly and completely filled out by the student and by the designated official of the school the student is attending or intends to attend. The student will be issued a Form I–20 ID copy with his or her admission number. The student must have the Form I–20 ID copy with him or her at all times. If the student loses the Form I–20 ID copy, the student must request a new Form I–20 ID copy on Form I–102 from the Service office having jurisdiction over the school the student was last authorized to attend.

(3) *Admission of the spouse and minor children of an M–1 student.* The spouse and minor children accompanying an M–1 student are eligible for admission in M–2 status if the student is admitted in M–1 status. The spouse and minor children following-to-join an M–1 student are eligible for admission to the United States in M–2 status if they are able to demonstrate that the M–1 student has been admitted and is, or will be within 30 days, enrolled in a full course of study, or engaged in approved practical training following completion of studies. In either case, at the time they seek admission, the eligible spouse and minor children of an M–1 student with a SEVIS Form I–20 must individually present an original SEVIS Form I–20 issued in the name of each M–2 dependent issued by a school authorized by the Service for attendance by M–1 foreign students. Prior to August 1, 2003, if exigent circumstances are demonstrated, the Service will allow the dependent of an M–1 student in possession of a SEVIS Form I–20 to enter the United States using a copy of the M–1 student's SEVIS Form I–20. (In the alternative, for dependents seeking admission to the United States prior to August 1, 2003, a copy of the M–1 student's current Form I–20ID issued prior to January 30, 2003, with proper endorsement by the DSO will satisfy this requirement.) A new SEVIS Form I–20 (or Form I–20M–N) is required for a dependent where there has been any substantive change in the M–1 student's current information.

(i) A properly endorsed page 4 of Form I–20M–N if there has been no substantive change in the information on the student's most recent Form I–20M since the form was initially issued; or

(ii) A new Form I–20M–N if there has been any substantive change in the information on the student's most recent Form I–20M since the form was initially issued.

(4) *Temporary absence*—(i) *General.* An M–1 student returning to the United States from a temporary absence to attend the school which the student was previously authorized to attend must present either—

(A) A properly endorsed page 4 of Form I–20M–N if there has been no substantive change in the information on the student's most recent Form I–20M since the form was initially issued; or

(B) A new Form I–20M–N if there has been any substantive change in the information on the student's most recent Form I–20M since the form was initially issued.

(ii) *Student who transferred between schools.* If an M–1 student has been authorized to transfer between schools and is returning to the United States from a temporary absence in order to attend the school to which transfer was authorized as indicated on the student's Form I–20 ID copy, the name of the school to which the student is destined does not need to be specified in the student's visa.

(5) *Period of stay.* A student in M nonimmigrant status is admitted for a fixed time period, which is the period necessary to complete the course of study indicated on the Form I–20, plus practical training following completion of the course of study, plus an additional 30 days to depart the United States, but not to exceed a total period of one year. An M–1 student may be admitted for a period up to 30 days before the report date or start date of the course of study listed on the Form I–20. An M–1 student who fails to maintain a full course of study or otherwise fails to maintain status is not eligible for the additional 30-day period of stay.

(6)–(8) [Reserved]

(9) *Full course of study.* Successful completion of the course of study must lead to the attainment of a specific educational or vocational objective. A ''full course of study'' as required by section 101(a)(15)(M)(i) of the Act means—

(i) Study at a community college or junior college, certified by a school official to consist of at least twelve semester or quarter hours of instruction per academic term in those institutions using standard semester, trimester, or quarter-hour systems, where all students enrolled for a minimum of twelve semester or quarter hours are charged full-time tuition or considered full-time for other administrative purposes, or its equivalent (as determined by the district director) except when the student needs a lesser course load to complete the course of study during the current term;

(ii) Study at a postsecondary vocational or business school, other than in a language training program except as provided in §214.3(a)(2)(iv), which confers upon its graduates recognized associate or other degrees or has established that its credits have been and are accepted unconditionally by at least three institutions of higher learning which are either: (1) A school (or school system) owned and operated as a public educational institution by the United States or a State or political subdivision thereof; or (2) a school accredited by a nationally recognized accrediting body; and which has been certified by a designated school official to consist of at least twelve hours of instruction a week, or its equivalent as determined by the district director;

(iii) Study in a vocational or other nonacademic curriculum, other than in a language training program except as provided in §214.3(a)(2)(iv), certified by a designated school official to consist of at least eighteen clock hours of attendance a week if the dominant part of the course of study consists of classroom instruction, or at least twenty-two clock hours a week if the dominant part of the course of study consists of shop or laboratory work; or

(iv) Study in a vocational or other nonacademic high school curriculum, certified by a designated school official to consist of class attendance for not less than the minimum number of hours a week prescribed by the school for normal progress towards graduation.

(v) *On-line courses/distance education programs.* No on-line or distance education classes may be considered to count toward an M–1 student's full course of study requirement if such classes do not require the student's physical attendance for classes, examination or other purposes integral to completion of the class. An on-line or distance education course is a course that is offered principally through the use of television, audio, or computer transmission including open broadcast, closed circuit, cable, microwave, or satellite, audio conferencing, or computer conferencing.

(vi) *Reduced course load.* The designated school official may authorize an M–1 student to engage in less than a full course of study only where the student has been compelled by illness or a medical condition that has been documented by a licensed medical doctor, doctor of osteopathy, or licensed clinical psychologist, to interrupt or reduce his or her course of study. A DSO may not authorize a reduced course load for more than an aggregate of 5 months per course of study. An M–1 student previously authorized to drop below a full course of study due to illness or medical condition for an aggregate of 5 months, may not be authorized by the DSO to reduce his or her course load on subsequent occasions during his or her particular course of study.

(A) *Non-SEVIS schools.* A DSO must report any student who has been authorized by the DSO to carry a reduced course load. Within 21 days of the authorization, the DSO must send a photocopy of the student's Form I–20 to the Service's data processing center indicating the date that authorization was granted. The DSO must also report to the Service's data processing center when the student has resumed a full course of study, no more than 21 days from the date the student resumed a full course of study. In this case, the DSO must submit a photocopy of the student's Form I–20 indicating the date that a full course of study was resumed, with a new program end date.

(B) *SEVIS reporting.* In order for a student to be authorized to drop below a full course of study, the DSO must update SEVIS prior to the student reducing his or her course load. The DSO must update SEVIS with the date, reason for authorization, and the start date of the next term or session. The DSO must also notify SEVIS within 21 days of the student's commencement of a full course of study.

(10) *Extension of stay*—(i) *Eligibility.* The cumulative time of extensions that can be granted to an M–1 student is limited to a period of 3 years from the M–1 student's original start date, plus 30 days. No extension can be granted to an M–1 student if the M–1 student is unable to complete the course of study within 3 years of the original program start date. This limit includes extensions that have been granted due to a drop below full course of study, a transfer of schools, or reinstatement. An M–1 student may be granted an extension of stay if it is established that:

(A) He or she is a bona fide nonimmigrant currently maintaining student status;

(B) Compelling educational or medical reasons have resulted in a delay to his or her course of study. Delays caused by academic probation or suspension are not acceptable reasons for program extension; and

(C) He or she is able to, and in good faith intends to, continue to maintain that status for the period for which the extension is granted.

(ii) *Application.* A student must apply to the Service for an extension on Form I–539, Application to Extend/Change Nonimmigrant Status. A student's M–2 spouse and children seeking an extension of stay must be included in the application. The student must submit the application to the service center having jurisdiction over the school the student is currently authorized to attend, at least 15 days but not more than 60 days before the program end date on the student's Form I–20. The application must also be accompanied by the student's Form I–20 and the Forms I–94 of the student's spouse and children, if applicable.

(iii) *Period of stay.* If an application for extension is granted, the student and the student's spouse and children, if applicable, are to be given an extension of stay for the period of time necessary to complete the course of study, plus 30 days within which to depart from the United States, or for a total period of one year, whichever is less. A student's M–2 spouse and children are not eligible for an extension unless the M–1 student is granted an extension of stay, or for a longer period than is granted to the M–1 student.

(iv) *SEVIS update.* A DSO must update SEVIS to recommend that a student be approved for an extension of stay. The SEVIS Form I–20 must be printed with the recommendation and new program end date for submission by mail to the service center, with Form I–539, and Forms I–94 if applicable.

(11) *School transfer*—(i) *Eligibility.* An M–1 student may not transfer to another school after six months from the date the student is first admitted as, or changes nonimmigrant classification to that of, an M–1 student unless the student is unable to remain at the school to which the student was initially admitted due to circumstances beyond the student's control. An M–1 student may be otherwise eligible to transfer to another school if the student—

(A) Is a bona fide nonimmigrant;

(B) Has been pursuing a full course of study at the school the student was last authorized to attend;

(C) Intends to pursue a full course of study at the school to which the student intends to transfer; and

(D) Is financially able to attend the school to which the student intends to transfer.

(ii) *Procedure.* A student must apply to the Service on Form I–539 for permission to transfer between schools. Upon application for school transfer, a student may effect the transfer subject to approval of the application. A student who transfers without complying with this requirement or whose application is denied after transfer pursuant to this regulation is considered to be out of status. If the application is approved, the approval of the transfer will be determined to be the program start date listed on the Form I–20, and

the student will be granted an extension of stay for the period of time necessary to complete the new course of study plus 30 days, or for a total period of one year, whichever is less.

(A) *Non-SEVIS school.* The application must be accompanied by the Form I–20ID copy and the Form I–94 of the student's spouse and children, if applicable. The Form I–539 must also be accompanied by Form I–20M–N properly and completely filled out by the student and by the designated official of the school which the student wishes to attend. Upon approval, the adjudicating officer will endorse the name of the school to which the transfer is authorized on the student's Form I–20ID copy and return it to the student. The officer will also endorse Form I–20M–N to indicate that a school transfer has been authorized and forward it to the Service's processing center for updating. The processing center will forward Form I–20M–N to the school to which the transfer has been authorized to notify the school of the action taken.

(B) *SEVIS school.* The student must first notify his or her current school of the intent to transfer and indicate the school to which the student intends to transfer. Upon notification by the student, the current school must update SEVIS to show the student as a ''transfer out'' and input the ''release date'' for transfer. Once updated as a ''transfer out'' the transfer school is permitted to generate a SEVIS Form I–20 for transfer but will not gain access to the student's SEVIS record until the release date is reached. Upon receipt of the SEVIS Form I–20 from the transfer school, the student must submit Form I–539 in accordance with §214.2(m)(11). The student may enroll in the transfer school at the next available term or session and is required to notify the DSO of the transfer school immediately upon beginning attendance. The transfer school must update the student's registration record in SEVIS in accordance with §214.3(g)(3). Upon approval of the transfer application, the Service officer will endorse the name of the school to which the transfer is authorized on the student's SEVIS Form I–20 and return it to the student.

(C) *Transition process.* Once SEVIS is fully operational and interfaced with the service center benefit processing system, the Service officer will transmit the approval of the transfer to SEVIS and endorse the name of the school to which transfer is authorized on the student's SEVIS Form I–20 and return it to the student. As part of a transitional process until that time, the student is required to notify the DSO at the transfer school of the decision of the Service within 15 days of the receipt of the adjudication by the Service. Upon notification by the student of the approval of the Service, the DSO must immediately update SEVIS to show that approval of the transfer has been granted. The DSO must then print an updated SEVIS Form I–20 for the student indicating that the transfer has been completed. If the application for transfer is denied, the student is out of status and the DSO must terminate the student's record in SEVIS.

(iii) *Student who has not been pursuing a full course of study.* If an M–1 student who has not been pursuing a full course of study at the school the student was last authorized to attend desires to attend a different school, the student must apply for reinstatement to student status under paragraph (m)(16) of this section.

(12) *Change in educational objective.* An M–1 student may not change educational objective.

(13) *Employment.* Except as provided in paragraph (m)(14) of this section, a student may not accept employment.

(14) *Practical training*—(i) *When practical training may be authorized.* Temporary employment for practical training may be authorized only after completion of the student's course of study.

(A) The proposed employment is recommended for the purpose of practical training;

(B) The proposed employment is related to the student's course of study; and

(C) Upon the designated school official's information and belief, employment comparable to the proposed employment is not available to the student in the country of the student's foreign residence.

(ii) *Application.* A M–1 student must apply for permission to accept employment for practical training on Form I–765, with fee as contained in 8 CFR 103.7(b)(1), accompanied by a Form I–20 that has been endorsed for practical training by the designated school official. The application must be submitted prior to the program end date listed on the student's Form I–20 but not more than 90 days before the program end date. The designated school official must certify on Form I–538 that—

(A) The proposed employment is recommended for the purpose of practical training;

(B) The proposed employment is related to the student's course of study; and

(C) Upon the designated school official's information and belief, employment comparable to the proposed employment is not available to the student in the country of the student's foreign residence.

(iii) *Duration of practical training.* When the student is authorized to engage in employment for practical training, he or she will be issued an employment authorization document. The M–1 student may not begin employment until he or she has been issued an employment authorization document by the Service. One month of employment authorization will be granted for each four months of full-time study that the M–1 student has completed. However, an M–1 student may not engage in more than six months of practical training in the aggregate. The student will not be granted employment authorization if he or she cannot complete the requested practical training within six months.

(iv) *Temporary absence of M–1 student granted practical training.* An M–1 student who has been granted permission to accept employment for practical training and who temporarily departs from the United States, may be readmitted for the remainder of the authorized period indicated on the student's Form I–20 ID copy. The student must be returning to the United States to perform the authorized practical training. A student may not be readmitted to begin practical training which was not authorized prior to the student's departure from the United States.

(v) *Effect of strike or other labor dispute.* Authorization for all employment for practical training is automatically suspended upon certification by the Secretary of Labor or the Secretary's designee to the Commissioner of Immigration and Naturalization or the Commissioner's designee that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place of employment. As used in this paragraph, ''place of employment'' means wherever the employer or joint employer does business.

(vi) *SEVIS process.* The DSO must update the student's record in SEVIS to recommend that the Service approve the student for practical training, and print SEVIS Form I–20 with the recommendation, for the student to submit to the Service with Form I–765 as provided in this paragraph (m)(14).

(15) *Decision on application for extension, permission to transfer to another school, or permission to accept employment for practical training.* The Service shall notify the applicant of the decision and, if the application is denied, of the reason(s) for the denial. The applicant may not appeal the decision.

(16) *Reinstatement to student status*—(i) *General.* A district director may consider reinstating a student who makes a request for reinstatement on Form I–539, Application to Extend/Change Nonimmigrant Status, accompanied by a properly completed SEVIS Form I–20 indicating the DSO's recommendation for reinstatement (or a properly completed Form I–20M–N issued prior to January 30, 2003, from the school the student is attending or intends to attend prior to August 1, 2003). The district director may consider granting the request only if the student:

(A) Has not been out of status for more than 5 months at the time of filing the request for reinstatement (or demonstrates that the failure to file within the 5 month period was the result of exceptional circumstances and that the student filed the request for reinstatement as promptly as possible under these exceptional circumstances);

(B) Does not have a record of repeated or willful violations of the Service regulations;

(C) Is currently pursuing, or intends to pursue, a full course of study at the school which issued the Form I–20M–N or SEVIS Form I–20;

(D) Has not engaged in unlawful employment;

(E) Is not deportable on any ground other than section 237(a)(1)(B) or (C)(i) of the Act; and

(F) Establishes to the satisfaction of the Service, by a detailed showing, either that:

(*1*) The violation of status resulted from circumstances beyond the student's control. Such circumstances might include serious injury or illness, closure of the institution, a natural disaster, or inadvertence, oversight or neglect on the part of the DSO, but do not include instances where a pattern of repeated violations or where a willful failure on the part of the student resulted in the need for reinstatement; or

(*2*) The violation relates to a reduction in the student's course load that would have been within a DSO's power to authorize, and that failure to approve reinstatement would result in extreme hardship to the student.

(ii) *Decision*. If the Service reinstates the student, the Service shall endorse the student's copy of Form I–20 to indicate that the student has been reinstated and return the form to the student. If the Form I–20 is from a non-SEVIS school, the school copy will be forwarded to the school. If the Form I–20 is from a SEVIS school, the adjudicating officer will update SEVIS to reflect the Service's decision. In either case, if the Service does not reinstate the student, the student may not appeal the decision. The district director will send notification to the school of the decision.

(17) *Spouse and children of M–1 student*. The M–2 spouse and minor children of an M–1 student shall each be issued an individual SEVIS Form I–20 in accordance with the provisions of § 214.3(k).

(i) *Employment*. The M–2 spouse and children may not accept employment.

(ii) *Study*—(A) *M–2 post-secondary/vocational study—*(*1*) *Authorized study at SEVP-certified schools*. An M–2 spouse or M–2 child may enroll in less than a full course of study, as defined in paragraphs (f)(6)(i)(A) through (D) or (m)(9)(i) through (v), in any course of study described in paragraphs (f)(6)(i)(A) through (D) or (m)(9)(i) through (v) of this section at an SEVP-certified school. Notwithstanding paragraphs (f)(6)(i)(B) and (m)(9)(i) of this section, study at an undergraduate college or university or at a community college or junior college is not a full course of study solely because the M–2 nonimmigrant is engaging in a lesser course load to complete a course of study during the current term. An M–2 spouse or M–2 child enrolled in less than a full course of study is not eligible to engage in employment pursuant to paragraph (m)(14) of this section or pursuant to paragraphs (f)(9) through (10) of this section.

(*2*) *Full course of study*. Subject to paragraph (m)(17)(ii)(B) of this section, an M–2 spouse and child may engage in a full course of study only by applying for and obtaining a change of status to F–1, M–1, or J–1 status, as appropriate, before beginning a full course of study. An M–2 spouse and M–2 child may engage in study that is avocational or recreational in nature, up to and including on a full-time basis.

(B) *M–2 elementary or secondary study*. An M–2 child may engage in full-time study, including any full course of study, in any elementary or secondary school (kindergarten through twelfth grade).

(C) An M–2 spouse or child violates his or her nonimmigrant status by enrolling in any study except as provided in paragraph (m)(17)(ii)(A) or (B) of this section.

(18) *Current name and address*. A student must inform the Service and the DSO of any legal changes to his or her name or of any change of address, within 10 days of the change, in a manner prescribed by the school. A student enrolled at a SEVIS school can satisfy the requirement in 8 CFR 265.1 of notifying the Service by providing a notice of a change of address within 10 days to the DSO, and the DSO in turn shall enter the information in SEVIS within 21 days of notification by the student. A nonimmigrant student enrolled at a

non-SEVIS institution must submit a notice of change of address to the Service, as provided in 8 CFR 265.1, within 10 days of the change. Except in the case of a student who cannot receive mail where he or she resides, the address provided by the student must be the actual physical location where the student resides rather than a mailing address. In cases where a student provides a mailing address, the school must maintain a record of, and must provide upon request from the Service, the actual physical location where the student resides.

(19) *Special rules for certain border commuter students*—(i) *Applicability.* For purposes of the special rules in this paragraph (m)(19), the term ''border commuter student'' means a national of Canada or Mexico who is admitted to the United States as an M–1 student to enroll in a full course of study, albeit on a part-time basis, in an approved school located within 75 miles of a United States land border. The border commuter student must maintain actual residence and place of abode in the student's country of nationality, and seek admission to the United States at a land border port-of-entry. These special rules do not apply to a national of Canada or Mexico who is:

(A) Residing in the United States while attending an approved school as an M–1 student, or

(B) Enrolled in a full course of study as defined in paragraph (m)(9) of this section.

(ii) *Full course of study.* The border commuter student must be enrolled in a full course of study at the school that leads to the attainment of a specific educational or vocational objective, albeit on a part-time basis. A designated school official at the school may authorize an eligible border commuter student to enroll in a course load below that otherwise required for a full course of study under paragraph (m)(9) of this section, provided that the reduced course load is consistent with the border commuter student's approved course of study.

(iii) *Period of stay.* An M–1 border commuter student is not entitled to an additional 30-day period of stay otherwise available under paragraph (m)(5) of this section.

(iv) *Employment.* A border commuter student may not be authorized to accept any employment in connection with his or her M–1 student status, except for practical training as provided in paragraph (m)(14) of this section.

(20) *Remittance of the fee.* An alien who applies for M–1 or M–3 nonimmigrant status in order to enroll in a program of study at a DHS-approved vocational educational institution is required to pay the SEVIS fee to DHS, pursuant to 8 CFR 214.13, except as otherwise provided in that section.

(n) *Certain parents and children of section 101(a)(27)(I) special immigrants*—(1) *Parent of special immigrant.* Upon application, a parent of a child accorded special immigrant status under section 101(a)(27)(I)(i) of the Act may be granted status under section 101(a)(15)(N)(i) of the Act as long as the permanent resident child through whom eligibility is derived remains a child as defined in section 101(b)(1) of the Act.

(2) *Child of section 101(a)(27)(I) special immigrants and section 101(a)(15)(N)(i) nonimmigrants.* Children of parents granted nonimmigrant status under section 101(a)(15)(N)(i) of the Act, or of parents who have been granted special immigrant status under section 101(a)(27)(I) (ii), (iii) or (iv) of the Act may be granted status under section 101(a)(15)(N)(ii) of the Act for such time as each remains a child as defined in section 101(b)(1) of the Act.

(3) *Admission and extension of stay.* A nonimmigrant granted (N) status shall be admitted for not to exceed three years with extensions in increments up to but not to exceed three years. Status as an (N) nonimmigrant shall terminate on the date the child described in paragraph (n)(1) or (n)(2) of this section no longer qualifies as a child as defined in section 101(b)(1) of the Act.

(4) *Employment.* A nonimmigrant admitted in or granted (N) status is authorized employment incident to (N) status without restrictions as to location or type of employment.

(o) *Aliens of extraordinary ability or achievement*—(1) *Classifications*—(i) *General.* Under section 101(a)(15)(O) of the Act, a qualified alien may be authorized to come to the United States to perform services relating to an event

or events if petitioned for by an employer. Under this nonimmigrant category, the alien may be classified under section 101(a)(15)(O)(i) of the Act as an alien who has extraordinary ability in the sciences, arts, education, business, or athletics, or who has a demonstrated record of extraordinary achievement in the motion picture or television industry. Under section 101(a)(15)(O)(ii) of the Act, an alien having a residence in a foreign country which he or she has no intention of abandoning may be classified as an accompanying alien who is coming to assist in the artistic or athletic performance of an alien admitted under section 101(a)(15)(O)(i) of the Act. The spouse or child of an alien described in section 101(a)(15)(O)(i) or (ii) of the Act who is accompanying or following to join the alien is entitled to classification pursuant to section 101(a)(15)(O)(iii) of the Act. These classifications are called the O–1, O–2, and O–3 categories, respectively. The petitioner must file a petition with the Service for a determination of the alien's eligibility for O–1 or O–2 classification before the alien may apply for a visa or seek admission to the United States. This paragraph sets forth the standards and procedures applicable to these classifications.

(ii) *Description of classifications.* (A) An O–1 classification applies to:

(*1*) An individual alien who has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and who is coming temporarily to the United States to continue work in the area of extraordinary ability; or

(*2*) An alien who has a demonstrated record of extraordinary achievement in motion picture and/or television productions and who is coming temporarily to the United States to continue work in the area of extraordinary achievement.

(B) An O–2 classification applies to an accompanying alien who is coming temporarily to the United States solely to assist in the artistic or athletic performance by an O–1. The O–2 alien must:

(*1*) Be an integral part of the actual performances or events and posses critical skills and experience with the O–1 alien that are not of a general nature and which are not possessed by others; or

(*2*) In the case of a motion picture or television production, have skills and experience with the O–1 alien which are not of a general nature and which are critical, either based on a pre-existing and longstanding working relationship or, if in connection with a specific production only, because significant production (including pre- and post-production) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production.

(2) *Filing of petitions*—(i) *General.* Except as provided for in paragraph (o)(2)(iv)(A) of this section, a petitioner seeking to classify an alien as an O–1 or O–2 nonimmigrant shall file a petition on Form I–129, Petition for a Nonimmigrant Worker. The petition may not be filed more than one year before the actual need for the alien's services. An O–1 or O–2 petition shall be adjudicated at the appropriate Service Center, even in emergency situations. Only one beneficiary may be included on an O–1 petition. O–2 aliens must be filed for on a separate petition from the O–1 alien. An O–1 or O–2 petition may only be filed by a United States employer, a United States agent, or a foreign employer through a United States agent. For purposes of paragraph (o) of this section, a foreign employer is any employer who is not amenable to service of process in the United States. A foreign employer may not directly petition for an O nonimmigrant alien but instead must use the services of a United States agent to file a petition for an O nonimmigrant alien. A United States agent petitioning on behalf of a foreign employer must be authorized to file the petition, and to accept services of process in the United States in proceedings under section 274A of the Act, on behalf of the foreign employer. An O alien may not petition for himself or herself.

(ii) *Evidence required to accompany a petition.* Petitions for O aliens shall be accompanied by the following:

(A) The evidence specified in the particular section for the classification;

(B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien will be employed;

(C) An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and

(D) A written advisory opinion(s) from the appropriate consulting entity or entities.

(iii) *Form of documentation.* The evidence submitted with an O petition shall conform to the following:

(A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, firm, establishment, or organization where the work was performed.

(B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability, or in the case of a motion picture or television production, the extraordinary achievement of the alien, shall specifically describe the alien's recognition and ability or achievement in factual terms and set forth the expertise of the affiant and the manner in which the affiant acquired such information.

(C) A legible photocopy of a document in support of the petition may be submitted in lieu of the original. However, the original document shall be submitted if requested by the Director.

(iv) *Other filing situations*—(A) *Services in more than one location.* A petition which requires the alien to work in more than one location must include an itinerary with the dates and locations of work.

(B) *Services for more than one employer.* If the beneficiary will work concurrently for more than one employer within the same time period, each employer must file a separate petition unless an established agent files the petition.

(C) *Change of employer.* If an O–1 or O–2 alien in the United States seeks to change employers, the new employer must file a petition and a request to extend the alien's stay. An O–2 alien may change employers only in conjunction with a change of employers by the principal O–1 alien. If the O–1 or O–2 petition was filed by an agent, an amended petition must be filed with evidence relating to the new employer and a request for an extension of stay.

(D) *Amended petition.* The petitioner shall file an amended petition on Form I–129, with fee, to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original approved petition. In the case of a petition filed for an artist or entertainer, a petitioner may add additional performances or engagements during the validity period of the petition without filing an amended petition, provided the additional performances or engagements require an alien of O–1 caliber.

(E) *Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act in its behalf. A United States agent may be: The actual employer of the beneficiary, the representative of both the employer and the beneficiary; or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by an agent is subject to the following conditions:

(*1*) An agent performing the function of an employer must provide the contractual agreement between the agent and the beneficiary which specifies the wage offered and the other terms and conditions of employment of the beneficiary.

(*2*) A person or company in business as an agent may file the petition involving multiple employers as the representative of both the employers and the beneficiary, if the supporting documentation includes a complete itinerary of the event or events. The itinerary must specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishments, venues, or locations where the services will be performed. A contract between the employers and

the beneficiary is required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(*3*) A foreign employer who, through a United States agent, files a petition for an O nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

(F) *Multiple beneficiaries.* More than one O–2 accompanying alien may be included on a petition if they are assisting the same O–1 alien for the same events or performances, during the same period of time, and in the same location.

(G) *Traded professional O–1 athletes.* In the case of a professional O–1 athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after acquisition by the new organization, within which time the new organization is expected to file a new Form I–129. If a new Form I–129 is not filed within 30 days, employment authorization will cease. If a new Form I–129 is filed within 30 days, the professional athlete shall be deemed to be in valid O–1 status, and employment shall continue to be authorized, until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

(3) *Petition for alien of extraordinary ability or achievement (O–1)*—(i) *General.* Extraordinary ability in the sciences, arts, education, business, or athletics, or extraordinary achievement in the case of an alien in the motion picture or television industry, must be established for an individual alien. An O–1 petition must be accompanied by evidence that the work which the alien is coming to the United States to continue is in the area of extraordinary ability, and that the alien meets the criteria in paragraph (o)(3)(iii) or (iv) of this section.

(ii) *Definitions.* As used in this paragraph, the term:

Arts includes any field of creative activity or endeavor such as, but not limited to, fine arts, visual arts, culinary arts, and performing arts. Aliens engaged in the field of arts include not only the principal creators and performers but other essential persons such as, but not limited to, directors, set designers, lighting designers, sound designers, choreographers, choreologists, conductors, orchestrators, coaches, arrangers, musical supervisors, costume designers, makeup artists, flight masters, stage technicians, and animal trainers.

Event means an activity such as, but not limited to, a scientific project, conference, convention, lecture series, tour, exhibit, business project, academic year, or engagement. Such activity may include short vacations, promotional appearances, and stopovers which are incidental and/or related to the event. A group of related activities may also be considered to be an event. In the case of an O–1 athlete, the event could be the alien's contract.

Extraordinary ability in the field of arts means distinction. Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

Extraordinary ability in the field of science, education, business, or athletics means a level of expertise indicating that the person is one of the small percentage who have arisen to the very top of the field of endeavor.

Extraordinary achievement with respect to motion picture and television productions, as commonly defined in the industry, means a very high level of accomplishment in the motion picture or television industry evidenced by a degree of skill and recognition significantly above that ordinarily encountered to the extent that the person is recognized as outstanding, notable, or leading in the motion picture or television field.

Peer group means a group or organization which is comprised of practitioners of the alien's occupation. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, such a representative may be considered the appropriate peer group for purposes of consultation.

(iii) *Evidentiary criteria for an O–1 alien of extraordinary ability in the fields of science, education, business, or athletics.* An alien of extraordinary ability in the fields of science, education, business, or athletics must demonstrate sustained national or international acclaim and recognition for achievements in the field of expertise by providing evidence of:

(A) Receipt of a major, internationally recognized award, such as the Nobel Prize; or

(B) At least three of the following forms of documentation:

(*1*) Documentation of the alien's receipt of nationally or internationally recognized prizes or awards for excellence in the field of endeavor;

(*2*) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;

(*3*) Published material in professional or major trade publications or major media about the alien, relating to the alien's work in the field for which classification is sought, which shall include the title, date, and author of such published material, and any necessary translation;

(*4*) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which classification is sought;

(*5*) Evidence of the alien's original scientific, scholarly, or business-related contributions of major significance in the field;

(*6*) Evidence of the alien's authorship of scholarly articles in the field, in professional journals, or other major media;

(*7*) Evidence that the alien has been employed in a critical or essential capacity for organizations and establishments that have a distinguished reputation;

(*8*) Evidence that the alien has either commanded a high salary or will command a high salary or other remuneration for services, evidenced by contracts or other reliable evidence.

(C) If the criteria in paragraph (o)(3)(iii) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

(iv) *Evidentiary criteria for an O–1 alien of extraordinary ability in the arts.* To qualify as an alien of extraordinary ability in the field of arts, the alien must be recognized as being prominent in his or her field of endeavor as demonstrated by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(*1*) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements;

(*2*) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(*3*) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(*4*) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion pictures or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(*5*) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials

must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(*6*) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to others in the field, as evidenced by contracts or other reliable evidence; or

(C) If the criteria in paragraph (o)(3)(iv) of this section do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility.

(v) *Evidentiary criteria for an alien of extraordinary achievement in the motion picture or television industry*. To qualify as an alien of extraordinary achievement in the motion picture or television industry, the alien must be recognized as having a demonstrated record of extraordinary achievement as evidenced by the following:

(A) Evidence that the alien has been nominated for, or has been the recipient of, significant national or international awards or prizes in the particular field such as an Academy Award, an Emmy, a Grammy, or a Director's Guild Award; or

(B) At least three of the following forms of documentation:

(*1*) Evidence that the alien has performed, and will perform, services as a lead or starring participant in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications contracts, or endorsements;

(*2*) Evidence that the alien has achieved national or international recognition for achievements evidenced by critical reviews or other published materials by or about the individual in major newspapers, trade journals, magazines, or other publications;

(*3*) Evidence that the alien has performed, and will perform, in a lead, starring, or critical role for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(*4*) Evidence that the alien has a record of major commercial or critically acclaimed successes as evidenced by such indicators as title, rating, standing in the field, box office receipts, motion picture or television ratings, and other occupational achievements reported in trade journals, major newspapers, or other publications;

(*5*) Evidence that the alien has received significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field in which the alien is engaged. Such testimonials must be in a form which clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(*6*) Evidence that the alien has either commanded a high salary or will command a high salary or other substantial remuneration for services in relation to other in the field, as evidenced by contracts or other reliable evidence.

(4) *Petition for an O–2 accompanying alien*—(i) *General*. An O–2 accompanying alien provides essential support to an O–1 artist or athlete. Such aliens may not accompany O–1 aliens in the fields of science, business, or education. Although the O–2 alien must obtain his or her own classification, this classification does not entitle him or her to work separate and apart from the O–1 alien to whom he or she provides support. An O–2 alien must be petitioned for in conjunction with the services of the O–1 alien.

(ii) *Evidentiary criteria for qualifying as an O–2 accompanying alien*—(A) *Alien accompanying an O–1 artist or athlete of extraordinary ability*. To qualify as an O–2 accompanying alien, the alien must be coming to the United States to assist in the performance of the O–1 alien, be an integral part of the actual performance, and have critical skills and experience with the O–1 alien which are not of a general nature and which are not possessed by a U.S. worker.

(B) *Alien accompanying an O–1 alien of extraordinary achievement*. To qualify as an O–2 alien accompanying and O–1 alien involved in a motion picture or television production, the alien must have skills and experience with the O–1 alien which are not of a general nature and which are critical based on a

pre-existing longstanding working relationship or, with respect to the specific production, because significant production (including pre- and post-production work) will take place both inside and outside the United States and the continuing participation of the alien is essential to the successful completion of the production.

(C) The evidence shall establish the current essentiality, critical skills, and experience of the O–2 alien with the O–1 alien and that the alien has substantial experience performing the critical skills and essential support services for the O–1 alien. In the case of a specific motion picture or television production, the evidence shall establish that significant production has taken place outside the United States, and will take place inside the United States, and that the continuing participation of the alien is essential to the successful completion of the production.

(5) *Consultation*—(i) *General.* (A) Consultation with an appropriate U.S. peer group (which could include a person or persons with expertise in the field), labor and/or management organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for an O–1 or O–2 classification can be approved.

(B) Except as provided in paragraph (o)(5)(i)(E) of this section, evidence of consultation shall be in the form of a written advisory opinion from a peer group (which could include a person or persons with expertise in the field), labor and/or management organization with expertise in the specific field involved.

(C) Except as provided in paragraph (o)(5)(i)(E) of this section, the petitioner shall obtain a written advisory opinion from a peer group (which could include a person or persons with expertise in the field), labor, and/or management organization with expertise in the specific field involved. The advisory opinion shall be submitted along with the petition when the petition is filed. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. Advisory opinions must be submitted in writing and must be signed by an authorized official of the group or organization.

(D) Except as provided in paragraph (o)(5)(i)(E) and (G) of this section, written evidence of consultation shall be included in the record in every approved O petition. Consultations are advisory and are not binding on the Service.

(E) In a case where the alien will be employed in the field of arts, entertainment, or athletics, and the Service has determined that a petition merits expeditious handling, the Service shall contact the appropriate labor and/or management organization and request an advisory opinion if one is not submitted by the petitioner. The labor and/or management organization shall have 24 hours to respond to the Service's request. The Service shall adjudicate the petition after receipt of the response from the consulting organization. The labor and/or management organization shall then furnish the Service with a written advisory opinion within 5 days of the initiating request. If the labor and/or management organization fails to respond within 24 hours, the Service shall render a decision on the petition without the advisory opinion.

(F) In a routine processing case where the petition is accompanied by a written opinion from a peer group, but the peer group is not a labor organization, the Director will forward a copy of the petition and all supporting documentation to the national office of the appropriate labor organization within 5 days of receipt of the petition. If there is a collective bargaining representative of an employer's employees in the occupational classification for which the alien is being sought, that representative shall be the appropriate labor organization for purposes of this section. The labor organization will then have 15 days from receipt of the petition and supporting documents to submit to the Service a written advisory opinion, comment, or letter of no objection. Once the 15-day period has expired, the Director shall adjudicate the petition in no more than 14 days. The Director may shorten this time in his or her discretion for emergency reasons, if no unreasonable burden would be imposed on any participant in the

process. If the labor organization does not respond within 15 days, the Director will render a decision on the record without the advisory opinion.

(G) In those cases where it is established by the petitioner that an appropriate peer group, including a labor organization, does not exist, the Service shall render a decision on the evidence of record.

(ii) *Consultation requirements for an O–1 alien for extraordinary ability*—(A) *Content.* Consultation with a peer group in the area of the alien's ability (which may include a labor organization), or a person or persons with expertise in the area of the alien's ability, is required in an O–1 petition for an alien of extraordinary ability. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If the advisory opinion is favorable to the petitioner, it should describe the alien's ability and achievements in the field of endeavor, describe the nature of the duties to be performed, and state whether the position requires the services of an alien of extraordinary ability. A consulting organization may also submit a letter of no objection in lieu of the above if it has no objection to the approval of the petition.

(B) *Waiver of consultation of certain aliens of extraordinary ability in the field of arts.* Consultation for an alien of extraordinary ability in the field of arts shall be waived by the Director in those instances where the alien seeks readmission to the United States to perform similar services within 2 years of the date of a previous consultation. The director shall, within 5 days of granting the waiver, forward a copy of the petition and supporting documentation to the national office of an appropriate labor organization. Petitioners desiring to avail themselves of the waiver should submit a copy of the prior consultation with the petition and advise the Director of the waiver request.

(iii) *Consultation requirements for an O–1 alien of extraordinary achievement.* In the case of an alien of extraordinary achievement who will be working on a motion picture or television production, consultation shall be made with the appropriate union representing the alien's occupational peers and a management organization in the area of the alien's ability. If an advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If the advisory opinion is favorable to the petitioner, the written advisory opinion from the labor and management organizations should describe the alien's achievements in the motion picture or television field and state whether the position requires the services of an alien of extraordinary achievement. If a consulting organization has no objection to the approval of the petition, the organization may submit a letter of no objection in lieu of the above.

(iv) *Consultation requirements for an O–2 accompanying alien.* Consultation with a labor organization with expertise in the skill area involved is required for an O–2 alien accompanying an O–1 alien of extraordinary ability. In the case of an O–2 alien seeking entry for a motion picture or television production, consultation with a labor organization and a management organization in the area of the alien's ability is required. If an advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which supports the conclusion reached in the opinion. If the advisory opinion is favorable to the petitioner, the opinion provided by the labor and/or management organization should describe the alien's essentiality to, and working relationship with, the O–1 artist or athlete and state whether there are available U.S. workers who can perform the support services. If the alien will accompany an O–1 alien involved in a motion picture or television production, the advisory opinion should address the alien's skills and experience wit the O–1 alien and whether the alien has a pre-existing longstanding working relationship with the O–1 alien, or whether significant production will take place in the United States and abroad and if the continuing participation of the alien is essential to the successful completion

of the production. A consulting organization may also submit a letter of no objection in lieu of the above if it has no objection to the approval of the petition.

(v) *Organizations agreeing to provide advisory opinions.* The Service will list in its Operations Instructions for O classification those peer groups, labor organizations, and/or management organizations which have agreed to provide advisory opinions to the Service and/or petitioners. The list will not be an exclusive or exhaustive list. The Service and petitioners may use other sources, such as publications, to identify appropriate peer groups, labor organizations, and management organizations. Additionally, the Service will list in its Operations Instructions those occupations or fields of endeavor where the nonexistence of an appropriate consulting entity has been verified.

(6) *Approval and validity of petition—*(1) *Approval.* The Director shall consider all of the evidence submitted and such other evidence as may be independently required to assist in the adjudication. The Director shall notify the petitioner of the approval of the petition on Form I–797, Notice of Action. The approval notice shall include the alien beneficiary name, the classification, and the petition's period of validity.

(ii) *Recording the validity of petitions.* Procedures for recording the validity period of petitions are as follows;

(A) If a new O petition is approved before the date the petitioner indicates the services will begin, the approved petition and approval notice shall show the actual dates requested by the petitioner, not to exceed the limit specified by paragraph (o)(6)(iii) of this section or other Service policy.

(B) If a new 0 petition is approved after the date the petitioner indicates the services will begin, the approved petition and approval notice shall generally show a validity period commencing with the date of approval and ending with the date requested by the petitioner, not to exceed the limit specified by paragraph (o)(6)(iii) of this section or other Service policy.

(C) If the period of services requested by the petitioner exceeds the limit specified in paragraph (o)(6)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.

(iii) *Validity*—(A) *O–1 petition.* An approved petition for an alien classified under section 101(a)(15)(O)(i) of the Act shall be valid for a period of time determined by the Director to be necessary to accomplish the event or activity, not to exceed 3 years.

(B) *O–2 petition.* An approved petition for an alien classified under section 101(a)(15)(O)(ii) of the Act shall be valid for a period of time determined to be necessary to assist the O–1 alien to accomplish the event or activity, not to exceed 3 years.

(iv) *Spouse and dependents.* The spouse and unmarried minor children of the O–1 or O–2 alien beneficiary are entitled to O–3 nonimmigrant classification, subject to the same period of admission and limitations as the alien beneficiary, if they are accompanying or following to join the alien beneficiary in the United States. Neither the spouse nor a child of the alien beneficiary may accept employment unless he or she has been granted employment authorization.

(7) The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under 8 CFR part 103.

(8) *Revocation of approval of petition—*(i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(O) of the Act and paragraph (o) of this section. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the Director who approved the petition.

(B) The Director may revoke a petition at any time, even after the validity of the petition has expired.

(ii) *Automatic revocation.* The approval of an unexpired petition is automatically revoked if the petitioner, or the named employer in a petition filed by an agent, goes out of business, files a written withdrawal of the petition, or

notifies the Service that the beneficiary is no longer employed by the petitioner.

(iii) *Revocation on notice*—(A) *Grounds for revocation.* The Director shall send to the petitioner a notice of intent to revoke the petition in relevant part if is determined that:

(*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;

(*2*) The statement of facts contained in the petition was not true and correct;

(*3*) The petitioner violated the terms or conditions of the approved petition;

(*4*) The petitioner violated the requirements of section 101(a)(15)(O) of the Act or paragraph (o) of this section; or

(*5*) The approval of the petition violated paragraph (o) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall 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 the date of the notice. The Director shall consider all relevant evidence presented in deciding whether to revoke the petition.

(9) *Appeal of a denial or a revocation of a petition*—(i) *Denial.* A denied petition may be appealed under 8 CFR part 103.

(ii) *Revocation.* A petition that has been revoked on notice may be appealed under 8 CFR part 103. Automatic revocations may not be appealed.

(10) *Admission.* 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 only engage in employment during the validity period of the petition.

(11) *Extention of visa petition validity.* The petitioner shall file a request to extend the validity of the original petition under section 101(a)(15)(O) of the Act on Form I–129, Petition for a Nonimmigrant Worker, in order to continue or complete the same activities or events specified in the original petition. Supporting documents are not required unless requested by the Director. A petition extension may be filed only if the validity of the original petition has not expired.

(12) *Extension of stay*—(i) *Extension procedure.* The petitioner shall request extension of the alien's stay to continue or complete the same event or activity by filing Form I–129, accompanied by a statement explaining the reasons for the extension. The petitioner must also request a petition extension. The dates of extension shall be the same for the petition and the beneficiary's extension of stay. The alien beneficiary must be physically present in the United States at the time of filing of the extension of stay. Even though the request to extend the petition and the alien's stay are combined on the petition, the Director shall make a separate determination on each. If the alien leaves the United States for business or personal reasons while the extension requests are pending, the petitioner may request the Director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa.

(ii) *Extension period.* An extension of stay may be authorized in increments of up to 1 year for an O–1 or O–2 beneficiary to continue or complete the same event or activity for which he or she was admitted plus an additional 10 days to allow the beneficiary to get his or her personal affairs in order.

(iii) *Denial of an extension of stay.* The denial of the request for the alien's extension of temporary stay may not be appealed.

(13) *Effect of approval of a permanent labor certification or filing of a preference petition on O classification.* The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying an O–1 petition, a request to extend such a petition, or the alien's application for admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as an O–1 nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States.

(14) *Effect of a strike.* (i) If the Secretary of Labor certifies to the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place where the beneficiary is to be employed, and that the employment of the beneficiary would adversely affect the wages and working conditions of U.S. citizens and lawful resident workers:

(A) A petition to classify an alien as a nonimmigrant as defined in section 101(a)(15)(O) of the Act shall be denied; or

(B) If a petition has been approved, but the alien has not yet entered the United States, or has entered the United States but has not commenced employment, the approval of the petition is automatically suspended, and the application for admission on the basis of the petition shall be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (o)(14)(i) of this section, the Commissioner shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commenced employment in the United States under an approved petition and is participating in a strike or labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Secretary of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated thereunder in the same manner as are all other O nonimmigrants;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(C) Although participation by an O nonimmigrant alien in a strike or other labor dispute involving a work stoppage of workers will not constitute a ground for deportation, and alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired will be subject to deportation.

(15) *Use of approval notice, Form I–797.* The Service shall notify the petitioner of Form I–797 whenever a visa petition or an extension of a visa petition is approved under the O classification. The beneficiary of an O 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 who visa will have expired before the date of his or her intended return, may use Form I–797 to apply for a new or revalidated visa during the validity period of the petition. A copy of Form I–797 shall be retained by the beneficiary and presented during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

(16) *Return transportation requirement.* In the case of an alien who enters the United States under section 101(a)(15(O) of the Act and whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of such nonimmigrant status and the petitioner are jointly and severally liable for the reasonable cost of return transportation of the alien abroad. For the purposes of this paragraph, the term ''abroad'' means the alien's last place of residence prior to his or her entry into the United States.

(p) *Artists, athletes, and entertainers*—(1) *Classifications*—(i) *General.* Under section 101(a)(15)(P) of the Act, an alien having a residence in a foreign country which he or she has not intention or abandoning may be authorized to come to the United States temporarily to perform services for an employer or a sponsor. Under the nonimmigrant category, the alien may be classified under section 101(a)(15)(P)(i) of the Act as an alien who is coming to the United

States to perform services as an internationally recognized athlete, individually or as part of a group or team, or member of an internationally recognized entertainment group; under section 101(a)(15)(P)(ii) of the Act, who is coming to perform as an artist or entertainer under a reciprocal exchange program; under section 101(a)(15)(P)(iii) of the Act, as an alien who is coming solely to perform, teach, or coach under a program that is culturally unique; or under section 101(a)(15)(P)(iv) of the Act, as the spouse or child of an alien described in section 101(a)(15)(P) (i), (ii), or (iii) of the Act who is accompanying or following to join the alien. These classifications are called P–1, P–2, P–3, and P–4 respectively. The employer or sponsor must file a petition with the Service for review of the services to be performed and for determination of the alien's eligibility for P–1, P–2, or P–3 classification before the alien may apply for a visa or seek admission to the United States. This paragraph sets forth the standards and procedures applicable to these classifications.

(ii) *Description of classification.* (A) A P–1 classification applies to an alien who is coming temporarily to the United States:

(*1*) To perform at specific athletic competition as an athlete, individually or as part of a group or team, at an internationally recognized level or performance, or

(*2*) To perform with, or as an integral and essential part of the performance of, and entertainment group that has been recognized internationally as being outstanding in the discipline for a sustained and substantial period of time, and who has had a sustained and substantial relationship with the group (ordinarily for at least 1 year) and provides functions integral to the performance of the group.

(B) A P–2 classification applies to an alien who is coming temporarily to the United States to perform as an artist or entertainer, individually or as part of a group, or to perform as an integral part of the performance of such a group, and who seeks to perform under a reciprocal exchange program which is between an organization or organizations in the United States and an organization or organizations in one or more foreign states, and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers.

(C) A P–3 classification applies to an alien artist or entertainer who is coming temporarily to the United States, either individually or as part of a group, or as an integral part of the performance of the group, to perform, teach, or coach under a commercial or noncommercial program that is culturally unique.

(2) *Filing of petitions*—(i) *General.* A P–1 petition for an athlete or entertainment group shall be filed by a United States employer, a United States sponsoring organization, a United States agent, or a foreign employer through a United States agent. For purposes of paragraph (p) of this section, a foreign employer is any employer who is not amenable to service of process in the United States. Foreign employers seeking to employ a P–1 alien may not directly petition for the alien but must use a United States agent. A United States agent petitioning on behalf of a foreign employer must be authorized to file the petition, and to accept service of process in the United States in proceedings under section 274A of the Act, on behalf of the foreign employer. A P–2 petition for an artist or entertainer in a reciprocal exchange program shall be filed by the United States labor organization which negotiated the reciprocal exchange agreement, the sponsoring organization, or a United States employer. A P–3 petition for an artist or entertainer in a culturally unique program shall be filed by the sponsoring organization or a United States employer. Essential support personnel may not be included on the petition filed for the principal alien(s). These aliens require a separate petition. The petitioner must file a P petition on Form I–129, Petition for Nonimmigrant Worker. The petition may not be filed more than one year before the actual need for the alien's services. A P–1, P–2, or P–3 petition shall be adjudicated at the appropriate Service Center, even in emergency situations.

(ii) *Evidence required to accompany a petition for a P nonimmigrant.* Petitions

for P nonimmigrant aliens shall be accompanied by the following:

(A) The evidence specified in the specific section of this part for the classification;

(B) Copies of any written contracts between the petitioner and the alien beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the alien(s) will be employed;

(C) An explanation of the nature of the events or activities, the beginning and ending dates for the events or activities, and a copy of any itinerary for the events or activities; and

(D) A written consultation from a labor organization.

(iii) *Form of documentation.* The evidence submitted with an P petition should conform to the following:

(A) Affidavits, contracts, awards, and similar documentation must reflect the nature of the alien's achievement and be executed by an officer or responsible person employed by the institution, establishment, or organization where the work has performed.

(B) Affidavits written by present or former employers or recognized experts certifying to the recognition and extraordinary ability, or, in the case of a motion picture or television production, the extraordinary achievement of the alien, which shall specifically describe the alien's recognition and ability or achievement in factual terms. The affidavit must also set forth the expertise of the affiant and the manner in which the affiant acquired such information.

(C) A legible copy of a document in support of the petition may be submitted in lieu of the original. However, the original document shall be submitted if requested by the Director.

(iv) *Other filing situations*—(A) *Services in more than one location.* A petition which requires the alien to work in more than one location (e.g., a tour) must include an itinerary with the dates and locations of the performances.

(B) *Services for more than one employer.* If the beneficiary or beneficiaries will work for more than one employer within the same time period, each employer must file a separate petition unless an agent files the petition pursuant to paragraph (p)(2)(iv)(E) of this section.

(C) *Change of employer—(1) General.* If a P–1, P–2, or P–3 alien in the United States seeks to change employers or sponsors, the new employer or sponsor must file both a petition and a request to extend the alien's stay in the United States. The alien may not commence employment with the new employer or sponsor until the petition and request for extension have been approved.

(*2*) *Traded professional P–1 athletes.* In the case of a professional P–1 athlete who is traded from one organization to another organization, employment authorization for the player will automatically continue for a period of 30 days after acquisition by the new organization, within which time the new organization is expected to file a new Form I–129 for P–1 nonimmigrant classification. If a new Form I–129 is not filed within 30 days, employment authorization will cease. If a new Form I–129 is filed within 30 days, the professional athlete shall be deemed to be in valid P–1 status, and employment shall continue to be authorized, until the petition is adjudicated. If the new petition is denied, employment authorization will cease.

(D) *Amended petition.* The petitioner shall file an amended petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or the beneficiary's eligibility as specified in the original approved petition. A petitioner may add additional, similar or comparable performance, engagements, or competitions during the validity period of the petition without filing an amended petition.

(E) *Agents as petitioners.* A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary; the representative of both the employer and the beneficiary; or, a person or entity authorized by the employer to act for, or in place of, the

employer as its agent. A petition filed by an United States agent is subject to the following conditions:

(*1*) An agent performing the function of an employer must specify the wage offered and the other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.

(*2*) A person or company in business as an agent may file the P petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employer(s) and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of the employment and to provide any required documentation.

(*3*) A foreign employer who, through a United States agent, files a petition for a P nonimmigrant alien is responsible for complying with all of the employer sanctions provisions of section 274A of the Act and 8 CFR part 274a.

(F) *Multiple beneficiaries.* More than one beneficiary may be included in a P petition if they are members of a group seeking classification based on the reputation of the group as an entity, or if they will provide essential support to P–1, P–2, or P–3 beneficiaries performing in the same location and in the same occupation.

(G) *Named beneficiaries.* Petitions for P classification must include the names of beneficiaries and other required information at the time of filing.

(H) *Substitution of beneficiaries.* A petitioner may request substitution of beneficiaries in approved P–1, P–2, and P–3 petitions for groups. To request substitution, the petitioner shall submit a letter requesting such substitution, along with a copy of the petitioner's approval notice, to the consular office at which the alien will apply for a visa or the Port-of-Entry where the alien will apply for admission. Essential support personnel may not be substituted at consular offices or at Ports-of-entry. In order to add additional new essential support personnel, a new I–129 petition must be filed.

(3) *Definitions.* As used in this paragraph, the term:

Arts includes fields of creative activity or endeavor such as, but not limited to, fine arts, visual arts, and performing arts.

Competition, event, or performance means an activity such as an athletic competition, athletic season, tournament, tour, exhibit, project, entertainment event, or engagement. Such activity could include short vacations, promotional appearances for the petitioning employer relating to the competition, event, or performance, and stopovers which are incidental and/or related to the activity. An athletic competition or entertainment event could include an entire season of performances A group of related activities will also be considered an event. In the case of a P–2 petition, the event may be the duration of the reciprocal exchange agreement. In the case of a P–1 athlete, the event may be the duration of the alien's contract.

Contract means the written agreement between the petitioner and the beneficiary(ies) that explains the terms and conditions of employment. The contract shall describe the services to be performed, and specify the wages, hours of work, working conditions, and any fringe benefits.

Culturally unique means a style of artistic expression, methodology, or medium which is unique to a particular country, nation, society, class, ethnicity, religion, tribe, or other group of persons.

Essential support alien means a highly skilled, essential person determined by the Director to be an integral part of the performance of a P–1, P–2, or P–3 alien because he or she performs support services which cannot be readily performed by a United States worker

and which are essential to the successful performance of services by the P–1, P–2, alien. Such alien must have appropriate qualifications to perform the services, critical knowledge of the specific services to be performed, and experience in providing such support to the P–1, P–2, or P–3 alien.

Group means two or more persons established as one entity or unit to perform or to provide a service.

Internationally recognized means having a high level of achievement in a field evidenced by a degree of skill and recognition substantially above that ordinarily encountered, to the extent that such achievement is renowned, leading, or well-known in more than one country.

Member of a group means a person who is actually performing the entertainment services.

Sponsor means an established organization in the United States which will not directly employ a P–1, P–2, or P–3 alien but will assume responsibility for the accuracy of the terms and conditions specified in the petition.

Team means two or more persons organized to perform together as a competitive unit in a competitive event.

(4) *Petition for an internationally recognized athlete or member of an internationally recognized entertainment group (P–1)*—(i) *Types of classification*—(A) *P–1 classification as an athlete in an individual capacity*. A P–1 classification may be granted to an alien who is an internationally recognized athlete based on his or her own reputation and achievements as an individual. The alien must be coming to the United States to perform services which require an internationally recognized athlete.

(B) *P–1 classification as a member of an entertainment group or an athletic team.* An entertainment group or athletic team consists of two or more persons who function as a unit. The entertainment group or athletic team as a unit must be internationally recognized as outstanding in the discipline and must be coming to perform services which require an internationally recognized entertainment group or athletic team. A person who is a member of an internationally recognized entertainment group or athletic team may be granted P–1 classification based on that relationship, but may not perform services separate and apart from the entertainment group or athletic team. An entertainment group must have been established for a minimum of 1 year, and 75 percent of the members of the group must have been performing entertainment services for the group for a minimum of 1 year.

(ii) *Criteria and documentary requirements for P–1 athletes*—(A) *General.* A P–1 athlete must have an internationally recognized reputation as an international athlete or he or she must be a member of a foreign team that is internationally recognized. The athlete or team must be coming to the United States to participate in an athletic competition which has a distinguished reputation and which requires participation of an athlete or athletic team that has an international reputation.

(B) *Evidentiary requirements for an internationally recognized athlete or athletic team.* A petition for an athletic team must be accompanied by evidence that the team as a unit has achieved international recognition in the sport. Each member of the team is accorded P–1 classification based on the international reputation of the team. A petition for an athlete who will compete individually or as a member of a U.S. team must be accompanied by evidence that the athlete has achieved international recognition in the sport based on his or her reputation. A petition for a P–1 athlete or athletic team shall include:

(*1*) A tendered contract with a major United States sports league or team, or a tendered contract in an individual sport commensurate with international recognition in that sport, if such contracts are normally executed in the sport, and

(*2*) Documentation of at least two of the following:

(*i*) Evidence of having participated to a significant extent in a prior season with a major United States sports league;

(*ii*) Evidence of having participated in international competition with a national team;

(*iii*) Evidence of having participated to a significant extent in a prior season

for a U.S. college or university in intercollegiate competition;

(*iv*) A written statement from an official of the governing body of the sport which details how the alien or team is internationally recognized;

(*v*) A written statement from a member of the sports media or a recognized expert in the sport which details how the alien or team is internationally recognized;

(*vi*) Evidence that the individual or team is ranked if the sport has international rankings; or

(*vii*) Evidence that the alien or team has received a significant honor or award in the sport.

(iii) *Criteria and documentary requirements for members of an internationally recognized entertainment group*—(A) *General.* A P–1 classification shall be accorded to an entertainment group to perform as a unit based on the international reputation of the group. Individual entertainers shall not be accorded P–1 classification to perform separate and apart from a group. Except as provided in paragraph (p)(4)(iii)(C)(*2*) of this section, it must be established that the group has been internationally recognized as outstanding in the discipline for a sustained and substantial period of time. Seventy-five percent of the members of the group must have had a sustained and substantial relationship with the group for at least 1 year and must provide functions integral to the group's performance.

(B) *Evidentiary criteria for members of internationally recognized entertainment groups.* A petition for P–1 classification for the members of an entertainment group shall be accompanied by:

(*1*) Evidence that the group has been established and performing regularly for a period of at least 1 year;

(*2*) A statement from the petitioner listing each member of the group and the exact dates for which each member has been employed on a regular basis by the group; and

(*3*) Evidence that the group has been internationally recognized in the discipline for a sustained and substantial period of time. This may be demonstrated by the submission of evidence of the group's nomination or receipt of significant international awards or prices for outstanding achievement in its field or by three of the following different types of documentation:

(*i*) Evidence that the group has performed, and will perform, as a starring or leading entertainment group in productions or events which have a distinguished reputation as evidenced by critical reviews, advertisements, publicity releases, publications, contracts, or endorsements;

(*ii*) Evidence that the group has achieved international recognition and acclaim for outstanding achievement in its field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material;

(*iii*) Evidence that the group has performed, and will perform, services as a leading or starring group for organizations and establishments that have a distinguished reputation evidenced by articles in newspapers, trade journals, publications, or testimonials;

(*iv*) Evidence that the group has a record of major commercial or critically acclaimed successes, as evidenced by such indicators as ratings; standing in the field; box office receipts; record, cassette, or video sales; and other achievements in the field as reported in trade journals, major newspapers, or other publications;

(*v*) Evidence that the group has achieved significant recognition for achievements from organizations, critics, government agencies, or other recognized experts in the field. Such testimonials must be in a form that clearly indicates the author's authority, expertise, and knowledge of the alien's achievements; or

(*vi*) Evidence that the group has either commanded a high salary or will command a high salary or other substantial remuneration for services comparable to other similarly situated in the field as evidenced by contracts or other reliable evidence.

(C) *Special provisions for certain entertainment groups*—(*1*) *Alien circus personnel.* The 1-year group membership requirement and the international recognition requirement are not applicable to alien circus personnel who perform as part of a circus or circus group, or who constitute an integral and essential part of the performance of such

circus or circus group, provided that the alien or aliens are coming to join a circus that has been recognized nationally as outstanding for a sustained and substantial period of time or as part of such a circus.

(*2*) *Certain nationally known entertainment groups.* The Director may waive the international recognition requirement in the case of an entertainment group which has been recognized nationally as being outstanding in its discipline for a sustained and substantial period of time in consideration of special circumstances. An example of a special circumstances would be when an entertainment group may find it difficult to demonstrate recognition in more than one country due to such factors as limited access to news media or consequences of geography.

(*3*) *Waiver of 1-year relationship in exigent circumstances.* The Director may waive the 1-year relationship requirement for an alien who, because of illness or unanticipated and exigent circumstances, replaces an essential member of a P–1 entertainment group or an alien who augments the group by performing a critical role. The Department of State is hereby delegated the authority to waive the 1-year relationship requirement in the case of consular substitutions involving P–1 entertainment groups.

(iv) *P–1 classification as an essential support alien*—(A) *General.* An essential support alien as defined in paragraph (p)(3) of this section may be granted P–1 classification based on a support relationship with an individual P–1 athlete, P–1 athletic team, or a P–1 entertainment group.

(B) *Evidentiary criteria for a P–1 essential support petition.* A petition for P–1 essential support personnel must be accompanied by:

(*1*) A consultation from a labor organization with expertise in the area of the alien's skill;

(*2*) A statement describing the alien(s) prior essentiality, critical skills, and experience with the principal alien(s); and

(*3*) A copy of the written contract or a summary of the terms of the oral agreement between the alien(s) and the employer.

(5) *Petition for an artist or entertainer under a reciprocal exchange program (P–2)*—(i) *General.* (A) A P–2 classification shall be accorded to artists or entertainers, individually or as a group, who will be performing under a reciprocal exchange program which is between an organization or organizations in the United States, which may include a management organization, and an organization or organizations in one or more foreign states and which provides for the temporary exchange of artists and entertainers, or groups of artists and entertainers.

(B) The exchange of artists or entertainers shall be similar in terms of caliber of artists or entertainers, terms and conditions of employment, such as length of employment, and numbers of artists or entertainers involved in the exchange. However, this requirement does not preclude an individual for group exchange.

(C) An alien who is an essential support person as defined in paragraph (p)(3) of this section may be accorded P–2 classification based on a support relationship to a P–2 artist or entertainer under a reciprocal exchange program.

(ii) *Evidentiary requirements for petition involving a reciprocal exchange program.* A petition for P–2 classification shall be accompanied by:

(A) A copy of the formal reciprocal exchange agreement between the U.S. organization or organizations which sponsor the aliens and an organization or organizations in a foreign country which will receive the U.S. artist or entertainers;

(B) A statement from the sponsoring organization describing the reciprocal exchange of U.S. artists or entertainers as it relates to the specific petition for which P–2 classification is being sought;

(C) Evidence that an appropriate labor organization in the United States was involved in negotiating, or has concurred with, the reciprocal exchange of U.S. and foreign artists or entertainers; and

(D) Evidence that the aliens for whom P–2 classification is being sought and the U.S. artists or entertainers subject to the reciprocal exchange agreement are artists or entertainers

with comparable skills, and that the terms and conditions of employment are similar.

(iii) *P–2 classification as an essential support alien*—(A) *General.* An essential support alien as defined in paragraph (p)(3) of this section may be granted P–2 classification based on a support relationship with a P–2 entertainer or P–2 entertainment group.

(B) *Evidentiary criteria for a P–2 essential support petition.* A petition for P–2 essential support personnel must be accompanied by:

(*1*) A consultation from a labor organization with expertise in the area of the alien's skill;

(*2*) A statement describing the alien(s) prior essentiality, critical skills, and experience with the principal alien(s); and

(*3*) A copy of the written contract or a summary of the terms of the oral agreement between the alien(s) and the employer.

(6) *Petition for an artist or entertainer under a culturally unique program*—(i) *General.* (A) A P–3 classification may be accorded to artists or entertainers, individually or as a group, coming to the United States for the purpose of developing, interpreting, representing, coaching, or teaching a unique or traditional ethnic, folk, cultural, musical, theatrical, or artistic performance or presentation.

(B) The artist or entertainer must be coming to the United States to participate in a cultural event or events which will further the understanding or development of his or her art form. The program may be of a commercial or noncommercial nature.

(ii) *Evidentiary criteria for a petition involving a culturally unique program.* A petition for P–3 classification shall be accompanied by:

(A) Affidavits, testimonials, or letters from recognized experts attesting to the authenticity of the alien's or the group's skills in performing, presenting, coaching, or teaching the unique or traditional art form and giving the credentials of the expert, including the basis of his or her knowledge of the alien's or group's skill, or

(B) Documentation that the performance of the alien or group is culturally unique, as evidence by reviews in newspapers, journals, or other published materials; and

(C) Evidence that all of the performances or presentations will be culturally unique events.

(iii) *P–3 classification as an essential support alien*—(A) *General.* An essential support alien as defined in paragraph (p)(3) of this section may be granted P–3 classification based on a support relationship with a P–3 entertainer or P–3 entertainment group.

(B) *Evidentiary criteria for a P–3 essential support petition.* A petition for P–3 essential support personnel must be accompanied by:

(*1*) A consultation from a labor organization with expertise in the area of the alien's skill;

(*2*) A statement describing the alien(s) prior essentiality, critical skills and experience with the principal alien(s); and

(*3*) A copy of the written contract or a summary of the terms of the oral agreement between the alien(s) and the employer.

(7) *Consultation*—(i) *General.* (A) Consultation with an appropriate labor organization regarding the nature of the work to be done and the alien's qualifications is mandatory before a petition for P–1, P–2, or P–3 classification can be approved.

(B) Except as provided in paragraph (p)(7)(i)(E) of this section, evidence of consultation shall be a written advisory opinion from an appropriate labor organization.

(C) Except as provided in paragraph (p)(7)(i)(E) of this section, the petitioner shall obtain a written advisory opinion from an appropriate labor organization. The advisory opinion shall be submitted along with the petition when the petition is filed. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which support the conclusion reached in the opinion. Advisory opinions must be submitted in writing and signed by an authorized official of the organization.

(D) Except as provided in paragraph (p)(7)(i) (E) and (F) of this section, written evidence of consultation shall

be included in the record of every approved petition. Consultations are advisory and are not binding on the Service.

(E) In a case where the Service has determined that a petition merits expeditious handling, the Service shall contact the labor organization and request an advisory opinion if one is not submitted by the petitioner. The labor organization shall have 24 hours to respond to the Service's request. The Service shall adjudicate the petition after receipt of the response from the labor organization. The labor organization shall then furnish the Service with a written advisory opinion within 5 working days of the request. If the labor organization fails to respond within 24 hours, the Service shall render a decision on the petition without the advisory opinion.

(F) In those cases where it is established by the petitioner that an appropriate labor organization does not exist, the Service shall render a decision on the evidence of record.

(ii) *Consultation requirements for P–1 athletes and entertainment groups.* Consultation with a labor organization that has expertise in the area of the alien's sport or entertainment field is required in the case of a P–1 petition. If the advisory opinion is not favorable to the petitioner, the advisory opinion must set forth a specific statement of facts which support the conclusion reached in the opinion. If the advisory opinion provided by the labor organization is favorable to the petitioner it should evaluate and/or describe the alien's or group's ability and achievements in the field of endeavor, comment on whether the alien or group is internationally recognized for achievements, and state whether the services the alien or group is coming to perform are appropriate for an internationally recognized athlete or entertainment group. In lieu of the above, a labor organization may submit a letter of no objection if it has no objection to the approval of the petition.

(iii) *Consultation requirements for P–1 circus personnel.* The advisory opinion provided by the labor organization should comment on whether the circus which will employ the alien has national recognition as well as any other aspect of the beneficiary's or beneficiaries' qualifications which the labor organization deems appropriate. If the advisory opinion is not favorable to the petitioner, it must set forth a specific statement of facts which support the conclusion reached in the opinion. In lieu of the above, a labor organization may submit a letter of no objection if it has no objection to the approval of the petition.

(iv) *Consultation requirements for P–2 alien in a reciprocal exchange program.* In P–2 petitions where an artist or entertainer is coming to the United States under a reciprocal exchange program, consultation with the appropriate labor organization is required to verify the existence of a viable exchange program. The advisory opinion from the labor organization shall comment on the bona fides of the reciprocal exchange program and specify whether the exchange meets the requirements of paragraph (p)(5) of this section. If the advisory opinion is not favorable to the petitioner, it must also set forth a specific statement of facts which support the conclusion reached in the opinion.

(v) *Consultation requirements for P–3 in a culturally unique program.* Consultation with an appropriate labor organization is required for P–3 petitions involving aliens in culturally unique programs. If the advisory opinion is favorable to the petitioner, it should evaluate the cultural uniqueness of the alien's skills, state whether the events are cultural in nature, and state whether the event or activity is appropriate for P–3 classification. If the advisory opinion is not favorable to the petitioner, it must also set forth a specific statement of facts which support the conclusion reached in the opinion. In lieu of the above, a labor organization may submit a letter of no objection if it has no objection to the approval of the petition.

(vi) *Consultation requirements for essential support aliens.* Written consultation on petitions for P–1, P–2, or P–3 essential support aliens must be made with a labor organization with expertise in the skill area involved. If the advisory opinion provided by the labor

organization is favorable to the petitioner, it must evaluate the alien's essentiality to and working relationship with the artist or entertainer, and state whether United States workers are available who can perform the support services. If the advisory opinion is not favorable to the petitioner, it must also set forth a specific statement of facts which support the conclusion reached in the opinion. A labor organization may submit a letter of no objection if it has no objection to the approval of the petition.

(vii) *Labor organizations agreeing to provide consultations.* The Service shall list in its Operations Instructions for P classification those organizations which have agreed to provide advisory opinions to the Service and/or petitioners. The list will not be an exclusive or exhaustive list. The Service and petitioners may use other sources, such as publications, to identify appropriate labor organizations. The Service will also list in its Operations Instructions those occupations or fields of endeavor where it has been determined by the Service that no appropriate labor organization exists.

(8) *Approval and validity of petition*—(i) *Approval.* The Director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist in his or her adjudication. The Director shall notify the petitioner of the approval of the petition on Form I–797, Notice of Action. The approval notice shall include the alien beneficiary's name and classification and the petition's period of validity.

(ii) *Recording the validity of petitions.* Procedures for recording the validity period of petitions are:

(A) If a new P petition is approved before the date the petitioner indicates the services will begin, the approved petition and approval notice shall show the actual dates requested by the petitioner as the validity period, not to exceed the limit specified in paragraph (p)(8)(iii) of this section or other Service policy.

(B) If a new P petition is approved after the date the petitioner indicates the services will begin, the approved petition and approval notice shall generally show a validity period commencing with the date of approval and ending with the date requested by the petitioner, not to exceed the limit specified in paragraph (p)(8)(iii) of this section or other Service policy.

(C) If the period of services requested by the petitioner exceeds the limit specified in paragraph (p)(8)(iii) of this section, the petition shall be approved only up to the limit specified in that paragraph.

(iii) *Validity.* The approval period of a P petition shall conform to the limits prescribed as follows:

(A) *P–1 petition for athletes.* An approved petition for an individual athlete classified under section 101(a)(15)(P)(i) of the Act shall be valid for a period up to 5 years. An approved petition for an athletic team classified under section 101(a)(15)(P)(i) of the Act shall be valid for a period of time determined by the Director to complete the competition or event for which the alien team is being admitted, not to exceed 1 year.

(B) *P–1 petition for an entertainment group.* An approved petition for an entertainment group classified under section 101(a)(15)(P)(i) of the Act shall be valid for a period of time determined by the Director to be necessary to complete the performance or event for which the group is being admitted, not to exceed 1 year.

(C) *P–2 and P–3 petitions for artists or entertainers.* An approved petition for an artist or entertainer under section 101(a)(15)(P)(ii) or (iii) of the Act shall be valid for a period of time determined by the Director to be necessary to complete the event, activity, or performance for which the P–2 or P–3 alien is admitted, not to exceed 1 year.

(D) *Spouse and dependents.* The spouse and unmarried minor children of a P–1, P–2, or P–3 alien beneficiary are entitled to P–4 nonimmigrant classification, subject to the same period of admission and limitations as the alien beneficiary, if they are accompanying or following to join the alien beneficiary in the United States. Neither the spouse nor a child of the alien beneficiary may accept employment unless he or she has been granted employment authorization.

(E) *Essential support aliens.* Petitions for essential support personnel to P–1,

P–2, and P–3 aliens shall be valid for a period of time determined by the Director to be necessary to complete the event, activity, or performance for which the P–1, P–2, or P–3 alien is admitted, not to exceed 1 year.

(9) The petitioner shall be notified of the decision, the reasons for the denial, and the right to appeal the denial under 8 CFR part 103. There is no appeal from a decision to deny an extension of stay to the alien or a change of nonimmigrant status.

(10) *Revocation of approval of petition*—(i) *General.* (A) The petitioner shall immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(P) of the Act and paragraph (p) of this section. An amended petition should be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall send a letter explaining the change(s) to the Director who approved the petition.

(B) The Director may revoke a petition at any time, even after the validity of the petition has expired.

(ii) *Automatic revocation.* The approval of an unexpired petition is automatically revoked if the petitioner, or the employer in a petition filed by an agent, goes out of business, files a written withdrawal of the petition, or notifies the Service that the beneficiary is no longer employed by the petitioner.

(iii) *Revocation on notice*—(A) *Grounds for revocation.* The Director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;

(*2*) The statement of facts contained in the petition were not true and correct;

(*3*) The petitioner violated the terms or conditions of the approved petition;

(*4*) The petitioner violated requirements of section 101(a)(15)(P) of the Act or paragraph (p) of this section; or

(*5*) The approval of the petition violated paragraph (p) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall 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 the date of the notice. The Director shall consider all relevant evidence presented in deciding whether to revoke the petition.

(11) *Appeal of a denial or a revocation of a petition*—(i) *Denial.* A denied petition may be appealed under 8 CFR part 103.

(ii) *Revocation.* A petition that has been revoked on notice may be appealed under 8 CFR part 103. Automatic revocations may not be appealed.

(12) *Admission.* 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.

(13) *Extension of visa petition validity.* The petitioner shall file a request to extend the validity of the original petition under section 101(a)(15)(P) of the Act on Form I–129 in order to continue or complete the same activity or event specified in the original petition. Supporting documents are not required unless requested by the Director. A petition extension may be filed only if the validity of the original petition has not expired.

(14) *Extension of stay*—(i) *Extension procedure.* The petitioner shall request extension of the alien's stay to continue or complete the same event or activity by filing Form I–129, accompanied by a statement explaining the reasons for the extension. The petitioner must also request a petition extension. The extension dates shall be the same for the petition and the beneficiary's stay. The beneficiary must be physically present in the United States at the time the extension of stay is filed. Even though the requests to extend the petition and the alien's stay are combined on the petition, the Director shall make a separate determination on each. If the alien leaves the United States for business or personal reasons while the extension requests are pending, the petitioner may

request the Director to cable notification of approval of the petition extension to the consular office abroad where the alien will apply for a visa.

(ii) *Extension periods*—(A) *P–1 individual athlete.* An extension of stay for a P–1 individual athlete and his or her essential support personnel may be authorized for a period up to 5 years for a total period of stay not to exceed 10 years.

(B) *Other P–1, P–2, and P–3 aliens.* An extension of stay may be authorized in increments of 1 year for P–1 athletic teams, entertainment groups, aliens in reciprocal exchange programs, aliens in culturally unique programs, and their essential support personnel to continue or complete the same event or activity for which they were admitted.

(15) *Effect of approval of a permanent labor certification or filing of a preference petition on P classification.* The approval of a permanent labor certification or the filing of a preference petition for an alien shall not be a basis for denying a P petition, a request to extend such a petition, or the alien's admission, change of status, or extension of stay. The alien may legitimately come to the United States for a temporary period as a P nonimmigrant and depart voluntarily at the end of his or her authorized stay and, at the same time, lawfully seek to become a permanent resident of the United States. This provision does not include essential support personnel.

(16) *Effect of a strike.* (i) If the Secretary of Labor certifies to the Commissioner that a strike or other labor dispute involving a work stoppage of workers is in progress in the occupation at the place where the beneficiary is to be employed, and that the employment of the beneficiary would adversely affect the wages and working conditions of U.S. citizens and lawful resident workers:

(A) A petition to classify an alien as a nonimmigrant as defined in section 101(a)(15)(P) of the Act shall be denied; or

(B) If a petition has been approved, but the alien has not yet entered the United States, or has entered the United States but has not commenced employment, the approval of the petition is automatically suspended, and the application for admission of the basis of the petition shall be denied.

(ii) If there is a strike or other labor dispute involving a work stoppage of workers in progress, but such strike or other labor dispute is not certified under paragraph (p)(16)(i) of this section, the Commissioner shall not deny a petition or suspend an approved petition.

(iii) If the alien has already commenced employment in the United States under an approved petition and is participating in a strike or labor dispute involving a work stoppage of workers, whether or not such strike or other labor dispute has been certified by the Secretary of Labor, the alien shall not be deemed to be failing to maintain his or her status solely on account of past, present, or future participation in a strike or other labor dispute involving a work stoppage of workers but is subject to the following terms and conditions:

(A) The alien shall remain subject to all applicable provisions of the Immigration and Nationality Act and regulations promulgated thereunder in the same manner as all other P nonimmigrant aliens;

(B) The status and authorized period of stay of such an alien is not modified or extended in any way by virtue of his or her participation in a strike or other labor dispute involving a work stoppage of workers; and

(C) Although participation by a P nonimmigrant alien in a strike or other labor dispute involving a work stoppages of workers will not constitute a ground for deportation, an alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired, will be subject to deportation.

(17) *Use of approval of notice, Form I–797.* The Service has notify the petitioner on Form I–797 whenever a visa petition or an extension of a visa petition is approved under the P classification. The beneficiary of a P petition who does not require a nonimmigrant visa may present a copy of the approved 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 expired before the date of his or her intended return, may use Form I–797 to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I–797 shall be retained by the beneficiary and present during the validity of the petition when reentering the United States to resume the same employment with the same petitioner.

(18) *Return transportation requirement.* In the case of an alien who enters the United States under section 101(a)(15)(P) of the Act and whose employment terminates for reasons other than voluntary resignation, the employer whose offer of employment formed the basis of suh nonimmigrant status and the petitioner are jointly and severally liable for the reasonable cost of return transporation of the alien abroad. For the purposes of this paragraph, the term ''abroad'' means the alien's last place of residence prior to his or her entry into the United States.

(q) *Cultural visitors*—(1)(i) *International cultural exchange visitors program.* Paragraphs (q)(2) through (q)(11) of this section provide the rules governing nonimmigrant aliens who are visiting the United States temporarily in an international cultural exchange visitors program (Q–1).

(ii) *Irish peace process cultural and training program.* Paragraph (q)(15) of this section provides the rules governing nonimmigrant aliens who are visiting the United States temporarily under the Irish peace process cultural and training program (Q–2) and their dependents (Q–3).

(iii) *Definitions.* As used in this section:

Country of nationality means the country of which the participant was a national at the time of the petition seeking international cultural exchange visitor status for him or her.

Doing business means the regular, systematic, and continuous provision of goods and/or services (including lectures, seminars and other types of cultural programs) by a qualified employer which has employees, and does not include the mere presence of an agent or office of the qualifying employer.

Duration of program means the time in which a qualified employer is conducting an approved international cultural exchange program in the manner as established by the employer's petition for program approval, provided that the period of time does not exceed 15 months.

International cultural exchange visitor means an alien who has a residence in a foreign country which he or she has no intention of abandoning, and who is coming temporarily to the United States to take part in an international cultural exchange program approved by the Attorney General.

Petitioner means the employer or its designated agent who has been employed by the qualified employer on a permanent basis in an executive or managerial capacity. The designated agent must be a United States citizen, an alien lawfully admitted for permanent residence, or an alien provided temporary residence status under sections 210 or 245A of the Act.

Qualified employer means a United States or foreign firm, corporation, non-profit organization, or other legal entity (including its U.S. branches, subsidiaries, affiliates, and franchises) which administers an international cultural exchange program designated by the Attorney General in accordance with the provisions of section 101(a)(15)(Q)(i) of the Act.

(2) *Admission of international cultural exchange visitor*—(i) *General.* A nonimmigrant alien may be authorized to enter the United States as a participant in an international cultural exchange program approved by the Attorney General for the purpose of providing practical training, employment, and the sharing of the history, culture, and traditions of the country of the alien's nationality. The period of admission is the duration of the approved international cultural exchange program or fifteen (15) months, whichever is shorter. A nonimmigrant alien admitted under this provision is classifiable as an international cultural exchange visitor in Q–1 status.

(ii) *Limitation on admission.* Any alien who has been admitted into the United States as an international cultural exchange visitor under section 101(a)(15)(Q)(i) of the Act shall not be

readmitted in Q–1 status unless the alien has resided and been physically present outside the United States for the immediate prior year. Brief trips to the United States for pleasure or business during the immediate prior year do not break the continuity of the one-year foreign residency.

(3) *International cultural exchange program*—(i) *General.* A United States employer shall petition the Attorney General on Form I–129, Petition for a Nonimmigrant Worker, for approval of an international cultural exchange program which is designed to provide an opportunity for the American public to learn about foreign cultures. The United States employer must simultaneously petition on the same Form I–129 for the authorization for one or more individually identified nonimmigrant aliens to be admitted in Q–1 status. These aliens are to be admitted to engage in employment or training of which the essential element is the sharing with the American public, or a segment of the public sharing a common cultural interest, of the culture of the alien's country of nationality. The international cultural exchange visitor's eligibility for admission will be considered only if the international cultural exchange program is approved.

(ii) *Program validity.* Each petition for an international cultural exchange program will be approved for the duration of the program, which may not exceed 15 months, plus 30 days to allow time for the participants to make travel arrangements. Subsequent to the approval of the initial petition, a new petition must be filed each time the qualified employer wishes to bring in additional cultural visitors. A qualified employer may replace or substitute a participant named on a previously approved petition for the remainder of the program in accordance with paragraph (q)(6) of this section. The replacement or substituting alien may be admitted in Q–1 status until the expiration date of the approved petition.

(iii) *Requirements for program approval.* An international cultural exchange program must meet all of the following requirements:

(A) *Accessibility to the public.* The international cultural exchange program must take place in a school, museum, business or other establishment where the American public, or a segment of the public sharing a common cultural interest, is exposed to aspects of a foreign culture as part of a structured program. Activities that take place in a private home or an isolated business setting to which the American public, or a segment of the public sharing a common cultural interest, does not have direct access do not qualify.

(B) *Cultural component.* The international cultural exchange program must have a cultural component which is an essential and integral part of the international cultural exchange visitor's employment or training. The cultural component must be designed, on the whole, to exhibit or explain the attitude, customs, history, heritage, philosophy, or traditions of the international cultural exchange visitor's country of nationality. A cultural component may include structured instructional activities such as seminars, courses, lecture series, or language camps.

(C) *Work component.* The international cultural exchange visitor's employment or training in the United States may not be independent of the cultural component of the international cultural exchange program. The work component must serve as the vehicle to achieve the objectives of the cultural component. The sharing of the culture of the international cultural exchange visitor's country of nationality must result from his or her employment or training with the qualified employer in the United States.

(iv) *Requirements for international cultural exchange visitors.* To be eligible for international cultural exchange visitor status, an alien must be a bona fide nonimmigrant who:

(A) Is at least 18 years of age at the time the petition is filed;

(B) Is qualified to perform the service or labor or receive the type of training stated in the petition;

(C) Has the ability to communicate effectively about the cultural attributes of his or her country of nationality to the American public; and

(D) Has resided and been physically present outside of the United States for the immediate prior year, if he or she

was previously admitted as an international cultural exchange visitor.

(4) *Supporting documentation*—(i) *Documentation by the employer*. To establish eligibility as a qualified employer, the petitioner must submit with the completed Form I–129 appropriate evidence that the employer:

(A) Maintains an established international cultural exchange program in accordance with the requirements set forth in paragraph (q)(3) of this section;

(B) Has designated a qualified employee as a representative who will be responsible for administering the international cultural exchange program and who will serve as liaison with the Immigration and Naturalization Service;

(C) Is actively doing business in the United States;

(D) Will offer the alien(s) wages and working conditions comparable to those accorded local domestic workers similarly employed; and

(E) Has the financial ability to remunerate the participant(s).

(ii) *Certification by petitioner*. (A) The petitioner must give the date of birth, country of nationality, level of education, position title, and a brief job description for each international cultural exchange visitor included in the petition. The petitioner must verify and certify that the prospective participants are qualified to perform the service or labor, or receive the type of training, described in the petition.

(B) The petitioner must report the international cultural exchange visitors' wages and certify that such cultural exchange visitors are offered wages and working conditions comparable to those accorded to local domestic workers similarly employed.

(iii) Supporting documentation as prescribed in paragraphs (q)(4)(i) and (q)(4)(ii) of this section must accompany a petition filed on Form I–129 in all cases except where the employer files multiple petitions in the same calendar year. When petitioning to repeat a previously approved international cultural exchange program, a copy of the initial program approval notice may be submitted in lieu of the documentation required under paragraph (q)(4)(i) of this section. The Service will request additional documentation only when clarification is needed.

(5) *Filing of petitions for international cultural exchange visitor program*—(i) *General*. A United States employer seeking to bring in international cultural exchange visitors must file a petition on Form I-129, Petition for a Nonimmigrant Worker, with the applicable fee, along with appropriate documentation. A new petition on Form I–129, with the applicable fee, must be filed with the appropriate service center each time a qualified employer wants to bring in additional international cultural exchange visitors. Each person named on an approved petition will be admitted only for the duration of the approved program. Replacement or substitution may be made for any person named on an approved petition as provided in paragraph (q)(6) of this section, but only for the remainder of the approved program.

(ii) *Petition for multiple participants*. The petitioner may include more than one participant on the petition. The petitioner shall include the name, date of birth, nationality, and other identifying information required on the petition for each participant. The petitioner must also indicate the United States consulate at which each participant will apply for a Q–1 visa. For participants who are visa-exempt under 8 CFR 212.1(a), the petitioner must indicate the port of entry at which each participant will apply for admission to the United States.

(iii) *Service, labor, or training in more than one location*. A petition which requires the international cultural exchange visitor to engage in employment or training (with the same employer) in more than one location must include an itinerary with the dates and locations of the services, labor, or training.

(iv) *Services, labor, or training for more than one employer*. If the international cultural exchange visitor will perform services or labor for, or receive training from, more than one employer, each employer must file a separate petition. The international cultural exchange visitor may work part-time for multiple employers provided that each

employer has an approved petition for the alien.

(v) *Change of employers.* If an international cultural exchange visitor is in the United States under section 101(a)(15)(Q)(i) of the Act and decides to change employers, the new employer must file a petition. However, the total period of time the international cultural exchange visitor may stay in the United States remains limited to fifteen (15) months.

(6) *Substitution or replacements of participants in an international cultural exchange visitor program.* The petitioner may substitute for or replace a person named on a previously approved petition for the remainder of the program without filing a new Form I–129. The substituting international cultural exchange visitor must meet the qualification requirements prescribed in paragraph (q)(3)(iv) of this section. To request substitution or replacement, the petitioner shall, by letter, notify the consular office at which the alien will apply for a visa or, in the case of visa-exempt aliens, the Service office at the port of entry where the alien will apply for admission. A copy of the petition's approval notice must be included with the letter. The petitioner must state the date of birth, country of nationality, level of education, and position title of each prospective international cultural exchange visitor and must certify that each is qualified to perform the service or labor or receive the type of training described in the approved petition. The petitioner must also indicate each international cultural exchange visitor's wages and certify that the international cultural exchange visitor is offered wages and working conditions comparable to those accorded to local domestic workers in accordance with paragraph (q)(11)(ii) of this section.

(7) *Approval of petition for international cultural exchange visitor program.* (i) The director shall consider all the evidence submitted and request other evidence as he or she may deem necessary.

(ii) The director shall notify the petitioner and the appropriate United States consulate(s) of the approval of a petition. For participants who are visa-exempt under 8 CFR 212.1(a), the director shall give notice of the approval to the director of the port of entry at which each such participant will apply for admission to the United States. The notice of approval shall include the name of the international cultural exchange visitors, their classification, and the petition's period of validity.

(iii) An approved petition for an alien classified under section 101(a)(15)(Q)(i) of the Act is valid for the length of the approved program or fifteen (15) months, whichever is shorter.

(iv) A petition shall not be approved for an alien who has an aggregate of fifteen (15) months in the United States under section 101(a)(15)(Q)(i) of the Act, unless the alien has resided and been physically present outside the United States for the immediate prior year.

(8) *Denial of the petition*—(i) *Notice of denial.* The petitioner shall be notified of the denial of a petition, the reasons for the denial, and the right to appeal the denial under part 103 of this chapter.

(ii) *Multiple participants.* A petition for multiple international cultural exchange visitors may be denied in whole or in part.

(9) *Revocation of approval of petition*—(i) *General.* The petitioner shall immediately notify the appropriate Service center of any changes in the employment of a participant which would affect eligibility under section 101(a)(15)(Q)(i) of the Act.

(ii) *Automatic revocation.* The approval of any petition is automatically revoked if the qualifying employer goes out of business, files a written withdrawal of the petition, or terminates the approved international cultural exchange program prior to its expiration date. No further action or notice by the Service is necessary in the case of automatic revocation. In any other case, the Service shall follow the revocation procedures in paragraphs (q)(9) (iii) through (v) of this section.

(iii) *Revocation on notice.* The director shall send the petitioner a notice of intent to revoke the petition in whole or in part if he or she finds that:

(A) The international cultural exchange visitor is no longer employed by the petitioner in the capacity specified in the petition, or if the international cultural exchange visitor is no

longer receiving training as specified in the petition;

(B) The statement of facts contained in the petition was not true and correct;

(C) The petitioner violated the terms and conditions of the approved petition; or

(D) The Service approved the petition in error.

(iv) *Notice and decision.* The notice of intent to revoke shall contain a detailed statement of the grounds for the revocation and the period of time allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director shall 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 shall remain approved and a revised approval notice shall be sent to the petitioner with the revocation notice.

(v) *Appeal of a revocation of a petition.* Revocation with notice of a petition in whole or in part may be appealed to the Associate Commissioner for Examinations under part 103 of this chapter. Automatic revocation may not be appealed.

(10) *Extension of stay.* An alien's total period of stay in the United States under section 101(a)(15)(Q)(i) of the Act cannot exceed fifteen (15) months. The authorized stay of an international cultural exchange visitor may be extended within the 15-month limit if he or she is the beneficiary of a new petition filed in accordance with paragraph (q)(3) of this section. The new petition, if filed by the same employer, should include a copy of the previous petition's approval notice and a letter from the petitioner indicating any terms and conditions of the previous petition that have changed.

(11) *Employment provisions*—(i) *General.* An alien classified under section 101(a)(15)(Q)(i) of the Act may be employed only by the qualified employer through which the alien attained Q–1 nonimmigrant status. An alien in this class is not required to apply for an employment authorization document. Employment outside the specific program violates the terms of the alien's Q–1 nonimmigrant status within the meaning of section 237(a)(1)(C)(i) of the Act.

(ii) *Wages and working conditions.* The wages and working conditions of an international cultural exchange visitor must be comparable to those accorded to domestic workers similarly employed in the geographical area of the alien's employment. The employer must certify on the petition that such conditions are met as in accordance with paragraph (q)(4)(iii)(B) of this section.

(12)–(14) [Reserved]

(15) *Irish peace process cultural and training program visitors (Q–2) and their dependents (Q–3)*—(i) *General.* An Irish Peace Process Cultural and Training Program (IPPCTP) visitor is a nonimmigrant alien coming to the United States temporarily to gain or upgrade work skills through training and temporary employment and to experience living in a diverse and peaceful environment.

(ii) *What are the requirements for participation?* (A) The principal alien must have been physically resident in either Northern Ireland or the counties of Louth, Monaghan, Cavan, Leitrim, Sligo, and Donegal in the Republic of Ireland, for at least 3 months immediately preceding application to the program and must show that he or she has no intention of abandoning this residence.

(B) The principal alien must be between the ages of 18 and 35.

(C) The principal alien must:

(*1*) Be unemployed for at least 3 months, or have completed or currently be enrolled in a training/employment program sponsored by the Training and Employment Agency of Northern Ireland (T&EA) or by the Training and Employment Authority of Ireland (FAS), or by other such publicly funded programs, or have been made redundant from employment (*i.e.*, lost their job), or have received a notice of redundancy (termination of employment); or

(*2*) Be a currently employed person whose employer has nominated him/her to participate in this program for additional training or job experience that is to benefit both the participant and his/her employer upon returning home.

(D) The principal alien must intend to come to the United States temporarily, for a period not to exceed 36 months, in order to obtain training, employment, and the experience of coexistence and conflict resolution in a diverse society.

(iii) *Are there any limitations on admissions?* (A) No more than 4,000 participants, including spouses and any minor children of principal aliens, may be admitted annually for 3 consecutive program years, beginning with FY 2000 (October 1, 1999, through September 30, 2000).

(B) For each alien admitted under section 101(a)(15)(Q)(ii) of the Act, the number of aliens admitted under section 101(a)(15)(H)(ii)(b) of the Act is reduced by one for that fiscal year or the subsequent fiscal year.

(C) This program expires on October 1, 2005.

(iv) *What are the requirements for initial admission to the United States?* (A) Principal aliens, their spouses, and minor children of principal aliens must present valid passports and either a Q–2 or Q–3 visa at the time of inspection.

(B) Initial admission for those principal and dependent aliens in this program who received their visas at either the U.S. Embassy in Dublin or the U.S. Consulate in Belfast must take place at the Service's Pre-Flight Inspection facilities at either the Shannon or Dublin airports in the Republic of Ireland.

(C) The principal alien will be required to present a Certification Letter issued by the Department of State's (DOS') Program Administrator documenting him or her as an individual selected for participation in the IPPCTP. Eligible dependents may be requested to present written documentation certifying their relationship to the principal.

(v) *May the principal alien and dependents make brief visits outside the United States?* (A) The principal alien, spouse, and any minor children of the principal alien may make brief departures, for periods not to exceed 3 consecutive months, and may be readmitted without having to obtain a new visa. However, such periods of time spent outside the United States will not be added to the end of stay, which is not to exceed a total of 3 years from the initial date of entry of the principal alien.

(B) Those participants or dependents who remain outside the United States in excess of 3 consecutive months will not be readmitted by the Service on their initial Q–2 or Q–3 visa. Instead, any such individual and eligible dependents wishing to rejoin the program will be required to reapply to the program and be in receipt of a new Q–2 or Q–3 visa and a Certification Letter issued by the DOS' Program Administrator, prior to any subsequent admission to the United States.

(vi) *How long may a Q–2 or Q–3 visa holder remain in the United States under this program?* (A) The principal alien and any accompanying, or following-to-join, spouse or minor children of the principal alien are admitted for the duration of the principal alien's planned cultural and training program or 36 months, whichever is shorter.

(B) Those participants and eligible dependents admitted for specific periods less than 36 months may extend their period of stay through the Service so that their total period of stay is 36 months, provided the extension of stay is related to employment or training certified by the DOS' Program Administrator.

(vii) *How is employment authorized under this program?* (A) Following endorsement of his/her Form I–94, Arrival-Departure Record, by a Service officer, any principal alien admitted under section 101(a)(15)(Q)(ii) of the Act is permitted to work for an employer or employers listed on the Certification Letter issued by the DOS' Program Administrator.

(B) The accompanying spouse and minor children of the principal alien may not accept employment, unless the spouse has also been designated as a principal alien (Q–2) in this program and has been issued a Certification Letter by the DOS' Program Administrator.

(viii) *May the principal alien change employers?* Principal aliens wishing to change employers must request such a change through the DOS' Program Administrator to the Service. Following review and consideration of the request by the Service, the Service will inform the participant of the decision. The

Service will grant such approval of employers only if the new employer has been approved by DOS in accordance with its regulations and such approval is communicated to the Service through the DOS' Program Administrator. If approved, the participant's Form I–94 will be annotated to show the new employer. If denied, there is no appeal under this section.

(ix) *May the principal alien hold other jobs during his/her U.S. visit?* No; any principal alien classified as an Irish peace process cultural and training program visitor may only engage in employment that has been certified by the DOS' Program Administrator and approved by the DOS or the Service as endorsed on the Form I–94. An alien who engages in unauthorized employment violates the terms of the Q-2 visa and will be considered to have violated section 237(a)(1)(C)(i) of the Act.

(x) *What happens if a principal alien loses his/her job?* A principal alien, who loses his or her job, will have 30 days from his/her last date of employment to locate appropriate employment or training, to have the job offer certified by the DOS' Program Administrator in accordance with the DOS' regulations and to have it approved by the Service. If appropriate employment or training cannot be found within this 30-day-period, the principal alien and any accompany family members will be required to depart the United States.

(r) *Religious workers.* This paragraph governs classification of an alien as a nonimmigrant religious worker (R–1).

(1) To be approved for temporary admission to the United States, or extension and maintenance of status, for the purpose of conducting the activities of a religious worker for a period not to exceed five years, an alien must:

(i) Be a member of a religious denomination having a bona fide nonprofit religious organization in the United States for at least two years immediately preceding the time of application for admission;

(ii) Be coming to the United States to work at least in a part time position (average of at least 20 hours per week);

(iii) Be coming solely as a minister or to perform a religious vocation or occupation as defined in paragraph (r)(3) of this section (in either a professional or nonprofessional capacity);

(iv) Be coming to or remaining in the United States at the request of the petitioner to work for the petitioner; and

(v) Not work in the United States in any other capacity, except as provided in paragraph (r)(2) of this section.

(2) An alien may work for more than one qualifying employer as long as each qualifying employer submits a petition plus all additional required documentation as prescribed by USCIS regulations.

(3) *Definitions.* As used in this section, the term:

Bona fide non-profit religious organization in the United States means a religious organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the Internal Revenue Service (IRS) confirming such exemption.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendment or equivalent sections of prior enactments of the Internal Revenue Code, and possessing a currently valid determination letter from the IRS confirming such exemption.

Denominational membership means membership during at least the two-year period immediately preceding the filing date of the petition, in the same type of religious denomination as the United States religious organization where the alien will work.

Minister means an individual who:

(A) Is fully authorized by a religious denomination, and fully trained according to the denomination's standards, to conduct religious worship and perform other duties usually performed by authorized members of the clergy of that denomination;

(B) Is not a lay preacher or a person not authorized to perform duties usually performed by clergy;

(C) Performs activities with a rational relationship to the religious calling of the minister; and

(D) Works solely as a minister in the United States which may include administrative duties incidental to the duties of a minister.

Petition means USCIS Form I–129, Petition for a Nonimmigrant Worker, a successor form, or any other form as may be prescribed by USCIS, along with a supplement containing attestations required by this section, the fee specified in 8 CFR 103.7(b)(1), and supporting evidence required by this part.

Religious denomination means a religious group or community of believers that is governed or administered under a common type of ecclesiastical government and includes one or more of the following:

(A) A recognized common creed or statement of faith shared among the denomination's members;

(B) A common form of worship;

(C) A common formal code of doctrine and discipline;

(D) Common religious services and ceremonies;

(E) Common established places of religious worship or religious congregations; or

(F) Comparable indicia of a bona fide religious denomination.

Religious occupation means an occupation that meets all of the following requirements:

(A) The duties must primarily relate to a traditional religious function and be recognized as a religious occupation within the denomination;

(B) The duties must be primarily related to, and must clearly involve, inculcating or carrying out the religious creed and beliefs of the denomination;

(C) The duties do not include positions which are primarily administrative or support such as janitors, maintenance workers, clerical employees, fund raisers, persons solely involved in the solicitation of donations, or similar positions, although limited administrative duties that are only incidental to religious functions are permissible; and

(D) Religious study or training for religious work does not constitute a religious occupation, but a religious worker may pursue study or training incident to status.

Religious vocation means a formal lifetime commitment, through vows, investitures, ceremonies, or similar indicia, to a religious way of life. The religious denomination must have a class of individuals whose lives are dedicated to religious practices and functions, as distinguished from the secular members of the religion. Examples of vocations include nuns, monks, and religious brothers and sisters.

Religious worker means an individual engaged in and, according to the denomination's standards, qualified for a religious occupation or vocation, whether or not in a professional capacity, or as a minister.

Tax-exempt organization means an organization that has received a determination letter from the IRS establishing that it, or a group it belongs to, is exempt from taxation in accordance with sections 501(c)(3) of the Internal Revenue Code of 1986, or subsequent amendments or equivalent sections of prior enactments of the Internal Revenue Code.

(4) *Requirements for admission/change of status; time limits*—(i) *Principal applicant (R–1 nonimmigrant).* If otherwise admissible, an alien who meets the requirements of section 101(a)(15)(R) of the Act may be admitted as an R–1 alien or changed to R–1 status for an initial period of up to 30 months from date of initial admission. If visa-exempt, the alien must present original documentation of the petition approval.

(ii) *Spouse and children (R–2 status).* The spouse and unmarried children under the age of 21 of an R–1 alien may be accompanying or following to join the R–1 alien, subject to the following conditions:

(A) R–2 status is granted for the same period of time and subject to the same limits as the principal, regardless of the time such spouse and children may have spent in the United States in R–2 status;

(B) Neither the spouse nor children may accept employment while in the United States in R–2 status; and

(C) The primary purpose of the spouse or children coming to the United States must be to join or accompany the principal R–1 alien.

(5) *Extension of stay or readmission.* An R–1 alien who is maintaining status or is seeking readmission and who satisfies the eligibility requirements of this section may be granted an extension of R–1 stay or readmission in R–1 status for the validity period of the petition, up to 30 months, provided the total period of time spent in R–1 status does not exceed a maximum of five years. A Petition for a Nonimmigrant Worker to request an extension of R–1 status must be filed by the employer with a supplement prescribed by USCIS containing attestations required by this section, the fee specified in 8 CFR 103.7(b)(1), and the supporting evidence, in accordance with the applicable form instructions.

(6) *Limitation on total stay.* An alien who has spent five years in the United States in R–1 status may not be readmitted to or receive an extension of stay in the United States under the R visa classification unless the alien has resided abroad and has been physically present outside the United States for the immediate prior year. The limitations in this paragraph shall not apply to R–1 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for such an exception. Such proof shall consist of evidence such as arrival and departure records, transcripts of processed income tax returns, and records of employment abroad.

(7) *Jurisdiction and procedures for obtaining R–1 status.* An employer in the United States seeking to employ a religious worker, by initial petition or by change of status, shall file a petition in accordance with the applicable form instructions.

(8) *Attestation.* An authorized official of the prospective employer of an R–1 alien must complete, sign and date an attestation prescribed by USCIS and submit it along with the petition. The prospective employer must specifically attest to all of the following:

(i) That the prospective employer is a bona fide non-profit religious organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation;

(ii) That the alien has been a member of the denomination for at least two years and that the alien is otherwise qualified for the position offered;

(iii) The number of members of the prospective employer's organization;

(iv) The number of employees who work at the same location where the beneficiary will be employed and a summary of the type of responsibilities of those employees. USCIS may request a list of all employees, their titles, and a brief description of their duties at its discretion;

(v) The number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years by the prospective employer's organization;

(vi) The number of special immigrant religious worker and nonimmigrant religious worker petitions and applications filed by or on behalf of any aliens for employment by the prospective employer in the past five years;

(vii) The title of the position offered to the alien and a detailed description of the alien's proposed daily duties;

(viii) Whether the alien will receive salaried or non-salaried compensation and the details of such compensation;

(ix) That the alien will be employed at least 20 hours per week;

(x) The specific location(s) of the proposed employment; and

(xi) That the alien will not be engaged in secular employment.

(9) *Evidence relating to the petitioning organization.* A petition shall include the following initial evidence relating to the petitioning organization:

(i) A currently valid determination letter from the IRS showing that the organization is a tax-exempt organization; or

(ii) For a religious organization that is recognized as tax-exempt under a group tax-exemption, a currently valid determination letter from the IRS establishing that the group is tax-exempt; or

(iii) For a bona fide organization that is affiliated with the religious denomination, if the organization was granted tax-exempt status under section 501(c)(3), or subsequent amendment or equivalent sections of prior enactments, of the Internal Revenue Code, as something other than a religious organization:

(A) A currently valid determination letter from the IRS establishing that the organization is a tax-exempt organization;

(B) Documentation that establishes the religious nature and purpose of the organization, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization;

(C) Organizational literature, such as books, articles, brochures, calendars, flyers, and other literature describing the religious purpose and nature of the activities of the organization; and

(D) A religious denomination certification. The religious organization must complete, sign and date a statement certifying that the petitioning organization is affiliated with the religious denomination. The statement must be submitted by the petitioner along with the petition.

(10) *Evidence relating to the qualifications of a minister.* If the alien is a minister, the petitioner must submit the following:

(i) A copy of the alien's certificate of ordination or similar documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination; and

(ii) Documents reflecting acceptance of the alien's qualifications as a minister in the religious denomination, as well as evidence that the alien has completed any course of prescribed theological education at an accredited theological institution normally required or recognized by that religious denomination, including transcripts, curriculum, and documentation that establishes that the theological education is accredited by the denomination, or

(iii) For denominations that do not require a prescribed theological education, evidence of:

(A) The denomination's requirements for ordination to minister;

(B) The duties allowed to be performed by virtue of ordination;

(C) The denomination's levels of ordination, if any; and

(D) The alien's completion of the denomination's requirements for ordination.

(11) *Evidence relating to compensation.* Initial evidence must state how the petitioner intends to compensate the alien, including specific monetary or in-kind compensation, or whether the alien intends to be self-supporting. In either case, the petitioner must submit verifiable evidence explaining how the petitioner will compensate the alien or how the alien will be self-supporting. Compensation may include:

(i) *Salaried or non-salaried compensation.* Evidence of compensation may include past evidence of compensation for similar positions; budgets showing monies set aside for salaries, leases, etc.; verifiable documentation that room and board will be provided; or other evidence acceptable to USCIS. IRS documentation, such as IRS Form W–2 or certified tax returns, must be submitted, if available. If IRS documentation is unavailable, the petitioner must submit an explanation for the absence of IRS documentation, along with comparable, verifiable documentation.

(ii) *Self support.* (A) If the alien will be self-supporting, the petitioner must submit documentation establishing that the position the alien will hold is part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

(B) An established program for temporary, uncompensated work is defined to be a missionary program in which:

(*1*) Foreign workers, whether compensated or uncompensated, have previously participated in R–1 status;

(*2*) Missionary workers are traditionally uncompensated;

(*3*) The organization provides formal training for missionaries; and

(*4*) Participation in such missionary work is an established element of religious development in that denomination.

(C) The petitioner must submit evidence demonstrating:

(*1*) That the organization has an established program for temporary, uncompensated missionary work;

(*2*) That the denomination maintains missionary programs both in the United states and abroad;

(*3*) The religious worker's acceptance into the missionary program;

(*4*) The religious duties and responsibilities associated with the traditionally uncompensated missionary work; and

(*5*) Copies of the alien's bank records, budgets documenting the sources of self-support (including personal or family savings, room and board with host families in the United States, donations from the denomination's churches), or other verifiable evidence acceptable to USCIS.

(12) *Evidence of previous R–1 employment.* Any request for an extension of stay as an R–1 must include initial evidence of the previous R–1 employment. If the beneficiary:

(i) Received salaried compensation, the petitioner must submit IRS documentation that the alien received a salary, such as an IRS Form W–2 or certified copies of filed income tax returns, reflecting such work and compensation for the preceding two years.

(ii) Received non-salaried compensation, the petitioner must submit IRS documentation of the non-salaried compensation if available. If IRS documentation is unavailable, an explanation for the absence of IRS documentation must be provided, and the petitioner must provide verifiable evidence of all financial support, including stipends, room and board, or other support for the beneficiary by submitting a description of the location where the beneficiary lived, a lease to establish where the beneficiary lived, or other evidence acceptable to USCIS.

(iii) Received no salary but provided for his or her own support, and that of any dependents, the petitioner must show how support was maintained by submitting with the petition verifiable documents such as audited financial statements, financial institution records, brokerage account statements, trust documents signed by an attorney, or other evidence acceptable to USCIS.

(13) *Change or addition of employers.* An R–1 alien may not be compensated for work for any religious organization other than the one for which a petition has been approved or the alien will be out of status. A different or additional employer seeking to employ the alien may obtain prior approval of such employment through the filing of a separate petition and appropriate supplement, supporting documents, and fee prescribed in 8 CFR 103.7(b)(1).

(14) *Employer obligations.* When an R–1 alien is working less than the required number of hours or has been released from or has otherwise terminated employment before the expiration of a period of authorized R–1 stay, the R–1 alien's approved employer must notify DHS within 14 days using procedures set forth in the instructions to the petition or otherwise prescribed by USCIS on the USCIS Internet Web site at *www.uscis.gov*.

(15) *Nonimmigrant intent.* An alien classified under section 101(a)(15)(R) of the Act shall maintain an intention to depart the United States upon the expiration or termination of R–1 or R–2 status. However, a nonimmigrant petition, application for initial admission, change of status, or extension of stay in R classification may not be denied solely on the basis of a filed or an approved request for permanent labor certification or a filed or approved immigrant visa preference petition.

(16) *Inspections, evaluations, verifications, and compliance reviews.* The supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, up to and including an on-site inspection of the petitioning organization. The inspection may include a tour of the organization's facilities, an interview with the organization's officials, a review of selected organization records relating to compliance with immigration laws and regulations, and an interview with any other individuals or review of any other records that the USCIS considers pertinent to the integrity of the organization. An inspection may include the organization headquarters, or satellite locations, or the work locations planned for the applicable employee. If USCIS decides to conduct a pre-approval inspection, satisfactory completion of

such inspection will be a condition for approval of any petition.

(17) *Denial and appeal of petition.* USCIS will provide written notification of the reasons for the denial under 8 CFR 103.3(a)(1). The petitioner may appeal the denial under 8 CFR 103.3.

(18) *Revocation of approved petitions*—(i) *Director discretion.* The director 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 ceases to exist or files a written withdrawal of the petition.

(iii) *Revocation on notice*—(A) *Grounds for revocation.* The director shall send to the petitioner a notice of intent to revoke the petition in relevant part if he or she finds that:

(*1*) The beneficiary is no longer employed by the petitioner in the capacity specified in the petition;

(*2*) The statement of facts contained in the petition was not true and correct;

(*3*) The petitioner violated terms and conditions of the approved petition;

(*4*) The petitioner violated requirements of section 101(a)(15)(R) of the Act or paragraph (r) of this section; or

(*5*) The approval of the petition violated paragraph (r) of this section or involved gross error.

(B) *Notice and decision.* The notice of intent to revoke shall 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 shall consider all relevant evidence presented in deciding whether to revoke the petition.

(19) *Appeal of a revocation of a petition.* A petition that has been revoked on notice in whole or in part may be appealed under 8 CFR 103.3. Automatic revocations may not be appealed.

(s) *NATO nonimmigrant aliens*—(1) *General*—(i) *Background.* The North Atlantic Treaty Organization (NATO) is constituted of nations signatory to the North Atlantic Treaty. The Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, signed in London, June 1951 (NATO Status of Forces Agreement), is the agreement between those nations that defines the terms of the status of their armed forces while serving abroad.

(A) Nonimmigrant aliens classified as NATO–1 through NATO–5 are officials, employees, or persons associated with NATO, and members of their immediate families, who may enter the United States in accordance with the NATO Status of Forces Agreement or the Protocol on the Status of International Military Headquarters set up pursuant to the North Atlantic Treaty (Paris Protocol). The following specific classifications shall be assigned to such NATO nonimmigrants:

(*1*) NATO–1—A principal permanent representative of a Member State to NATO (including any of its subsidiary bodies) resident in the United States and resident members of permanent representative's official staff; Secretary General, Deputy Secretary General, Assistant Secretaries General and Executive Secretary of NATO; other permanent NATO officials of similar rank; and the members of the immediate family of such persons.

(*2*) NATO–2—Other representatives of Member States to NATO (including any of its subsidiary bodies) including representatives, advisers and technical experts of delegations, and the members of the immediate family of such persons; dependents of members of a force entering in accordance with the provisions of the NATO Status of Forces Agreement or in accordance with the provisions of the Paris Protocol; members of such a force, if issued visas.

(*3*) NATO–3—Official clerical staff accompanying a representative of a Member State to NATO (including any of its subsidiary bodies) and the members of the immediate family of such persons.

(*4*) NATO–4—Officials of NATO (other than those classifiable under NATO–1) and the members of their immediate family

(*5*) NATO–5—Experts, other than NATO officials classifiable under NATO–4, employed on missions on behalf of NATO and their dependents.

(B) Nonimmigrant aliens classified as NATO–6 are civilians, and members of their immediate families, who may enter the United States as employees of a force entering in accordance with

the NATO Status of Forces Agreement, or as members of a civilian component attached to or employed by NATO Headquarters, Supreme Allied Commander, Atlantic (SACLANT), set up pursuant to the Paris Protocol.

(C) Nonimmigrant aliens classified as NATO–7 are attendants, servants, or personal employees of nonimmigrant aliens classified as NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, and NATO–6, who are authorized to work only for the NATO–1 through NATO–6 nonimmigrant from whom they derive status, and members of their immediate families.

(ii) *Admission and extension of stay.* NATO–1, NATO–2, NATO–3, NATO–4, and NATO–5 aliens are normally exempt from inspection under 8 CFR 235.1(c). NATO–6 aliens may be authorized admission for duration of status. NATO–7 aliens may be admitted for not more than 3 years and may be granted extensions of temporary stay in increments of not more than 2 years. In addition, an application for extension of temporary stay for a NATO–7 alien must be accompanied by a statement signed by the employing official stating that he or she intends to continue to employ the NATO–7 applicant, describing the work the applicant will perform, and acknowledging that this is, and will be, the sole employment of the NATO–7 applicant.

(2) *Definition of a dependent of a NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6.* For purposes of employment in the United States, the term *dependent* of a NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 principal alien, as used in this section, means any of the following immediate members of the family habitually residing in the same household as the NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 principal alien assigned to official duty in the United States:

(i) Spouse;

(ii) Unmarried children under the age of 21;

(iii) Unmarried sons or daughters under the age of 23 who are in full-time attendance as students at post-secondary educational institutions;

(iv) Unmarried sons or daughters under the age of 25 who are in full-time attendance as students at post-secondary educational institutions if a formal bilateral employment agreement permitting their employment in the United States was signed prior to November 21, 1988, and such bilateral employment agreements do not specify under the age of 23 as the maximum age for employment of such sons and daughters;

(v) Unmarried sons or daughters who are physically or mentally disabled to the extent that they cannot adequately care for themselves or cannot establish, maintain, or re-establish their own households. The Service may require medical certification(s) as it deems necessary to document such mental or physical disability.

(3) *Dependent employment requirements based on formal bilateral employment agreements and informal de facto reciprocal arrangements*—(i) *Formal bilateral employment agreements.* The Department of State's Family Liaison office (FLO) shall maintain all listing of NATO Member States which have entered into formal bilateral employment agreements that include NATO personnel. A dependent of a NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 principal alien assigned to official duty in the United States may accept, or continue in, unrestricted employment based on such formal bilateral agreement upon favorable recommendation by SACLANT, pursuant to paragraph (s)(5) of this section, and issuance of employment authorization documentation by the Service in accordance with 8 CFR part 274a. The application procedures are set forth in paragraph (s)(5) of this section.

(ii) *Informal de facto reciprocal arrangements.* For purposes of this section, an informal de facto reciprocal arrangement exists when the Office of the Secretary of Defense, Foreign Military Rights Affairs (OSD/FMRA), certifies, with State Department concurrence, that a NATO Member State allows appropriate employment in the local economy for dependents of members of the force and members of the civilian component of the United States assigned to duty in the NATO Member State. OSD/FMRA and State's FLO shall maintain a listing of countries

with which such reciprocity exists. Dependents of a NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 principal alien assigned to official duty in the United States may be authorized to accept, or continue in, employment based upon informal de facto arrangements upon favorable recommendation by SACLANT, pursuant to paragraph (s)(5) of this section, and issuance of employment authorization by the Service in accordance with 8 CFR part 274a. Additionally, the application procedures set forth in paragraph (s)(5) of this section must be complied with, and the following conditions must be met:

(A) Both the principal alien and the dependent requesting employment are maintaining NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 status, as appropriate;

(B) The principal alien's total length of assignment in the United States is expected to last more than 6 months;

(C) Employment of a similar nature for dependents of members of the force and members of the civilian component of the United States assigned to official duty in the NATO Member State employing the principal alien is not prohibited by the NATO Member State;

(D) The proposed employment is not in an occupation listed in the Department of Labor's Schedule B (20 CFR part 656), or otherwise determined by the Department of Labor to be one for which there is an oversupply of qualified United States workers in the area of proposed employment. This Schedule B restriction does not apply to a dependent son or daughter who is a full-time student if the employment is part-time, consisting of not more than 20 hours per week, of if it is temporary employment of not more than 12 weeks during school holiday periods; and

(E) The proposed employment is not contrary to the interest of the United States. Employment contrary to the interest of the United States includes, but is not limited to, the employment of NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 dependents who have criminal records; who have violated United States immigration laws or regulations, or visa laws or regulations; who have worked illegally in the United States; or who cannot establish that they have paid taxes and social security on income from current or previous United States employment.

(iii) State's FLO shall inform the Service, by contacting Headquarters, Adjudications, Attention: Chief, Business and Trade Services Branch, 425 I Street, NW., Washington, DC 20536, of any additions or changes to the formal bilateral employment agreements and informal de facto reciprocal arrangements.

(4) *Applicability of a formal bilateral agreement or an informal de facto arrangement for NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, or NATO–6 dependents.* The applicability of a formal bilateral agreement shall be based on the NATO Member State which employs the principal alien and not on the nationality of the principal alien or dependent. The applicability of an informal de facto arrangement shall be based on the NATO Member State which employs the principal alien, and the principal alien also must be a national of the NATO Member State which employs him or her in the United States. Dependents of SACLANT employees receive bilateral agreement or de facto arrangement employment privileges as appropriate based upon the nationality of the SACLANT employee (principal alien).

(5) *Application procedures.* The following procedures are required for dependent employment applications under bilateral agreements and de facto arrangements:

(i) The dependent of a NATO alien shall submit a complete application for employment authorization, including Form I–765 and Form I–566, completed in accordance with the instructions on, or attached to, those forms. The complete application shall be submitted to SACLANT for certification of the Form I–566 and forwarding to the Service.

(ii) In a case where a bilateral dependent employment agreement containing a numerical limitation on the number of dependents authorized to work is applicable, the certifying officer of SACLANT shall not forward the application for employment authorization to the Service unless, following consultation with State's Office of Protocol, the certifying officer has confirmed that this numerical limitation

has not been reached. The countries with such limitations are indicated on the bilateral/de facto dependent employment listing issued by State's FLO.

(iii) SACLANT shall keep copies of each application and certified Form I–566 for 3 years from the date of the certification.

(iv) A dependent applying under the terms of a de facto arrangement must also attach a statement from the prospective employer which includes the dependent's name, a description of the position offered, the duties to be performed, the hours to be worked, the salary offered, and verification that the dependent possesses the qualifications for the position.

(v) A dependent applying under paragraph (s)(2) (iii) or (iv) of this section must also submit a certified statement from the post-secondary educational institution confirming that he or she is pursuing studies on a full-time basis.

(vi) A dependent applying under paragraph (s)(2)(v) of this section must also submit medical certification regarding his or her condition. The certification should identify both the dependent and the certifying physician, give the physician's phone number, identify the condition, describe the symptoms, provide a clear prognosis, and certify that the dependent is unable to maintain a home of his or her own.

(vii) The Service may require additional supporting documentation, but only after consultation with SACLANT.

(6) *Period of time for which employment may be authorized.* If approved, an application to accept or continue employment under this paragraph shall be granted in increments of not more than 3 years.

(7) *Income tax and Social Security liability.* Dependents who are granted employment authorization under this paragraph are responsible for payment of all Federal, state, and local income taxes, employment and related taxes and Social Security contributions on any remuneration received.

(8) *No appeal.* There shall be no appeal from a denial of permission to accept or continue employment under this paragraph.

(9) *Unauthorized employment.* An alien classified as a NATO–1, NATO–2, NATO–3, NATO–4, NATO–5, NATO–6, or NATO–7 who is not a NATO principal alien and who engages in employment outside the scope of, or in a manner contrary to, this paragraph may be considered in violation of status pursuant to section 237(a)(1)(C)(i) of the Act. A NATO principal alien in those classifications who engages in employment outside the scope of his or her official position may be considered in violation of status pursuant to section 237(a)(1)(C)(i) of the Act.

(t) *Alien witnesses and informants*—(1) *Alien witness or informant in criminal matter.* An alien may be classified as an S–5 alien witness or informant under the provisions of section 101(a)(15)(S)(i) of the Act if, in the exercise of discretion pursuant to an application on Form I–854 by an interested federal or state law enforcement authority (''LEA''), it is determined by the Commissioner that the alien:

(i) Possesses critical reliable information concerning a criminal organization or enterprise;

(ii) Is willing to supply, or has supplied, such information to federal or state LEA; and

(iii) Is essential to the success of an authorized criminal investigation or the successful prosecution of an individual involved in the criminal organization or enterprise.

(2) *Alien witness or informant in counterterrorism matter.* An alien may be classified as an S–6 alien counterterrorism witness or informant under the provisions of section 101(a)(15)(S)(ii) of the Act if it is determined by the Secretary of State and the Commissioner acting jointly, in the exercise of their discretion, pursuant to an application on Form I–854 by an interested federal LEA, that the alien:

(i) Possesses critical reliable information concerning a terrorist organization, enterprise, or operation;

(ii) Is willing to supply or has supplied such information to a federal LEA;

(iii) Is in danger or has been placed in danger as a result of providing such information; and

(iv) Is eligible to receive a reward under section 36(a) of the State Department Basic Authorities Act of 1956, 22 U.S.C. 2708(a).

(3) *Spouse, married and unmarried sons and daughters, and parents of alien witness or informant in criminal or counterterrorism matter.* An alien spouse, married or unmarried son or daughter, or parent of an alien witness or informant may be granted derivative S classification (S–7) when accompanying, or following to join, the alien witness or informant if, in the exercise of discretion by, with respect to paragraph (t)(1) of this section, the Commissioner, or, with respect to paragraph (t)(2) of this section, the Secretary of State and the Commissioner acting jointly, consider it to be appropriate. A nonimmigrant in such derivative S–7 classification shall be subject to the same period of admission, limitations, and restrictions as the alien witness or informant and must be identified by the requesting LEA on the application Form I–854 in order to qualify for S nonimmigrant classification. Family members not identified on the Form I–854 application will not be eligible for S nonimmigrant classification.

(4) *Request for S nonimmigrant classification.* An application on Form I–854, requesting S nonimmigrant classification for a witness or informant, may only be filed by a federal or state LEA (which shall include a federal or state court or a United States Attorney's Office) directly in need of the information to be provided by the alien witness or informant. The completed application is filed with the Assistant Attorney General, Criminal Division, Department of Justice, who will forward only properly certified applications that fall within the numerical limitation to the Commissioner, Immigration and Naturalization Service, for approval, pursuant to the following process.

(i) *Filing request.* For an alien to qualify for status as an S nonimmigrant, S nonimmigrant classification must be requested by an LEA. The LEA shall recommend an alien for S nonimmigrant classification by: Completing Form I–854, with all necessary endorsements and attachments, in accordance with the instructions on, or attached to, that form, and agreeing, as a condition of status, that no promises may be, have been, or will be made by the LEA that the alien will or may remain in the United States in S or any other nonimmigrant classification or parole, adjust status to that of lawful permanent resident, or otherwise attempt to remain beyond a 3-year period other than by the means authorized by section 101(a)(15)(S) of the Act. The alien, including any derivative beneficiary who is 18 years or older, shall sign a statement, that is part of or affixed to Form I–854, acknowledging awareness that he or she is restricted by the terms of S nonimmigrant classification to the specific terms of section 101(a)(15)(S) of the Act as the exclusive means by which he or she may remain permanently in the United States.

(A) *District director referral.* Any district director or Service officer who receives a request by an alien, an eligible LEA, or other entity seeking S nonimmigrant classification shall advise the requestor of the process and the requirements for applying for S nonimmigrant classification. Eligible LEAs seeking S nonimmigrant classification shall be referred to the Commissioner.

(B) *United States Attorney certification.* The United States Attorney with jurisdiction over a prosecution or investigation that forms the basis for a request for S nonimmigrant classification must certify and endorse the application on Form I–854 and agree that no promises may be, have been, or will be made that the alien will or may remain in the United States in S or any other nonimmigrant classification or parole, adjust status to lawful permanent resident, or attempt to remain beyond the authorized period of admission.

(C) *LEA certification.* LEA certifications on Form I–854 must be made at the seat-of-government level, if federal, or the highest level of the state LEA involved in the matter. With respect to the alien for whom S nonimmigrant classification is sought, the LEA shall provide evidence in the form of attachments establishing the nature of the alien's cooperation with the government, the need for the alien's presence in the United States, all conduct or

conditions which may constitute a ground or grounds of excludability, and all factors and considerations warranting a favorable exercise of discretionary waiver authority by the Attorney General on the alien's behalf. The attachments submitted with a request for S nonimmigrant classification may be in the form of affidavits, statements, memoranda, or similar documentation. The LEA shall review Form I–854 for accuracy and ensure the alien understands the certifications made on Form I–854.

(D) *Filing procedure.* Upon completion of Form I–854, the LEA shall forward the form and all required attachments to the Assistant Attorney General, Criminal Division, United States Department of Justice, at the address listed on the form.

(ii) *Assistant Attorney General, Criminal Division review*—(A) *Review of information.* Upon receipt of a complete application for S nonimmigrant classification on Form I–854, with all required attachments, the Assistant Attorney General, Criminal Division, shall ensure that all information relating to the basis of the application, the need for the witness or informant, and grounds of excludability under section 212 of the Act has been provided to the Service on Form I–854, and shall consider the negative and favorable factors warranting an exercise of discretion on the alien's behalf. No application may be acted on by the Assistant Attorney General unless the eligible LEA making the request has proceeded in accordance with the instructions on, or attached to, Form I–854 and agreed to all provisions therein.

(B) *Advisory panel.* Where necessary according to procedures established by the Assistant Attorney General, Criminal Division, an advisory panel, composed of representatives of the Service, Marshals Service, Federal Bureau of Investigation, Drug Enforcement Administration, Criminal Division, and the Department of State, and those representatives of other LEAs, including state and federal courts designated by the Attorney General, will review the completed application and submit a recommendation to the Assistant Attorney General, Criminal Division, regarding requests for S nonimmigrant classification. The function of this advisory panel is to prioritize cases in light of the numerical limitation in order to determine which cases will be forwarded to the Commissioner.

(C) *Assistant Attorney General certification.* The certification of the Assistant Attorney General, Criminal Division, to the Commissioner recommending approval of the application for S nonimmigrant classification shall contain the following:

(*1*) All information and attachments that may constitute, or relate to, a ground or grounds of excludability under section 212(a) of the Act;

(*2*) Each section of law under which the alien appears to be inadmissible;

(*3*) The reasons that waiver(s) of inadmissibility are considered to be justifiable and in the national interest;

(*4*) A detailed statement that the alien is eligible for S nonimmigrant classification, explaining the nature of the alien's cooperation with the government and the government's need for the alien's presence in the United States;

(*5*) The intended date of arrival;

(*6*) The length of the proposed stay in the United States;

(*7*) The purpose of the proposed stay; and

(*8*) A statement that the application falls within the statutorily specified numerical limitation.

(D) *Submission of certified requests for S nonimmigrant classification to Service.* (*1*) The Assistant Attorney General, Criminal Division, shall forward to the Commissioner only qualified applications for S–5 nonimmigrant classification that have been certified in accordance with the provisions of this paragraph and that fall within the annual numerical limitation.

(*2*) The Assistant Attorney General Criminal Division, shall forward to the Commissioner applications for S–6 nonimmigrant classification that have been certified in accordance with the provisions of this paragraph, certified by the Secretary of State or eligibility for S–6 classification, and that fall within the annual numerical limitation.

(5) *Decision on application.* (i) The Attorney General's authority to waive grounds of excludability pursuant to

section 212 of the Act is delegated to the Commissioner and shall be exercised with regard to S nonimmigrant classification only upon the certification of the Assistant Attorney General, Criminal Division. Such certification is nonreviewable as to the matter's significance, importance, and/or worthwhileness to law enforcement. The Commissioner shall make the final decision to approve or deny a request for S nonimmigrant classification certified by the Assistant Attorney General, Criminal Division.

(ii) *Decision to approve application.* Upon approval of the application on Form I–854, the Commissioner shall notify the Assistant Attorney General, Criminal Division, the Secretary of State, and Service officers as appropriate. Admission shall be authorized for a period not to exceed 3 years.

(iii) *Decision to deny application.* In the event the Commissioner decides to deny an application for S nonimmigrant classification on Form I–854, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to deny.

(6) *Submission of requests for S nonimmigrant visa classification to Secretary of State.* No request for S nonimmigrant visa classification may be presented to the Secretary of State unless it is approved and forwarded by the Commissioner.

(7) *Conditions of status.* An alien witness or informant is responsible for certifying and fulfilling the terms and conditions specified on Form I–854 as a condition of status. The LEA that assumes responsibility for the S nonimmigrant must:

(i) Ensure that the alien:

(A) Reports quarterly to the LEA on his or her whereabouts and activities, and as otherwise specified on Form I–854 or pursuant to the terms of his or her S nonimmigrant classification;

(B) Notifies the LEA of any change of home or work address and phone numbers or any travel plans;

(C) Abides by the law and all specified terms, limitations, or restrictions on the visa, Form I–854, or any waivers pursuant to classification; and

(D) Cooperates with the responsible LEA in accordance with the terms of his or her classification and any restrictions on Form I–854;

(ii) Provide the Assistant Attorney General, Criminal Division, with the name of the control agent on an ongoing basis and provide a quarterly report indicating the whereabouts, activities, and any other control information required on Form I–854 or by the Assistant Attorney General;

(iii) Report immediately to the Service any failure on the alien's part to:

(A) Report quarterly;

(B) Cooperate with the LEA;

(C) Comply with the terms and conditions of the specific S nonimmigrant classification; or

(D) Refrain from criminal activity that may render the alien deportable, which information shall also be forwarded to the Assistant Attorney General, Criminal Division; and

(iv) Report annually to the Assistant Attorney General, Criminal Division, on whether the alien's S nonimmigrant classification and cooperation resulted in either:

(A) A successful criminal prosecution or investigation or the failure to produce a successful resolution of the matter; or

(B) The prevention or frustration of terrorist acts or the failure to prevent such acts.

(v) Assist the alien in his or her application to the Service for employment authorization.

(8) *Annual report.* The Assistant Attorney General, Criminal Division, in consultation with the Commissioner, shall compile the statutorily mandated annual report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate.

(9) *Admission.* The responsible LEA will coordinate the admission of an alien in S nonimmigrant classification with the Commissioner as to the date, time, place, and manner of the alien's arrival.

(10) *Employment.* An alien classified under section 101(a)(15)(S) of the Act may apply for employment authorization by filing Form I–765, Application for Employment Authorization, with fee, in accordance with the instructions on, or attached to, that form pursuant to § 274a.12(c)(21) of this chapter.

(11) *Failure to maintain status.* An alien classified under section 101(a)(15)(S) of the Act shall abide by all the terms and conditions of his or her S nonimmigrant classification imposed by the Attorney General. If the terms and conditions of S nonimmigrant classification will not be or have not been met, or have been violated, the alien is convicted of any criminal offense punishable by a term of imprisonment of 1 year or more, is otherwise rendered deportable, or it is otherwise appropriate or in the public interest to do so, the Commissioner shall proceed to deport an alien pursuant to the terms of 8 CFR 242.26. In the event the Commissioner decides to deport an alien witness or informant in S nonimmigrant classification, the Assistant Attorney General, Criminal Division, and the relevant LEA shall be notified in writing to that effect. The Assistant Attorney General, Criminal Division, shall concur in or object to that decision. Unless the Assistant Attorney General, Criminal Division, objects within 7 days, he or she shall be deemed to have concurred in the decision. In the event of an objection by the Assistant Attorney General, Criminal Division, the matter will be expeditiously referred to the Deputy Attorney General for a final resolution. In no circumstances shall the alien or the relevant LEA have a right of appeal from any decision to deport.

(12) *Change of classification.* (i) An alien in S nonimmigrant classification is prohibited from changing to any other nonimmigrant classification.

(ii) An LEA may request that any alien lawfully admitted to the United States and maintaining status in accordance with the provisions of § 248.1 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).

(u) [Reserved]

(v) *Certain spouses and children of LPRs.* Section 214.15 of this chapter provides the procedures and requirements pertaining to V nonimmigrant status.

(w) *CNMI-Only Transitional Worker (CW–1)*—(1) *Definitions.* The following definitions apply to petitions for and maintenance of CW status in the Commonwealth of the Northern Mariana Islands (the CNMI or the Commonwealth):

(i) *Direct Guam transit* means travel from the CNMI to the Philippines by an alien in CW status, or from the Philippines to the CNMI by an alien with a valid CW visa, on a direct itinerary involving a flight stopover or connection in Guam (and no other place) within 8 hours of arrival in Guam, without the alien leaving the Guam airport.

(ii) *Doing business* means the regular, systematic, and continuous provision of goods or services by an employer as defined in this paragraph and does not include the mere presence of an agent or office of the employer in the CNMI.

(iii) *Employer* means a person, firm, corporation, contractor, or other association, or organization which:

(A) Engages a person to work within the CNMI; and

(B) Has or will have an employer-employee relationship with the CW–1 nonimmigrant being petitioned for.

(iv) *Employer-employee relationship* means that the employer will hire, pay, fire, supervise, and control the work of the employee.

(v) *Lawfully present in the CNMI* means that the alien:

(A) At the time the application for CW status is filed, is an alien lawfully present in the CNMI under 48 U.S.C. 1806(e); or

(B) Was lawfully admitted or paroled into the CNMI under the immigration laws on or after the transition program effective date, other than an alien admitted or paroled as a visitor for business or pleasure (B–1 or B–2, under any visa-free travel provision or parole of

certain visitors from Russia and the People's Republic of China), and remains in a lawful immigration status.

(vi) *Legitimate business* means a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit, or is a governmental, charitable or other validly recognized nonprofit entity. The business must meet applicable legal requirements for doing business in the CNMI. A business will not be considered legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. DHS will determine whether a business is legitimate.

(vii) *Minor child* means a child as defined in section 101(b)(1) of the Act who is under 18 years of age.

(viii) *Numerical limitation* means the maximum number of persons who may be granted CW–1 status in a given fiscal year or other period as determined by DHS, as follows:

(A) For fiscal year 2011, the numerical limitation is 22,417 per fiscal year.

(B) For fiscal year 2012, the numerical limitation is 22,416 per fiscal year.

(C) For each fiscal year beginning on October 1, 2012 until the end of the transition period, the numerical limitation will be a number less than 22,416 that is determined by DHS and published via Notice in the FEDERAL REGISTER. The numerical limitation for any fiscal year will be less than the number for the previous fiscal year, and will be a number reasonably calculated in DHS's discretion to reduce the number of CW–1 nonimmigrants to zero by the end of the transition period.

(D) DHS may adjust the numerical limitation for a fiscal year or other period in its discretion at any time via Notice in the FEDERAL REGISTER, as long as such adjustment is consistent with paragraph (w)(1)(viii)(C) of this section.

(E) If the numerical limitation is not reached for a specified fiscal year, unused numbers do not carry over to the next fiscal year.

(ix) *Occupational category* means those employment activities that DHS has determined require alien workers to supplement the resident workforce and includes:

(A) Professional, technical, or management occupations;

(B) Clerical and sales occupations;

(C) Service occupations;

(D) Agricultural, fisheries, forestry, and related occupations;

(E) Processing occupations;

(F) Machine trade occupations;

(G) Benchwork occupations;

(H) Structural work occupations; and

(I) Miscellaneous occupations.

(x) *Petition* means USCIS Form I–129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker, a successor form, other form, or electronic equivalent, any supplemental information requested by USCIS, and additional evidence as may be prescribed or requested by USCIS.

(xi) *Transition period* means the period beginning on the transition program effective date and ending on December 31, 2014, unless the CNMI-only transitional worker program is extended by the Secretary of Labor, in which case the transition period will end for purposes of the CW transitional worker program on the date designated by the Secretary of Labor.

(xii) *United States worker* means a national of the United States, an alien lawfully admitted for permanent residence, or a national of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau who is eligible for nonimmigrant admission and is employment-authorized under the Compacts of Free Association between the United States and those nations.

(2) *Eligible aliens.* Subject to the numerical limitation, an alien may be classified as a CW–1 nonimmigrant if, during the transition period, the alien:

(i) Will enter or remain in the CNMI for the purpose of employment in the transition period in an occupational category that DHS has designated as requiring alien workers to supplement the resident workforce;

(ii) Is petitioned for by an employer;

(iii) Is not present in the United States, other than the CNMI;

(iv) If present in the CNMI, is lawfully present in the CNMI;

(v) Is not inadmissible to the United States as a nonimmigrant or has been

granted a waiver of each applicable ground of inadmissibility; and

(vi) Is ineligible for status in a nonimmigrant worker classification under section 101(a)(15) of the Act.

(3) *Derivative beneficiaries—CW–2 nonimmigrant classification.* The spouse or minor child of a CW–1 nonimmigrant may accompany or follow the alien as a CW–2 nonimmigrant if the alien:

(i) Is not present in the United States, other than the CNMI;

(ii) If present in the CNMI, is lawfully present in the CNMI; and

(iii) Is not inadmissible to the United States as a nonimmigrant or has been granted a waiver of each applicable ground of inadmissibility.

(4) *Eligible employers.* To be eligible to petition for a CW–1 nonimmigrant worker, an employer must:

(i) Be engaged in legitimate business;

(ii) Consider all available United States workers for the position being filled by the CW–1 worker;

(iii) Offer terms and conditions of employment which are consistent with the nature of the petitioner's business and the nature of the occupation, activity, and industry in the CNMI; and

(iv) Comply with all Federal and Commonwealth requirements relating to employment, including but not limited to nondiscrimination, occupational safety, and minimum wage requirements.

(5) *Petition requirements.* An employer who seeks to classify an alien as a CW–1 worker must file a petition with USCIS and pay the requisite petition fee plus the CNMI education fee of $150 per beneficiary per year. An employer filing a petition is eligible to apply for a waiver of the fee based upon inability to pay as provided by 8 CFR 103.7(c). If the beneficiary will perform services for more than one employer, each employer must file a separate petition with fees with USCIS.

(6) *Appropriate documents.* Documentary evidence establishing eligibility for CW status is required. A petition must be accompanied by:

(i) Evidence demonstrating the petitioner meets the definition of eligible employer in this section;

(ii) An attestation by the petitioner certified as true and accurate by an appropriate official of the petitioner, of the following:

(A) No qualified United States worker is available to fill the position;

(B) The employer is doing business as defined in paragraph (w)(1)(ii) of this section;

(C) The employer is a legitimate business as defined in paragraph (w)(1)(vi) of this section;

(D) The employer is an eligible employer as described in paragraph (w)(4) of this section and will continue to comply with the requirements for an eligible employer until such time as the employer no longer employs the CW–1 nonimmigrant worker;

(E) The beneficiary meets the qualifications for the position;

(F) The beneficiary, if present in the CNMI, is lawfully present in the CNMI;

(G) The position is not temporary or seasonal employment, and the petitioner does not reasonably believe it to qualify for any other nonimmigrant worker classification; and

(H) The position falls within the list of occupational categories designated by DHS.

(iii) Evidence of licensure if an occupation requires a Commonwealth or local license for an individual to fully perform the duties of the occupation. Categories of valid licensure for CW–1 classification are:

(A) *Licensure.* An alien seeking CW–1 classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the CNMI and immediately engage in employment in the occupation.

(B) *Temporary licensure.* If a temporary license is available and allowed for the occupation with a temporary license, USCIS may grant the petition at its discretion after considering the duties performed, the degree of supervision received, and any limitations placed on the alien by the employer and/or pursuant to the temporary license.

(C) *Duties without licensure.* If the CNMI allows an individual to fully practice the occupation that usually requires a license without a license under the supervision of licensed senior or supervisory personnel in that occupation, USCIS may grant CW–1 status at its discretion after considering the

duties performed, the degree of supervision received, and any limitations placed on the alien if the facts demonstrate that the alien under supervision could fully perform the duties of the occupation.

(7) *Change of employers.* A change of employment to a new employer inconsistent with paragraphs (w)(7)(i) and (ii) of this section will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act. A CW–1 nonimmigrant may change employers if:

(i) The prospective new employer files a petition to classify the alien as a CW–1 worker in accordance with paragraph (w)(5) of this section, and

(ii) An extension of the alien's stay is requested if necessary for the validity period of the petition.

(iii) A CW–1 may work for a prospective new employer after the prospective new employer files a Form I–129CW petition on the employee's behalf if:

(A) The prospective employer has filed a nonfrivolous petition for new employment before the date of expiration of the CW–1's authorized period of stay; and

(B) Subsequent to his or her lawful admission, the CW–1 has not been employed without authorization in the United States.

(iv) Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

(v) If a CW–1's employment has been terminated prior to the filing of a petition by a prospective new employer consistent with paragraphs (w)(7)(i) and (ii), the CW–1 will not be considered to be in violation of his or her CW–1 status during the 30-day period immediately following the date on which the CW–1's employment terminated if a nonfrivolous petition for new employment is filed consistent with this paragraph within that 30-day period and the CW–1 does not otherwise violate the terms and conditions of his or her status during that 30-day period.

(8) *Amended or new petition.* If there are any material changes in the terms and conditions of employment, the petitioner must file an amended or new petition to reflect the changes.

(9) *Multiple beneficiaries.* A petitioning employer may include more than one beneficiary in a CW–1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location.

(10) *Named beneficiaries.* The petition must include the name of the beneficiary and other required information, as indicated in the form instructions, at the time of filing. Unnamed beneficiaries will not be permitted.

(11) *Early termination.* The petitioning employer must pay the reasonable cost of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission.

(12) *Approval.* USCIS will consider all the evidence submitted and such other evidence required in the form instructions to adjudicate the petition. USCIS will notify the petitioner of the approval of the petition on Form I–797, Notice of Action, or in another form as USCIS may prescribe:

(i) The approval notice will include the classification and name of the beneficiary or beneficiaries and the petition's period of validity. A petition for more than one beneficiary may be approved in whole or in part.

(ii) The petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services.

(13) *Petition validity.* An approved petition will be valid for a period of up to one year.

(14) *How to apply for CW–1 or CW–2 status.* (i) Upon approval of the petition, a beneficiary, his or her eligible spouse, and or his or her minor child(ren) outside the CNMI will be informed in the approval notice of where they may apply for a visa authorizing admission in CW–1 or CW–2 status.

(ii) If the beneficiary is present in the CNMI, the petition also serves as the application for a grant of status as a CW–1.

(iii) If the eligible spouse and/or minor child(ren) are present in the CNMI, the spouse or child(ren) may apply for CW–2 dependent status on Form I–539 (or such alternative form as

USCIS may designate) in accordance with the form instructions. The CW–2 status may not be approved until approval of the CW–1 petition. A spouse or child applying for CW–2 status on Form I–539 is eligible to apply for a waiver of the fee based upon inability to pay as provided by 8 CFR 103.7(c).

(15) *Biometrics and other information.* The beneficiary of a CW–1 petition or the spouse or child applying for a grant or, extension of CW–2 status, or a change of status to CW–2 status, must submit biometric information as requested by USCIS. For a Form I–129CW petition where the beneficiary is present in the CNMI, the employer must submit the biometric service fee described in 8 CFR 103.7(b)(1) with the petition for each beneficiary for which CW–1 status is being requested or request a fee waiver for any biometric services provided, including but not limited to reuse of previously provided biometric information for background checks. For a Form I–539 application where the applicant is present in the CNMI, the applicant must submit a biometric service fee for each CW–2 nonimmigrant on the application with the application or obtain a waiver of the biometric service fee described in 8 CFR 103.7(b)(1) for any biometric services provided, including but not limited to reuse of previously provided biometric information for background checks. A biometric service fee is not required for beneficiaries under the age of 14, or who are at least 79 years of age.

(16) *Period of admission.* (i) A CW–1 nonimmigrant will be admitted for the period of petition validity, plus up to 10 days before the validity period begins and 10 days after the validity period ends. The CW–1 nonimmigrant may not work except during the validity period of the petition. A CW–2 spouse will be admitted for the same period as the principal alien. A CW–2 minor child will be admitted for the same period as the principal alien, but such admission will not extend beyond the child's 18th birthday.

(ii) The temporary departure from the CNMI of the CW–1 nonimmigrant will not affect the derivative status of the CW–2 spouse and minor children, provided the familial relationship continues to exist and the principal remains eligible for admission as a CW–1 nonimmigrant.

(17) *Extension of petition validity and extension of stay.* (i) The petitioner may request an extension of an employee's CW–1 nonimmigrant status by filing a new petition.

(ii) A request for a petition extension may be filed only if the validity of the original petition has not expired.

(iii) Extensions of CW–1 status may be granted for a period of up to 1 year until the end of the transition period, subject to the numerical limitation.

(iv) To qualify for an extension of stay, the petitioner must demonstrate that the beneficiary or beneficiaries:

(A) Continuously maintained the terms and conditions of CW–1 status;

(B) Remains admissible to the United States; and

(C) Remains eligible for CW–1 classification.

(v) The derivative CW–2 nonimmigrant may file an application for extension of nonimmigrant stay on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW–2 status extension may not be approved until approval of the CW–1 extension petition.

(18) *Change or adjustment of status.* A CW–1 or CW–2 nonimmigrant can apply to change nonimmigrant status under section 248 of the Act or apply for adjustment of status under section 245 of the Act, if otherwise eligible. During the transition period, CW–1 or CW–2 nonimmigrants may be the beneficiary of a petition for or may apply for any nonimmigrant or immigrant visa classification for which they may qualify.

(19) *Effect of filing an application for or approval of a permanent labor certification, preference petition, or filing of an application for adjustment of status on CW–1 or CW–2 classification.* An alien may be granted, be admitted in and maintain lawful CW–1 or CW–2 nonimmigrant status while, at the same time, lawfully seeking to become a lawful permanent resident of the United States, provided he or she intends to depart the CNMI voluntarily at the end of the period of authorized stay. The filing of an application for or approval of a permanent labor certification or an immigrant visa preference

petition, the filing of an application for adjustment of status, or the lack of residence abroad will not be the basis for denying:

(i) A CW–1 petition filed on behalf of the alien;

(ii) A request to extend a CW–1 status pursuant to a petition previously filed on behalf of the alien;

(iii) An application for CW–2 classification filed by an alien;

(iv) A request to extend CW–2 status pursuant to the extension of a related CW–1 alien's extension; or

(v) An application for admission as a CW–1 or CW–2 nonimmigrant.

(20) *Rejection.* USCIS may reject an employer's petition for new or extended CW–1 status if the numerical limitation has been met. In that case, the petition and accompanying fee will be rejected and returned with the notice that numbers are unavailable for the CW nonimmigrant classification. The beneficiary's application for admission based upon an approved petition will not be rejected based upon the numerical limitation.

(21) *Denial.* The ultimate decision to grant or deny CW–1 or CW–2 classification or status is a discretionary determination, and the petition or the application may be denied for failure of the petitioner or the applicant to demonstrate eligibility or for other good cause. The denial of a petition to classify an alien as a CW–1 may be appealed to the USCIS Administrative Appeals Office or any successor body. The denial of a grant of CW–1 or CW–2 status within the CNMI, or of an application for change or extension of status filed under this section, may not be appealed.

(22) *Terms and conditions of CW Nonimmigrant status*—(i) *Geographical limitations.* CW–1 and CW–2 statuses are only applicable in the CNMI. Entry, employment and residence in the rest of the United States (including Guam) require the appropriate visa or visa waiver. Except as provided in paragraph (w)(22)(iii) of this section, an alien with CW–1 or CW–2 status who enters or attempts to enter, or travels or attempts to travel to any other part of the United States without an appropriate visa or visa waiver, or who violates conditions of nonimmigrant stay applicable to any such authorized status in any other part of the United States, will be deemed to have violated CW–1 or CW–2 status.

(ii) *Re-entry.* An alien with CW–1 or CW–2 status who travels abroad from the CNMI will require a CW–1 or CW–2 or other appropriate visa to be re-admitted to the CNMI.

(iii) *Direct Guam transit*—(A) *Travel from the CNMI to the Philippines.* An alien with CW–1 or CW–2 status who is a national of the Philippines may travel to the Philippines via a direct Guam transit without being deemed to violate that status.

(B) *Travel from the Philippines to the CNMI.* An alien who is a national of the Philippines may travel to the CNMI via a direct Guam transit under the following conditions: If an immigration officer determines that the alien warrants a discretionary exercise of parole authority, the alien may be paroled into Guam via direct Guam transit to undergo preinspection outbound from Guam for admission to the CNMI pursuant to 8 CFR 235.5(a) or to proceed for inspection upon arrival in the CNMI. During any such preinspection, the alien will be admitted in CW–1 or CW–2 status if the immigration officer in Guam determines that the alien is admissible to the CNMI. A condition of the admission is that the alien must complete the direct Guam transit. DHS, in its discretion, may exempt such alien from the provisions of 8 CFR 235.5(a) relating to separation and boarding of passengers after inspection.

(iv) *Employment authorization.* An alien with CW–1 nonimmigrant status is only authorized employment in the CNMI for the petitioning employer. An alien with CW–2 status is not authorized to be employed.

(23) *Expiration of status.* CW–1 status expires when the alien violates his or her CW–1 status (or in the case of a CW–1 status violation caused solely by termination of the alien's employment, at the end of the 30 day period described in section 214.2(w)(7)(v)), 10 days after the end of the petition's validity period, or at the end of the transitional worker program, whichever is earlier. CW–2 nonimmigrant status expires when the status of the related CW–1 alien expires, on a CW–2 minor

child's 18th birthday, when the alien violates his or her status, or at the end of the transitional worker program, whichever is earlier. No alien will be eligible for admission to the CNMI in CW–1 or CW–2 status, and no CW–1 or CW–2 visa will be valid for travel to the CNMI, after the transitional worker program ends.

(24) *Waivers of inadmissibility for applicants lawfully present in the CNMI.* An applicant for CW–1 or CW–2 nonimmigrant status, who is otherwise eligible for such status and otherwise admissible to the United States, and who possesses appropriate documents demonstrating that the applicant is lawfully present in the CNMI, may be granted a waiver of inadmissibility under section 212(d)(3)(A)(ii) of the Act, including the grounds of inadmissibility described in sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(II) of the Act, as a matter of discretion for the purpose of granting the CW–1 or CW–2 nonimmigrant status. Such waiver may be granted without additional form or fee. Appropriate documents required for such a waiver include a valid unexpired passport and other documentary evidence demonstrating that the applicant is lawfully present in the CNMI, such as an ''umbrella permit'' or a DHS-issued Form I–94. Evidence that the applicant possesses appropriate documents may be provided by an employer to accompany a petition, by an eligible spouse or minor child to accompany the Form I–539 (or such alternative form as USCIS may designate), or in such other manner as USCIS may designate.

(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 of the printed volume and at *www.fdsys.gov*.

§ 214.3 Approval of schools for enrollment of F and M nonimmigrants.

(a) *Filing petition*—(1) *General.* A school or school system seeking initial or continued authorization for attendance by nonimmigrant students under sections 101(a)(15)(F)(i) or 101(a)(15)(M)(i) of the Act, or both, must file a petition for certification or recertification with SEVP, using the Student and Exchange Visitor Information System (SEVIS), in accordance with the procedures at paragraph (h) of this section. The petition must state whether the school or school system is seeking certification or recertification for attendance of nonimmigrant students under section 101(a)(15)(F)(i) or 101(a)(15)(M)(i) of the Act or both. The petition must identify by name and address each location of the school that is included in the petition for certification or recertification, specifically including any physical location in which a nonimmigrant can attend classes through the school (*i.e.*, campus, extension campuses, satellite campuses, etc.).

(i) *School systems.* A school system, as used in this section, means public school (grades 9–12) or private school (grades kindergarten–12). A petition by a school system must include a list of the names and addresses of those schools included in the petition with the supporting documents.

(ii) *Submission requirements.* Certification and recertification petitions require that a complete Form I–17, Petition for Approval of School for Attendance by Nonimmigrant Student, including supplements A and B and bearing original signatures, be included with the school's submission of supporting documentation. In submitting the Form I–17, a school certifies that the designated school officials (DSOs) signing the form have read and understand DHS regulations relating to: Nonimmigrant students at 8 CFR 214.1, 214.2(f), and/or 214.2(m); change of nonimmigrant classification for students at 8 CFR 248; school certification and recertification under this section; withdrawal of school certification under this section and 8 CFR 214.4; that both the school and its DSOs intend to comply with these regulations at all times; and that, to the best of its knowledge, the school is eligible for SEVP certification. Willful misstatements may constitute perjury (18 U.S.C. 1621).

USCIS Resources

Form G-28: Notice of Entry of Appearance as Attorney

Notice of Entry of Appearance as Attorney or Accredited Representative

Department of Homeland Security

DHS
Form G-28
OMB No. 1615-0105
Expires 05/31/2021

Part 1. Information About Attorney or Accredited Representative

1. USCIS Online Account Number (if any)
▶

Name of Attorney or Accredited Representative

2.a. Family Name (Last Name)

2.b. Given Name (First Name)

2.c. Middle Name

Address of Attorney or Accredited Representative

3.a. Street Number and Name

3.b. ☐ Apt. ☐ Ste. ☐ Flr.

3.c. City or Town

3.d. State **3.e.** ZIP Code

3.f. Province

3.g. Postal Code

3.h. Country

Contact Information of Attorney or Accredited Representative

4. Daytime Telephone Number

5. Mobile Telephone Number (if any)

6. Email Address (if any)

7. Fax Number (if any)

Part 2. Eligibility Information for Attorney or Accredited Representative

Select **all applicable** items.

1.a. ☐ I am an attorney eligible to practice law in, and a member in good standing of, the bar of the highest courts of the following states, possessions, territories, commonwealths, or the District of Columbia. If you need extra space to complete this section, use the space provided in **Part 6. Additional Information**.

Licensing Authority

1.b. Bar Number (if applicable)

1.c. I (select **only one** box) ☐ am not ☐ am subject to any order suspending, enjoining, restraining, disbarring, or otherwise restricting me in the practice of law. If you are subject to any orders, use the space provided in **Part 6. Additional Information** to provide an explanation.

1.d. Name of Law Firm or Organization (if applicable)

2.a. ☐ I am an accredited representative of the following qualified nonprofit religious, charitable, social service, or similar organization established in the United States and recognized by the Department of Justice in accordance with 8 CFR part 1292.

2.b. Name of Recognized Organization

2.c. Date of Accreditation (mm/dd/yyyy)

3. ☐ I am associated with _____, the attorney or accredited representative of record who previously filed Form G-28 in this case, and my appearance as an attorney or accredited representative for a limited purpose is at his or her request.

4.a. ☐ I am a law student or law graduate working under the direct supervision of the attorney or accredited representative of record on this form in accordance with the requirements in 8 CFR 292.1(a)(2).

4.b. Name of Law Student or Law Graduate

Part 3. Notice of Appearance as Attorney or Accredited Representative

If you need extra space to complete this section, use the space provided in **Part 6. Additional Information**.

This appearance relates to immigration matters before (select **only one** box):

1.a. ☐ U.S. Citizenship and Immigration Services (USCIS)

1.b. List the form numbers or specific matter in which appearance is entered.

2.a. ☐ U.S. Immigration and Customs Enforcement (ICE)

2.b. List the specific matter in which appearance is entered.

3.a. ☐ U.S. Customs and Border Protection (CBP)

3.b. List the specific matter in which appearance is entered.

4. Receipt Number (if any)

►

5. I enter my appearance as an attorney or accredited representative at the request of the (select **only one** box):

☐ Applicant ☐ Petitioner ☐ Requestor

☐ Beneficiary/Derivative ☐ Respondent (ICE, CBP)

Information About Client (Applicant, Petitioner, Requestor, Beneficiary or Derivative, Respondent, or Authorized Signatory for an Entity)

6.a. Family Name (Last Name)

6.b. Given Name (First Name)

6.c. Middle Name

7.a. Name of Entity (if applicable)

7.b. Title of Authorized Signatory for Entity (if applicable)

8. Client's USCIS Online Account Number (if any)

►

9. Client's Alien Registration Number (A-Number) (if any)

► **A-**

Client's Contact Information

10. Daytime Telephone Number

11. Mobile Telephone Number (if any)

12. Email Address (if any)

Mailing Address of Client

NOTE: Provide the client's mailing address. **Do not** provide the business mailing address of the attorney or accredited representative **unless** it serves as the safe mailing address on the application or petition being filed with this Form G-28.

13.a. Street Number and Name

13.b. ☐ Apt. ☐ Ste. ☐ Flr.

13.c. City or Town

13.d. State **13.e.** ZIP Code

13.f. Province

13.g. Postal Code

13.h. Country

Part 4. Client's Consent to Representation and Signature

Consent to Representation and Release of Information

I have requested the representation of and consented to being represented by the attorney or accredited representative named in **Part 1.** of this form. According to the Privacy Act of 1974 and U.S. Department of Homeland Security (DHS) policy, I also consent to the disclosure to the named attorney or accredited representative of any records pertaining to me that appear in any system of records of USCIS, ICE, or CBP.

Part 4. Client's Consent to Representation and Signature (continued)

Options Regarding Receipt of USCIS Notices and Documents

USCIS will send notices to both a represented party (the client) and his, her, or its attorney or accredited representative either through mail or electronic delivery. USCIS will send all secure identity documents and Travel Documents to the client's U.S. mailing address.

If you want to have notices and/or secure identity documents sent to your attorney or accredited representative of record rather than to you, please select **all applicable** items below. You may change these elections through written notice to USCIS.

1.a. ☐ I request that USCIS send original notices on an application or petition to the business address of my attorney or accredited representative as listed in this form.

1.b. ☐ I request that USCIS send any secure identity document (Permanent Resident Card, Employment Authorization Document, or Travel Document) that I receive to the U.S. business address of my attorney or accredited representative (or to a designated military or diplomatic address in a foreign country (if permitted)).

NOTE: If your notice contains Form I-94, Arrival-Departure Record, USCIS will send the notice to the U.S. business address of your attorney or accredited representative. If you would rather have your Form I-94 sent directly to you, select **Item Number 1.c.**

1.c. ☐ I request that USCIS send my notice containing Form I-94 to me at my U.S. mailing address.

Signature of Client or Authorized Signatory for an Entity

2.a. Signature of Client or Authorized Signatory for an Entity

➡

2.b. Date of Signature (mm/dd/yyyy)

Part 5. Signature of Attorney or Accredited Representative

I have read and understand the regulations and conditions contained in 8 CFR 103.2 and 292 governing appearances and representation before DHS. I declare under penalty of perjury under the laws of the United States that the information I have provided on this form is true and correct.

1. a. Signature of Attorney or Accredited Representative

1.b. Date of Signature (mm/dd/yyyy)

2.a. Signature of Law Student or Law Graduate

2.b. Date of Signature (mm/dd/yyyy)

Part 6. Additional Information

If you need extra space to provide any additional information within this form, use the space below. If you need more space than what is provided, you may make copies of this page to complete and file with this form or attach a separate sheet of paper. Type or print your name at the top of each sheet; indicate the **Page Number**, **Part Number**, and **Item Number** to which your answer refers; and sign and date each sheet.

1.a Family Name (Last Name)

1.b. Given Name (First Name)

1.c. Middle Name

2.a. Page Number **2.b.** Part Number **2.c.** Item Number

2.d.

3.a. Page Number **3.b.** Part Number **3.c.** Item Number

3.d.

4.a. Page Number **4.b.** Part Number **4.c.** Item Number

4.d.

5.a. Page Number **5.b.** Part Number **5.c.** Item Number

5.d.

6.a. Page Number **6.b.** Part Number **6.c.** Item Number

6.d.

USCIS Resources

Form I-129: Petition for Nonimmigrant Worker

Petition for a Nonimmigrant Worker

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

For USCIS Use Only	Receipt	Partial Approval (explain)	Action Block
Class: _____ No. of Workers: _____ Job Code: _____ Validity Dates: _____ From: _____ To: _____	☐ **Classification Approved** ☐ Consulate/POE/PFI Notified At: _____ ☐ Extension Granted ☐ COS/Extension Granted		

► **START HERE - Type or print in black ink.**

Part 1. Petitioner Information

If you are an individual filing this petition, complete **Item Number 1. If you are a company or an organization filing this petition,** complete **Item Number 2**.

1. Legal Name of Individual Petitioner

Family Name (Last Name) | Given Name (First Name) | Middle Name

2. Company or Organization Name

3. Mailing Address of Individual, Company or Organization

In Care Of Name

Street Number and Name | Apt. Ste. Flr. ☐ ☐ ☐ Number

City or Town | State | ZIP Code

Province | Postal Code | Country

4. Contact Information

Daytime Telephone Number | Mobile Telephone Number | Email Address (if any)

5. Other Information

Federal Employer Identification Number (FEIN) ►

Individual IRS Tax Number ►

U.S. Social Security Number (if any) ►

Part 2. Information About This Petition (See instructions for fee information)

1. **Requested Nonimmigrant Classification** (Write classification symbol):

2. **Basis for Classification** (select **only one** box)**:**

- ☐ **a.** New employment.
- ☐ **b.** Continuation of previously approved employment without change with the same employer.
- ☐ **c.** Change in previously approved employment.
- ☐ **d.** New concurrent employment.
- ☐ **e.** Change of employer.
- ☐ **f.** Amended petition.

3. **Provide the most recent petition/application receipt number for the beneficiary. If none exists, indicate "None."** ▶

4. **Requested Action** (select **only one** box)**:**

- ☐ **a.** Notify the office in **Part 4.** so each beneficiary can obtain a visa or be admitted. (**NOTE:** A petition is not required for E-1, E-2, E-3, H-1B1 Chile/Singapore, or TN visa beneficiaries.)
- ☐ **b.** Change the status and extend the stay of each beneficiary because the beneficiary(ies) is/are now in the United States in another status (see instructions for limitations). This is available only when you check "New Employment" in **Item Number 2.**, above.
- ☐ **c.** Extend the stay of each beneficiary because the beneficiary(ies) now hold(s) this status.
- ☐ **d.** Amend the stay of each beneficiary because the beneficiary(ies) now hold(s) this status.
- ☐ **e.** Extend the status of a nonimmigrant classification based on a free trade agreement. (See Trade Agreement Supplement to Form I-129 for TN and H-1B1.)
- ☐ **f.** Change status to a nonimmigrant classification based on a free trade agreement. (See Trade Agreement Supplement to Form I-129 for TN and H-1B1.)

5. **Total number of workers included in this petition.** (See instructions relating to when more than one worker can be included.) ▶

Part 3. Beneficiary Information (Information about the beneficiary/beneficiaries you are filing for. Complete the blocks below. Use the Attachment-1 sheet to name each beneficiary included in this petition.)

1. **If an Entertainment Group, Provide the Group Name**

2. **Provide Name of Beneficiary**

Family Name (Last Name)	Given Name (First Name)	Middle Name

3. **Provide all other names the beneficiary has used.** Include nicknames, aliases, maiden name, and names from all previous marriages**.**

Family Name (Last Name)	Given Name (First Name)	Middle Name

4. **Other Information**

Date of birth (mm/dd/yyyy)

Gender ☐ Male ☐ Female

U.S. Social Security Number (if any) ▶

Part 3. Beneficiary Information (Information about the beneficiary/beneficiaries you are filing for. Complete the blocks below. Use the Attachment-1 sheet to name each beneficiary included in this petition.) (continued)

Alien Registration Number (A-Number)
► A-

Country of Birth

Province of Birth

Country of Citizenship or Nationality

5. If the beneficiary is in the United States, complete the following:

Date of Last Arrival (mm/dd/yyyy)

I-94 Arrival-Departure Record Number
►

Passport or Travel Document Number

Date Passport or Travel Document Issued (mm/dd/yyyy)

Date Passport or Travel Document Expires (mm/dd/yyyy)

Passport or Travel Document Country of Issuance

Current Nonimmigrant Status

Date Status Expires or D/S (mm/dd/yyyy)

Student and Exchange Visitor Information System (SEVIS) Number (if any)

Employment Authorization Document (EAD) Number (if any)

6. Current Residential U.S. Address (if applicable) (do not list a P.O. Box)

Street Number and Name

Apt. Ste. Flr. ☐ ☐ ☐ Number

City or Town

State

ZIP Code

Part 4. Processing Information

1. If a beneficiary or beneficiaries named in **Part 3.** is/are outside the United States, or a requested extension of stay or change of status cannot be granted, state the U.S. Consulate or inspection facility you want notified if this petition is approved.

a. Type of Office (select only one box)**:** ☐ Consulate ☐ Pre-flight inspection ☐ Port of Entry

b. Office Address (City)

c. U.S. State or Foreign Country

d. Beneficiary's Foreign Address

Street Number and Name

Apt. Ste. Flr. ☐ ☐ ☐ Number

City or Town

State

Province

Postal Code

Country

2. Does each person in this petition have a valid passport? ☐ Yes ☐ No. If no, go to **Part 9.** and type or print your explanation.

Part 4. Processing Information (continued)

3. Are you filing any other petitions with this one?

☐ Yes. If yes, how many? ▶ ☐ No

4. Are you filing any applications for replacement/initial I-94, Arrival-Departure Records with this petition? Note that if the beneficiary was issued an electronic Form I-94 by CBP when he/she was admitted to the United States at an air or sea port, he/she may be able to obtain the Form I-94 from the CBP Website at **www.cbp.gov/i94** instead of filing an application for a replacement/initial I-94.

☐ Yes. If yes, how many? ▶ ☐ No

5. Are you filing any applications for dependents with this petition?

☐ Yes. If yes, how many? ▶ ☐ No

6. Is any beneficiary in this petition in removal proceedings?

☐ Yes. If yes, proceed to **Part 9.** and list the beneficiary's(ies) name(s). ☐ No

7. Have you ever filed an immigrant petition for any beneficiary in this petition?

☐ Yes. If yes, how many? ▶ ☐ No

8. Did you indicate you were filing a new petition in **Part 2.**?

☐ Yes. If yes, answer the questions below. ☐ No. If no, proceed to **Item Number 9.**

a. Has any beneficiary in this petition ever been given the classification you are now requesting within the last seven years?

☐ Yes. If yes, proceed to **Part 9.** and type or print your explanation. ☐ No

b. Has any beneficiary in this petition ever been denied the classification you are now requesting within the last seven years?

☐ Yes. If yes, proceed to **Part 9.** and type or print your explanation. ☐ No

9. Have you ever previously filed a nonimmigrant petition for this beneficiary?

☐ Yes. If yes, proceed to **Part 9.** and type or print your explanation. ☐ No

10. If you are filing for an entertainment group, has any beneficiary in this petition not been with the group for at least one year?

☐ Yes. If yes, proceed to **Part 9.** and type or print your explanation. ☐ No

11.a. Has any beneficiary in this petition ever been a J-1 exchange visitor or J-2 dependent of a J-1 exchange visitor?

☐ Yes. If yes, proceed to **Item Number 11.b.** ☐ No

11.b. If you checked yes in **Item Number 11.a.**, provide the dates the beneficiary maintained status as a J-1 exchange visitor or J-2 dependent. Also, provide evidence of this status by attaching a copy of either a DS-2019, Certificate of Eligibility for Exchange Visitor (J-1) Status, a Form IAP-66, or a copy of the passport that includes the J visa stamp.

Part 5. Basic Information About the Proposed Employment and Employer

Attach the Form I-129 supplement relevant to the classification of the worker(s) you are requesting.

1. Job Title

2. LCA or ETA Case Number

Part 5. Basic Information About the Proposed Employment and Employer (continued)

3. Address where the beneficiary(ies) will work if different from address in **Part 1.**

Street Number and Name | Apt. Ste. Flr. | Number

City or Town | State | ZIP Code

4. Did you include an itinerary with the petition? ☐ Yes ☐ No

5. Will the beneficiary(ies) work for you off-site at another company or organization's location? ☐ Yes ☐ No

6. Will the beneficiary(ies) work exclusively in the Commonwealth of the Northern Mariana Islands (CNMI)? ☐ Yes ☐ No

7. Is this a full-time position? ☐ Yes ☐ No

8. If the answer to **Item Number 7.** is no, how many hours per week for the position? ►

9. Wages: **$** per (Specify hour, week, month, or year) ►

10. Other Compensation (Explain)

11. Dates of intended employment From: (mm/dd/yyyy) To: (mm/dd/yyyy)

12. Type of Business **13.** Year Established

14. Current Number of Employees in the United States **15.** Gross Annual Income **16.** Net Annual Income

Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

(This section of the form is required only for H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions. It is not required for any other classifications. Please review the Form I-129 General Filing Instructions before completing this section.)

Select Item Number 1. or Item Number 2. as appropriate. DO NOT select both boxes.

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

1. ☐ A license is not required from either the U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or

2. ☐ A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

Part 7. Declaration, Signature, and Contact Information of Petitioner or Authorized Signatory (Read the information on penalties in the instructions before completing this section.)

Copies of any documents submitted are exact photocopies of unaltered, original documents, and I understand that, as the petitioner, I may be required to submit original documents to U.S. Citizenship and Immigration Services (USCIS) at a later date.

I authorize the release of any information from my records, or from the petitioning organization's records that USCIS needs to determine eligibility for the immigration benefit sought. I recognize the authority of USCIS to conduct audits of this petition using publicly available open source information. I also recognize that any supporting evidence submitted in support of this petition may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.

If filing this petition on behalf of an organization, I certify that I am authorized to do so by the organization.

I certify, under penalty of perjury, that I have reviewed this petition and that all of the information contained in the petition, including all responses to specific questions, and in the supporting documents, is complete, true, and correct.

1. Name and Title of Authorized Signatory

Family Name (Last Name)

Given Name (First Name)

Title

2. Signature and Date

Signature of Authorized Signatory

Date of Signature (mm/dd/yyyy)

3. Signatory's Contact Information

Daytime Telephone Number

Email Address (if any)

NOTE: If you do not fully complete this form or fail to submit the required documents listed in the instructions, a final decision on your petition may be delayed or the petition may be denied.

Part 8. Declaration, Signature, and Contact Information of Person Preparing Form, If Other Than Petitioner

Provide the following information concerning the preparer:

1. Name of Preparer

Family Name (Last Name)

Given Name (First Name)

2. Preparer's Business or Organization Name (if any)

(If applicable, provide the name of your accredited organization recognized by the Board of Immigration Appeals (BIA).)

Part 8. Declaration, Signature, and Contact Information of Person Preparing Form, If Other Than Petitioner (continued)

3. Preparer's Mailing Address

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ | Number

City or Town | State | ZIP Code

Province | Postal Code | Country

4. Preparer's Contact Information

Daytime Telephone Number | Fax Number | Email Address (if any)

Preparer's Declaration

By my signature, I certify, swear, or affirm, under penalty of perjury, that I prepared this petition on behalf of, at the request of, and with the express consent of the petitioner or authorized signatory. The petitioner has reviewed this completed petition as prepared by me and informed me that all of the information in the form and in the supporting documents, is complete, true, and correct.

5. Signature and Date

Signature of Preparer | Date of Signature (mm/dd/yyyy)

Part 9. Additional Information About Your Petition For Nonimmigrant Worker

If you require more space to provide any additional information within this petition, use the space below. If you require more space than what is provided to complete this petition, you may make a copy of **Part 9.** to complete and file with this petition. In order to assist us in reviewing your response, you must identify the **Page Number, Part Number and Item Number** corresponding to the additional information.

1. A-Number ► **A-**

2. **Page Number** **Part Number** **Item Number**

3. **Page Number** **Part Number** **Item Number**

4. **Page Number** **Part Number** **Item Number**

E-1/E-2 Classification Supplement to Form I-129

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

1. Name of the Petitioner

2. Name of the Beneficiary

Family Name (Last Name) | Given Name (First Name) | Middle Name

3. Classification sought (select **only one** box):

☐ E-1 Treaty Trader ☐ E-2 Treaty Investor ☐ E-2 CNMI Investor

4. Name of country signatory to treaty with the United States

5. Are you seeking advice from USCIS to determine whether changes in the terms or conditions of E status for one or more employees are substantive? ☐ Yes ☐ No

Section 1. Information About the Employer Outside the United States (if any)

1. Employer's Name

2. Total Number of Employees

3. Employer's Address

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ Number

City or Town | State | ZIP Code

Province | Postal Code | Country

4. Principal Product, Merchandise or Service

5. Employee's Position - Title, duties and number of years employed

Section 2. Additional Information About the U.S. Employer

1. How is the U.S. company related to the company abroad? (select **only one** box)

☐ Parent ☐ Branch ☐ Subsidiary ☐ Affiliate ☐ Joint Venture

2.a. Place of Incorporation or Establishment in the United States

2.b. Date of incorporation or establishment (mm/dd/yyyy)

3. Nationality of Ownership (Individual or Corporate)

Name (First/MI/Last)	Nationality	Immigration Status	Percent of Ownership

4. Assets

5. Net Worth

6. Net Annual Income

7. Staff in the United States

a. How many executive and managerial employees does the petitioner have who are nationals of the treaty country in either E, L, or H nonimmigrant status?

b. How many persons with special qualifications does the petitioner employ who are in either E, L, or H nonimmigrant status?

c. Provide the total number of employees in executive and managerial positions in the United States.

d. Provide the total number of positions in the United States that require persons with special qualifications.

8. If the petitioner is attempting to qualify the employee as an executive or manager, provide the total number of employees he or she will supervise. Or, if the petitioner is attempting to qualify the employee based on special qualifications, explain why the special qualifications are essential to the successful or efficient operation of the treaty enterprise.

Section 3. Complete If Filing for an E-1 Treaty Trader

1. Total Annual Gross Trade/Business of the U.S. company

2. For Year Ending (yyyy)

3. Percent of total gross trade between the United States and the treaty trader country.

Section 4. Complete If Filing for an E-2 Treaty Investor

Total Investment: Cash Equipment Other

Inventory Premises Total

Trade Agreement Supplement to Form I-129

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

1. Name of the Petitioner

2. Name of the Beneficiary

3. Employer is a (select **only one** box):

☐ U.S. Employer ☐ Foreign Employer

4. If Foreign Employer, Name the Foreign Country

Section 1. Information About Requested Extension or Change (See instructions attached to this form.)

1. This is a request for Free Trade status based on (select **only one** box):

☐ **a.** Free Trade, Canada (TN1)
☐ **b.** Free Trade, Mexico (TN2)
☐ **c.** Free Trade, Chile (H-1B1)
☐ **d.** Free Trade, Singapore (H-1B1)
☐ **e.** Free Trade, Other
☐ **f.** A sixth consecutive request for Free Trade, Chile or Singapore (H-1B1)

Section 2. Petitioner's Declaration, Signature, and Contact Information (Read the information on penalties in the instructions before completing this section.)

Copies of any documents submitted are exact photocopies of unaltered, original documents, and I understand that, as the petitioner, I may be required to submit original documents to U.S. Citizenship and Immigration Services (USCIS) at a later date.

I authorize the release of any information from my records, or from the petitioning organization's records that USCIS needs to determine eligibility for the immigration benefit sought. I recognize the authority of USCIS to conduct audits of this petition using publicly available open source information. I also recognize that any supporting evidence submitted in support of this petition may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.

I certify, under penalty of perjury, that I have reviewed this petition and that all of the information contained on the petition, including all responses to specific questions, and in the supporting documents, is complete, true, and correct.

I am filing this petition on behalf of an organization and I certify that I am authorized to do so by the organization.

1. Name of Petitioner

Family Name (Last Name)

Given Name (First Name)

2. Signature and Date

Signature of Petitioner

Date of Signature (mm/dd/yyyy)

3. Petitioner's Contact Information

Daytime Telephone Number

Mobile Telephone Number

Email Address (if any)

Section 3. Declaration, Signature, and Contact Information of Person Preparing Form, If Other Than Petitioner

Provide the following information concerning the preparer:

1. Name of Preparer

Family Name (Last Name) | Given Name (First Name)

2. Preparer's Business or Organization Name (if any)

(If applicable, provide the name of your accredited organization recognized by the Board of Immigration Appeals (BIA)).

3. Preparer's Mailing Address

Street Number and Name | Apt. Ste. Flr. ☐ ☐ ☐ | Number

City or Town | State | ZIP Code

Province | Postal Code | Country

4. Preparer's Contact Information

Daytime Telephone Number | Fax Number | Email Address (if any)

Preparer's Declaration

By my signature, I certify, swear, or affirm, under penalty of perjury, that I prepared this petition on behalf of, at the request of, and with the express consent of the petitioner or authorized signatory. The petitioner has reviewed this completed petition as prepared by me and informed me that all of the information in the form and in the supporting documents, is complete, true, and correct.

5. Signature and Date

Signature of Preparer | Date of Signature (mm/dd/yyyy)

H Classification Supplement to Form I-129

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

1. Name of the Petitioner

Name of the beneficiary or if this petition includes multiple beneficiaries, the total number of beneficiaries

2.a. Name of the Beneficiary

OR

2.b. Provide the total number of beneficiaries

3. List each beneficiary's prior periods of stay in H or L classification in the United States for the last six years (beneficiaries requesting H-2A or H-2B classification need only list the last three years). Be sure to only list those periods in which each beneficiary was actually in the United States in an H or L classification. Do not include periods in which the beneficiary was in a dependent status, for example, H-4 or L-2 status.

NOTE: Submit photocopies of Forms I-94, I-797, and/or other USCIS issued documents noting these periods of stay in the H or L classification. (If more space is needed, attach an additional sheet.)

Subject's Name	Period of Stay (mm/dd/yyyy) From	To

4. Classification sought (select **only one** box):

- ☐ **a.** H-1B Specialty Occupation
- ☐ **b.** H-1B1 Chile and Singapore
- ☐ **c.** H-1B2 Exceptional services relating to a cooperative research and development project administered by the U.S. Department of Defense (DOD)
- ☐ **d.** H-1B3 Fashion model of distinguished merit and ability
- ☐ **e.** H-2A Agricultural worker
- ☐ **f.** H-2B Non-agricultural worker
- ☐ **g.** H-3 Trainee
- ☐ **h.** H-3 Special education exchange visitor program

5. Are you filing this petition on behalf of a beneficiary subject to the Guam-CNMI cap exemption under Public Law 110-229?

☐ Yes ☐ No

6. Are you requesting a change of employer and was the beneficiary previously subject to the Guam-CNMI cap exemption under Public Law 110-229?

☐ Yes ☐ No

7.a. Does any beneficiary in this petition have ownership interest in the petitioning organization?

☐ Yes. If yes, please explain in **Item Number 7.b.** ☐ No

7.b. Explanation

Section 1. Complete This Section If Filing for H-1B Classification

1. Describe the proposed duties.

2. Describe the beneficiary's present occupation and summary of prior work experience.

Statement for H-1B Specialty Occupations and H-1B1 Chile and Singapore

By filing this petition, I agree to, and will abide by, the terms of the labor condition application (LCA) for the duration of the beneficiary's authorized period of stay for H-1B employment. I certify that I will maintain a valid employer-employee relationship with the beneficiary at all times. If the beneficiary is assigned to a position in a new location, I will obtain and post an LCA for that site prior to reassignment.

I further understand that I cannot charge the beneficiary the ACWIA fee, and that any other required reimbursement will be considered an offset against wages and benefits paid relative to the LCA.

Signature of Petitioner	**Name of Petitioner**	**Date** (mm/dd/yyyy)
➡		

Statement for H-1B Specialty Occupations and U.S. Department of Defense (DOD) Projects

As an authorized official of the employer, I certify that the employer will be liable for the reasonable costs of return transportation of the alien abroad if the beneficiary is dismissed from employment by the employer before the end of the period of authorized stay.

Signature of Authorized Official of Employer	**Name of Authorized Official of Employer**	**Date** (mm/dd/yyyy)

Statement for H-1B U.S. Department of Defense Projects Only

I certify that the beneficiary will be working on a cooperative research and development project or a co-production project under a reciprocal government-to-government agreement administered by the U.S. Department of Defense.

Signature of DOD Project Manager	**Name of DOD Project Manager**	**Date** (mm/dd/yyyy)

Section 2. Complete This Section If Filing for H-2A or H-2B Classification

1. Employment is: (select **only one** box)

☐ **a.** Seasonal ☐ **b.** Peak load ☐ **c.** Intermittent ☐ **d.** One-time occurrence

2. Temporary need is: (select **only one** box)

☐ **a.** Unpredictable ☐ **b.** Periodic ☐ **c.** Recurrent annually

Section 2. Complete This Section If Filing for H-2A or H-2B Classification (continued)

3. Explain your temporary need for the workers' services (Attach a separate sheet if additional space is needed).

4. List the countries of citizenship for the H-2A or H-2B workers you plan to hire.

a.	**d.**
b.	**e.**
c.	**f.**

5.a. You must provide all of the requested information for **Item Numbers 5.a. - 6.** for each H-2A or H-2B worker you plan to hire who is not from a country that has been designated as a participating country in accordance with 8 CFR 214.2(h)(5)(i)(F)(1) or 214.2(h)(6)(i)(E)(1). See www.uscis.gov for the list of participating countries. (Attach a separate sheet if additional space is needed.)

Family Name (Last Name)	Given Name (First Name)	Middle Name

5.b. Provide all other name(s) used

Family Name (Last Name)	Given Name (First Name)	Middle Name

5.c. Date of Birth (mm/dd/yyyy)

5.d. Country of Birth

5.e. Country of Citizenship or Nationality

6.a. Have any of the workers listed in **Item Number 5.** above ever been admitted to the United States previously in H-2A/H-2B status?

☐ Yes. If yes, go to **Part 9.** of Form I-129 and write your explanation. ☐ No

6.b. Visa Classification (H-2A or H-2B):

NOTE: If any of the H-2A or H-2B workers you are requesting are nationals of a country that is not on the eligible countries list, you must also provide evidence showing: **(1)** that workers with the required skills are not available from a country currently on the eligible countries list*; **(2)** whether the beneficiaries have been admitted previously to the United States in H-2A or H-2B status; **(3)** that there is no potential for abuse, fraud, or other harm to the integrity of the H-2A or H-2B visa programs through the potential admission of the intended workers; and **(4)** any other factors that may serve the United States interest.

* For H-2A petitions only: You must also show that workers with the required skills are not available from among United States workers.

7.a. Did you or do you plan to use a staffing, recruiting, or similar placement service or agent to locate the H-2A/H-2B workers that you intend to hire by filing this petition?

☐ Yes ☐ No

If yes, list the name and address of service or agent used below. Please use **Part 9.** of Form I-129 if you need to include the name and address of more than one service or agent.

7.b. Name

Section 2. Complete This Section If Filing for H-2A or H-2B Classification (continued)

7.c. Address

Street Number and Name | Apt. Ste. Flr. | Number

City or Town | State | ZIP Code

8.a. Did any of the H-2A/H-2B workers that you are requesting pay you, or an agent, a job placement fee or other form of compensation (either direct or indirect) as a condition of the employment, or do they have an agreement to pay you or the service such fees at a later date? The phrase "fees or other compensation" includes, but is not limited to, petition fees, attorney fees, recruitment costs, and any other fees that are a condition of a beneficiary's employment that the employer is prohibited from passing to the H-2A or H-2B worker under law under U.S. Department of Labor rules. This phrase does not include reasonable travel expenses and certain government-mandated fees (such as passport fees) that are not prohibited from being passed to the H-2A or H-2B worker by statute, regulations, or any laws. ☐ Yes ☐ No

8.b. If yes, list the types and amounts of fees that the worker(s) paid or will pay.

8.c. If the workers paid any fee or compensation, were they reimbursed? ☐ Yes ☐ No

8.d. If the workers agreed to pay a fee that they have not yet been paid, has their agreement been terminated before the workers paid the fee? (Submit evidence of termination or reimbursement with this petition.) ☐ Yes ☐ No

9. Have you made reasonable inquiries to determine that to the best of your knowledge the recruiter, facilitator, or similar employment service that you used has not collected, and will not collect, directly or indirectly, any fees or other compensation from the H-2 workers of this petition as a condition of the H-2 workers' employment? ☐ Yes ☐ No

NOTE: If USCIS determines that you knew, or should have known, that the workers requested in connection with this petition paid any fees or other compensation at any time as a condition of employment, your petition may be denied or revoked.

10.a. Have you ever had an H-2A or H-2B petition denied or revoked because an employee paid a job placement fee or other similar compensation as a condition of the job offer or employment? ☐ Yes ☐ No

10.a.1 If yes, when?

10.a.2 Receipt Number: ►

10.b. Were the workers reimbursed for such fees and compensation? (Submit evidence of reimbursement.) If you answered no because you were unable to locate the workers, include evidence of your efforts to locate the workers. ☐ Yes ☐ No

11. Have any of the workers you are requesting experienced an interrupted stay associated with their entry as an H-2A or H-2B? (See form instructions for more information on interrupted stays.) ☐ Yes ☐ No

If yes, document the workers' periods of stay in the table on the first page of this supplement. Submit evidence of each entry and each exit, with the petition, as evidence of the interrupted stays.

12.a. If you are an H-2A petitioner, are you a participant in the E-Verify program? ☐ Yes ☐ No

12.b. If yes, provide the E-Verify Company ID or Client Company ID.

Section 2. Complete This Section If Filing for H-2A or H-2B Classification (continued)

The H-2A/H-2B petitioner and each employer consent to allow Government access to the site where the labor is being performed for the purpose of determining compliance with H-2A/H-2B requirements. The petitioner further agrees to notify DHS beginning on a date and in a manner specified in a notice published in the Federal Register within 2 workdays if: an H-2A/H-2B worker fails to report for work within 5 workdays after the employment start date stated on the petition or, applicable to H-2A petitioners only, within 5 workdays of the start date established by the petitioner, whichever is later; the agricultural labor or services for which H-2A/H-2B workers were hired is completed more than 30 days early; or the H-2A/H-2B worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired. The petitioner agrees to retain evidence of such notification and make it available for inspection by DHS officers for a one-year period. "Workday" means 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.

For H-2A petitioners only: The petitioner agrees to pay $10 in liquidated damages for each instance where it cannot demonstrate it is in compliance with the notification requirement.

The petitioner must execute **Part A.** If the petitioner is the employer's agent, the employer must execute **Part B.** If there are joint employers, they must each execute **Part C.**

Part A. Petitioner

By filing this petition, I agree to the conditions of H-2A/H-2B employment and agree to the notification requirements. For H-2A petitioners: I also agree to the liquidated damages requirements defined in 8 CFR 214.2(h)(5)(vi)(B)(3).

Signature of Petitioner	**Name of Petitioner**	**Date** (mm/dd/yyyy)
➡		

Part B. Employer who is not the petitioner

I certify that I have authorized the party filing this petition to act as my agent in this regard. I assume full responsibility for all representations made by this agent on my behalf and agree to the conditions of H-2A/H-2B eligibility.

Signature of Employer	**Name of Employer**	**Date** (mm/dd/yyyy)

Part C. Joint Employers

I agree to the conditions of H-2A eligibility.

Signature of Joint Employer	**Name of Joint Employer**	**Date** (mm/dd/yyyy)
Signature of Joint Employer	**Name of Joint Employer**	**Date** (mm/dd/yyyy)
Signature of Joint Employer	**Name of Joint Employer**	**Date** (mm/dd/yyyy)
Signature of Joint Employer	**Name of Joint Employer**	**Date** (mm/dd/yyyy)

Section 3. Complete This Section If Filing for H-3 Classification

If you answer yes to any of the following questions, attach a full explanation.

1. Is the training you intend to provide, or similar training, available in the beneficiary's country? ☐ Yes ☐ No

2. Will the training benefit the beneficiary in pursuing a career abroad? ☐ Yes ☐ No

3. Does the training involve productive employment incidental to the training? If yes, explain the amount of compensation employment versus the classroom in **Part 9. of Form I-129.** ☐ Yes ☐ No

4. Does the beneficiary already have skills related to the training? ☐ Yes ☐ No

5. Is this training an effort to overcome a labor shortage? ☐ Yes ☐ No

6. Do you intend to employ the beneficiary abroad at the end of this training? ☐ Yes ☐ No

7. If you do not intend to employ the beneficiary abroad at the end of this training, explain why you wish to incur the cost of providing this training and your expected return from this training.

H-1B and H-1B1 Data Collection and Filing Fee Exemption Supplement

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

1. Name of the Petitioner

2. Name of the Beneficiary

Section 1. General Information

1. **Employer Information** - (select all items that apply)

a. Is the petitioner an H-1B dependent employer? ☐ Yes ☐ No

b. Has the petitioner ever been found to be a willful violator? ☐ Yes ☐ No

c. Is the beneficiary an H-1B nonimmigrant exempt from the Department of Labor attestation requirements? ☐ Yes ☐ No

c.1. If yes, is it because the beneficiary's annual rate of pay is equal to at least $60,000? ☐ Yes ☐ No

c.2. Or is it because the beneficiary has a master's degree or higher degree in a specialty related to the employment? ☐ Yes ☐ No

d. Does the petitioner employ 50 or more individuals in the United States? ☐ Yes ☐ No

d.1. If yes, are more than 50 percent of those employees in H-1B, L-1A, or L-1B nonimmigrant status? ☐ Yes ☐ No

2. **Beneficiary's Highest Level of Education** (select **only one** box)

☐ **a.** NO DIPLOMA

☐ **b.** HIGH SCHOOL GRADUATE DIPLOMA or the equivalent (for example: GED)

☐ **c.** Some college credit, but less than 1 year

☐ **d.** One or more years of college, no degree

☐ **e.** Associate's degree (for example: AA, AS)

☐ **f.** Bachelor's degree (for example: BA, AB, BS)

☐ **g.** Master's degree (for example: MA, MS, MEng, MEd, MSW, MBA)

☐ **h.** Professional degree (for example: MD, DDS, DVM, LLB, JD)

☐ **i.** Doctorate degree (for example: PhD, EdD)

3. Major/Primary Field of Study

4. Rate of Pay Per Year

5. DOT Code

6. NAICS Code

Section 2. Fee Exemption and/or Determination

In order for USCIS to determine if you must pay the additional **$1,500** or **$750** American Competitiveness and Workforce Improvement Act (ACWIA) fee, answer all of the following questions:

1. Are you an institution of higher education as defined in section 101(a) of the Higher Education Act of 1965, 20 U.S.C. 1001(a)? ☐ Yes ☐ No

2. Are you a nonprofit organization or entity related to or affiliated with an institution of higher education, as defined in 8 CFR 214.2(h)(19)(iii)(B)? ☐ Yes ☐ No

Section 2. Fee Exemption and/or Determination (continued)

3. Are you a nonprofit research organization or a governmental research organization, as defined in 8 CFR 214.2(h)(19)(iii)(C)? ☐ Yes ☐ No

4. Is this the second or subsequent request for an extension of stay that this petitioner has filed for this alien? ☐ Yes ☐ No

5. Is this an amended petition that does not contain any request for extensions of stay? ☐ Yes ☐ No

6. Are you filing this petition to correct a USCIS error? ☐ Yes ☐ No

7. Is the petitioner a primary or secondary education institution? ☐ Yes ☐ No

8. Is the petitioner a nonprofit entity that engages in an established curriculum-related clinical training of students registered at such an institution? ☐ Yes ☐ No

If you answered yes to any of the questions above, you are not required to submit the ACWIA fee for your H-1B Form I-129 petition. If you answered no to all questions, answer **Item Number 9.** below.

9. Do you currently employ a total of 25 or fewer full-time equivalent employees in the United States, including all affiliates or subsidiaries of this company/organization? ☐ Yes ☐ No

If you answered yes, to **Item Number 9.** above, you are required to pay an additional ACWIA fee of **$750**. If you answered no, then you are required to pay an additional ACWIA fee of **$1,500**.

NOTE: A petitioner seeking initial approval of H-1B nonimmigrant status for a beneficiary, or seeking approval to employ an H-1B nonimmigrant currently working for another employer, must submit an additional **$500** Fraud Prevention and Detection fee. For petitions filed on or after December 18, 2015, an additional fee of **$4,000** must be submitted if you responded yes to **Item Numbers 1.d. and 1.d.1. of Section 1.** of this supplement. This **$4,000** fee was mandated by the provisions of Public Law 114-113.

The Fraud Prevention and Detection Fee and Public Law 114-113 fee do not apply to H-1B1 petitions. **These fees, when applicable, may not be waived.** You must include payment of the fees when you submit this form. Failure to submit the fees when required will result in rejection or denial of your submission. Each of these fees should be paid by separate checks or money orders.

Section 3. Numerical Limitation Information

1. Specify the type of H-1B petition you are filing. (select **only one** box):

☐ **a.** CAP H-1B Bachelor's Degree
☐ **b.** CAP H-1B U.S. Master's Degree or Higher
☐ **c.** CAP H-1B1 Chile/Singapore
☐ **d.** CAP Exempt

2. If you answered **Item Number 1.b. "CAP H-1B U.S. Master's Degree or Higher**," provide the following information regarding the master's or higher degree the beneficiary has earned from a U.S. institution as defined in 20 U.S.C. 1001(a):

a. Name of the United States Institution of Higher Education

b. Date Degree Awarded

c. Type of United States Degree

d. Address of the United States institution of higher education

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ | Number

City or Town | State | ZIP Code

Section 3. Numerical Limitation Information (continued)

3. If you answered **Item Number 1.d. "CAP Exempt**," you must specify the reason(s) this petition is exempt from the numerical limitation for H-1B classification:

- ☐ **a.** The petitioner is an institution of higher education as defined in section 101(a) of the Higher Education Act, of 1965, 20 U.S.C. 1001(a).
- ☐ **b.** The petitioner is a nonprofit entity related to or affiliated with an institution of higher education as defined in 8 CFR 214.2(h)(8)(ii)(F)(2).
- ☐ **c.** The petitioner is a nonprofit research organization or a governmental research organization as defined in 8 CFR 214.2(h)(8)(ii)(F)(3).
- ☐ **d.** The beneficiary will be employed at a qualifying cap exempt institution, organization or entity pursuant to 8 CFR 214.2(h)(8)(ii)(F)(4).
- ☐ **e.** The petitioner is requesting an amendment to or extension of stay for the beneficiary's current H-1B classification.
- ☐ **f.** The beneficiary of this petition is a J-1 nonimmigrant physician who has received a waiver based on section 214(l) of the Act.
- ☐ **g.** The beneficiary of this petition has been counted against the cap and **(1)** is applying for the remaining portion of the 6 year period of admission, or **(2)** is seeking an extension beyond the 6-year limitation based upon sections 104(c) or 106(a) of the American Competitiveness in the Twenty-First Century Act (AC21).
- ☐ **h.** The petitioner is an employer subject to the Guam-CNMI cap exemption pursuant to Public Law 110-229.

Section 4. Off-Site Assignment of H-1B Beneficiaries

1. The beneficiary of this petition will be assigned to work at an off-site location for all or part of the period for which H-1B classification sought. ☐ Yes ☐ No

If no, do not complete **Item Numbers 2.** and **3**.

2. Placement of the beneficiary off-site during the period of employment will comply with the statutory and regulatory requirements of the H-1B nonimmigrant classification. ☐ Yes ☐ No

3. The beneficiary will be paid the higher of the prevailing or actual wage at any and all off-site locations. ☐ Yes ☐ No

L Classification Supplement to Form I-129

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

1. Name of the Petitioner

2. Name of the Beneficiary

3. This petition is (select **only one** box): ☐ **a.** An individual petition ☐ **b.** A blanket petition

4.a. Does the petitioner employ 50 or more individuals in the U.S.? ☐ Yes ☐ No

4.b. If yes, are more than 50 percent of those employee in H-1B, L-1A, or L-1B nonimmigrant status? ☐ Yes ☐ No

Section 1. Complete This Section If Filing For An Individual Petition

1. Classification sought (select **only one** box): ☐ **a.** L-1A manager or executive ☐ **b.** L-1B specialized knowledge

2. List the beneficiary's and any dependent family member's prior periods of stay in an H or L classification in the United States for the last seven years. Be sure to list only those periods in which the beneficiary and/or family members were physically present in the U.S. in an H or L classification. Do not include periods in which the beneficiary was in a dependent status, for example, H-4 or L-2 status. If more space is needed, go to **Part 9. of Form I-129**.

NOTE: Submit photocopies of Forms I-94, I-797, and/or other USCIS issued documents noting these periods of stay in the H or L classification. (If more space is needed, attach an additional sheet.)

Subject's Name	**Period of Stay** (mm/dd/yyyy) **From**	**To**

3. Name of Employer Abroad

4. Address of Employer Abroad

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ Number

City or Town | State | ZIP Code

Province | Postal Code | Country

Section 1. Complete This Section If Filing For An Individual Petition (continued)

5. Dates of beneficiary's employment with this employer. Explain any interruptions in employment.

Dates of Employment (mm/dd/yyyy) From	To	Explanation of Interruptions

6. Describe the beneficiary's duties abroad for the 3 years preceding the filing of the petition. (If the beneficiary is currently inside the United States, describe the beneficiary's duties abroad for the 3 years preceding the beneficiary's admission to the United States.)

7. Describe the beneficiary's proposed duties in the United States.

8. Summarize the beneficiary's education and work experience.

9. How is the U.S. company related to the company abroad? (select **only one** box)

☐ **a.** Parent ☐ **b.** Branch ☐ **c.** Subsidiary ☐ **d.** Affiliate ☐ **e.** Joint Venture

Section 1. Complete This Section If Filing For An Individual Petition (continued)

10. Describe the percentage of stock ownership and managerial control of each company that has a qualifying relationship. Provide the Federal Employer Identification Number for each U.S. company that has a qualifying relationship.

Percentage of company stock ownership and managerial control of each company that has a qualifying relationship.	**Federal Employer Identification Number for each U.S. company that has a qualifying relationship**

11. Do the companies currently have the same qualifying relationship as they did during the one-year period of the alien's employment with the company abroad?

☐ Yes ☐ No. If no, provide an explanation in **Part 9. of Form I-129** that the U.S. company has and will have a qualifying relationship with another foreign entity during the full period of the requested period of stay.

12. Is the beneficiary coming to the United States to open a new office?

☐ Yes ☐ No (attach explanation)

If you are seeking L-1B specialized knowledge status for an individual, answer the following question:

13.a. Will the beneficiary be stationed primarily offsite (at the worksite of an employer other than the petitioner or its affiliate, subsidiary, or parent)?

☐ Yes ☐ No

13.b. If you answered yes to the preceding question, describe how and by whom the beneficiary's work will be controlled and supervised. Include a description of the amount of time each supervisor is expected to control and supervise the work. If you need additional space to respond to this question, proceed to **Part 9.** of the Form I-129, and type or print your explanation.

13.c. If you answered yes to the preceding question, describe the reasons why placement at another worksite outside the petitioner, subsidiary, affiliate, or parent is needed. Include a description of how the beneficiary's duties at another worksite relate to the need for the specialized knowledge he or she possesses. If you need additional space to respond to this question, proceed to **Part 9.** of the Form I-129, and type or print your explanation.

Section 2. Complete This Section If Filing A Blanket Petition

List all U.S. and foreign parent, branches, subsidiaries, and affiliates included in this petition. (Attach separate sheets of paper if additional space is needed.)

Name and Address	Relationship

Section 3. Additional Fees

NOTE: A petitioner that seeks initial approval of L nonimmigrant status for a beneficiary, or seeks approval to employ an L nonimmigrant currently working for another employer, must submit an additional **$500** Fraud Prevention and Detection fee. For petitions filed on or after December 18, 2015, you must submit an additional fee of **$4,500** if you responded yes to both questions in **Item Numbers 4.a.** and **4.b.** on the first page of this L Classification Supplement. This **$4,500** fee is mandated by the provisions of Public Law 114-113.

These fees, when applicable, may not be waived. You must include payment of the fees with your submission of this form. Failure to submit the fees when required will result in rejection or denial of your submission. Each of these fees should be paid by separate checks or money orders.

O and P Classifications Supplement to Form I-129

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

Section 1. Complete This Section if Filing for O or P Classification

1. Name of the Petitioner

Name of the Beneficiary or if this petition includes multiple beneficiaries, the total number of beneficiaries included.

2.a. Name of the Beneficiary

OR

2.b. Provide the total number of beneficiaries:

3. **Classification sought** (select **only one** box)

- ☐ **a.** O-1A Alien of extraordinary ability in sciences, education, business or athletics (not including the arts, motion picture or television industry)
- ☐ **b.** O-1B Alien of extraordinary ability in the arts or extraordinary achievement in the motion picture or television industry
- ☐ **c.** O-2 Accompanying alien who is coming to the United States to assist in the performance of the O-1
- ☐ **d.** P-1 Major League Sports
- ☐ **e.** P-1 Athlete or Athletic/Entertainment Group (includes minor league sports not affiliated with Major League Sports)
- ☐ **f.** P-1S Essential Support Personnel for P-1
- ☐ **g.** P-2 Artist or entertainer for reciprocal exchange program
- ☐ **h.** P-2S Essential Support Personnel for P-2
- ☐ **i.** P-3 Artist/Entertainer coming to the United States to perform, teach, or coach under a program that is culturally unique
- ☐ **j.** P-3S Essential Support Personnel for P-3

4. Explain the nature of the event.

5. Describe the duties to be performed.

6. If filing for an O-2 or P support classification, list dates of the beneficiary's prior work experience under the principal O-1 or P alien.

7.a. Does any beneficiary in this petition have ownership interest in the petitioning organization?

☐ Yes. If yes, please explain in **Item Number 7.b.** ☐ No.

Section 1. Complete This Section if Filing for O or P Classification (continued)

7.b. Explanation

8. Does an appropriate labor organization exist for the petition?
☐ Yes ☐ No. If no, proceed to **Part 9.** and type or print your explanation.

9. Is the required consultation or written advisory opinion being submitted with this petition?
☐ Yes ☐ No - copy of request attached ☐ N/A

If no, provide the following information about the organization(s) to which you have sent a duplicate of this petition.

O-1 Extraordinary Ability

10.a. Name of Recognized Peer/Peer Group or Labor Organization

10.b. Physical Address

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ | Number

City or Town | State | ZIP Code

10.c. Date Sent (mm/dd/yyyy)

10.d. Daytime Telephone Number

O-1 Extraordinary achievement in motion pictures or television

11.a. Name of Labor Organization

11.b. Complete Address

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ | Number

City or Town | State | ZIP Code

11.c. Date Sent (mm/dd/yyyy)

11.d. Daytime Telephone Number

12.a. Name of Management Organization

12.b. Physical Address

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ | Number

City or Town | State | ZIP Code

12.c. Date Sent (mm/dd/yyyy)

12.d. Daytime Telephone Number

Section 1. Complete This Section if Filing for O or P Classification (continued)

O-2 or P alien

13.a. Name of Labor Organization

13.b. Complete Address

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ Number

City or Town | State | ZIP Code

13.c. Date Sent (mm/dd/yyyy)

13.d. Daytime Telephone Number

Section 2. Statement by the Petitioner

I certify that I, the petitioner, and the employer whose offer of employment formed the basis of status (if different from the petitioner) will be jointly and severally liable for the reasonable costs of return transportation of the beneficiary abroad if the beneficiary is dismissed from employment by the employer before the end of the period of authorized stay.

1. Name of Petitioner

Family Name (Last Name) | Given Name (First Name) | Middle Name

2. Signature and Date

Signature of Petitioner | Date of Signature (mm/dd/yyyy)

3. Petitioner's Contact Information

Daytime Telephone Number | Email Address (if any)

Q-1 Classification Supplement to Form I-129

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

1. Name of the Petitioner

2. Name of the Beneficiary

Section 1. Complete if you are filing for a Q-1 International Cultural Exchange Alien

I hereby certify that the participant(s) in the international cultural exchange program:

a. Is at least 18 years of age,

b. Is qualified to perform the service or labor or receive the type of training stated in the petition,

c. Has the ability to communicate effectively about the cultural attributes of his or her country of nationality to the American public, and

d. Has resided and been physically present outside the United States for the immediate prior year. (Applies only if the participant was previously admitted as a Q-1).

I also certify that I will offer the alien(s) the same wages and working conditions comparable to those accorded local domestic workers similarly employed.

1. Name of Petitioner

Family Name (Last Name) | Given Name (First Name) | Middle Name

2. Signature and Date

Signature of Petitioner | Date of Signature (mm/dd/yyyy)

3. Petitioner's Contact Information

Daytime Telephone Number | Email Address (if any)

R-1 Classification Supplement to Form I-129

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

USCIS
Form I-129
OMB No. 1615-0009
Expires 01/31/2022

1. Name of the Petitioner

2. Name of the Beneficiary

Section 1. Complete This Section If You Are Filing For An R-1 Religious Worker

Employer Attestation

Provide the following information about the petitioner:

1.a. Number of members of the petitioner**'s** religious organization?

1.b. Number of employees working at the same location where the beneficiary will be employed?

1.c. Number of aliens holding special immigrant or nonimmigrant religious worker status currently employed or employed within the past five years?

1.d. Number of special immigrant religious worker petition(s) (I-360) and nonimmigrant religious worker petition(s) (I-129) filed by the petitioner within the past five years?

2. Has the beneficiary or any of the beneficiary's dependent family members previously been admitted to the United States for a period of stay in the R visa classification in the last five years? ☐ Yes ☐ No

If yes, complete the spaces below. List the beneficiary and any dependent family member's prior periods of stay in the R visa classification in the United States in the last five years. Please be sure to list only those periods in which the beneficiary and/or family members were actually in the United States in an R classification.

NOTE: Submit photocopies of Forms I-94 (Arrival-Departure Record), I-797 (Notice of Action), and/or other USCIS documents identifying these periods of stay in the R visa classification(s). If more space is needed, provide the information in **Part 9. of Form I-129**.

Alien or Dependent Family Member's Name	**Period of Stay (mm/dd/yyyy)** **From**	**To**

Section 1. Complete This Section If You Are Filing For An R-1 Religious Worker (continued)

3. Provide a summary of the type of responsibilities of those employees who work at the same location where the beneficiary will be employed. If additional space is needed, provide the information on additional sheet(s) of paper.

Position	Summary of the Type of Responsibilities for That Position

4. Describe the relationship, if any, between the religious organization in the United States and the organization abroad of which the beneficiary is a member.

Provide the following information about the prospective employment:

5.a. Title of position offered.

5.b. Detailed description of the beneficiary's proposed daily duties.

5.c. Description of the beneficiary's qualifications for position offered.

5.d. Description of the proposed salaried compensation or non-salaried compensation. If the beneficiary will be self-supporting, the petitioner must submit documentation establishing that the position the beneficiary will hold is part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

Section 1. Complete This Section If You Are Filing For An R-1 Religious Worker (continued)

5.e. List of the address(es) or location(s) where the beneficiary will be working.

Petitioner Attestations

Does the petitioner attest to all of the requirements described in Item Numbers 6. - 12. below?

6. The petitioner is a bona fide non-profit religious organization or a bona fide organization that is affiliated with the religious denomination and is tax-exempt as described in section 501(c)(3) of the Internal Revenue Code of 1986, subsequent amendment, or equivalent sections of prior enactments of the Internal Revenue Code. If the petitioner is affiliated with the religious denomination, complete the Religious Denomination Certification included in this supplement.

☐ Yes ☐ No. If no, type or print your explanation below and if needed, go to **Part 9. of Form I-129**.

7. The petitioner is willing and able to provide salaried or non-salaried compensation to the beneficiary. If the beneficiary will be self-supporting, the petitioner must submit documentation establishing that the position the beneficiary will hold is part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

☐ Yes ☐ No. If no, type or print your explanation below and if needed, go to **Part 9. of Form I-129**.

8. If the beneficiary worked in the United States in an R-1 status during the 2 years immediately before the petition was filed, the beneficiary received verifiable salaried or non-salaried compensation, or provided uncompensated self-support.

☐ Yes ☐ No. If no, type or print your explanation below and if needed, go to **Part 9. of Form I-129**.

9. If the position is not a religious vocation, the beneficiary will not engage in secular employment, and the petitioner will provide salaried or non-salaried compensation. If the position is a traditionally uncompensated and not a religious vocation, the beneficiary will not engage in secular employment, and the beneficiary will provide self-support.

☐ Yes ☐ No. If no, type or print your explanation below and if needed, go to **Part 9. of Form I-129**.

Section 1. Complete This Section If You Are Filing For An R-1 Religious Worker (continued)

10. The offered position requires at least 20 hours of work per week. If the offered position at the petitioning organization requires fewer than 20 hours per week, the compensated service for another religious organization and the compensated service at the petitioning organization will total 20 hours per week. If the beneficiary will be self-supporting, the petitioner must submit documentation establishing that the position the beneficiary will hold is part of an established program for temporary, uncompensated missionary work, which is part of a broader international program of missionary work sponsored by the denomination.

☐ Yes ☐ No. If no, type or print your explanation below and if needed, go to **Part 9. of Form I-129**.

11. The beneficiary has been a member of the petitioner's denomination for at least two years immediately before Form I-129 was filed and is otherwise qualified to perform the duties of the offered position.

☐ Yes ☐ No. If no, type or print your explanation below and if needed, go to **Part 9. of Form I-129**.

12. The petitioner will notify USCIS within 14 days if an R-1 alien is working less than the required number of hours or has been released from or has otherwise terminated employment before the expiration of a period of authorized R-1 stay.

☐ Yes ☐ No. If no, type or print your explanation below and if needed, go to **Part 9. of Form I-129**.

Attestation

I certify, under penalty of perjury, that the contents of this attestation and the evidence submitted with it are true and correct.

Name of Petitioner

Title

Signature of Petitioner

Date (mm/dd/yyyy)

Employer or Organization Name

Section 1. Complete This Section If You Are Filing For An R-1 Religious Worker (continued)

Employer or Organization Address (do not use a post office or private mail box)

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ | Number

City or Town | State | ZIP Code

Employer or Organization's Contact Information

Daytime Telephone Number | Fax Number | Email Address (if any)

Section 2. This Section Is Required For Petitioners Affiliated With The Religious Denomination

Religious Denomination Certification

I certify, under penalty of perjury, that:

Name of Employing Organization

is affiliated with:

Name of Religious Denomination

and that the attesting organization within the religious denomination is tax-exempt as described in section 501(c)(3) of the Internal Revenue Code of 1986 (codified at 26 U.S.C. 501(c)(3)), any subsequent amendment(s), subsequent amendment, or equivalent sections of prior enactments of the Internal Revenue Code. The contents of this certification are true and correct to the best of my knowledge.

Name of Authorized Representative of Attesting Organization | Title

Signature of Authorized Representative of Attesting Organization | Date (mm/dd/yyyy)

Attesting Organization Name and Address (do not use a post office or private mail box)

Attesting Organization Name

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ | Number

City or Town | State | ZIP Code

Attesting Organization's Contact Information

Daytime Telephone Number | Fax Number | Email Address (if any)

Attachment-1

Attach to Form I-129 when more than one person is included in the petition. (List each person separately. Do not include the person you named on the Form I-129.)

Family Name (Last Name) | Given Name (First Name) | Middle Name

Date of birth (mm/dd/yyyy) | Gender ☐ Male ☐ Female | U.S. Social Security Number (if any) ▶ | A-Number (if any) A-

All Other Names Used (include aliases, maiden name and names from previous marriages)

Family Name (Last Name) | Given Name (First Name) | Middle Name

Address in the United States Where You Intend to Live (Complete Address)

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ Number

City or Town | State | ZIP Code

Foreign Address (Complete Address)

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ Number

City or Town | State | ZIP Code

Province | Postal Code | Country

Country of Birth | Country of Citizenship or Nationality

IF IN THE UNITED STATES:

Date of Last Arrival (mm/dd/yyyy) | I-94 Arrival-Departure Record Number | Passport or Travel Document Number

Date Passport or Travel Document Issued (mm/dd/yyyy) | Date Passport or Travel Document Expires (mm/dd/yyyy) | Country of Issuance for Passport or Travel Document

Current Nonimmigrant Status | Date Status Expires or D/S (mm/dd/yyyy)

Student and Exchange Visitor Information System (SEVIS) Number (if any) | Employment Authorization Document (EAD) Number (if any)

Attachment-1

Attach to Form I-129 when more than one person is included in the petition. (List each person separately. Do not include the person you named on the Form I-129.)

Family Name (Last Name) | Given Name (First Name) | Middle Name

Date of birth (mm/dd/yyyy) | Gender ☐ Male ☐ Female | U.S. Social Security Number (if any) ▶ | A-Number (if any) A-

All Other Names Used (include aliases, maiden name and names from previous Marriages)

Family Name (Last Name) | Given Name (First Name) | Middle Name

Address in the United States Where You Intend to Live (Complete Address)

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ Number

City or Town | State | ZIP Code

Foreign Address (Complete Address)

Street Number and Name | Apt. ☐ Ste. ☐ Flr. ☐ Number

City or Town | State | ZIP Code

Province | Postal Code | Country

Country of Birth | Country of Citizenship or Nationality

IF IN THE UNITED STATES:

Date of Last Arrival (mm/dd/yyyy) | I-94 Arrival-Departure Record Number | Passport or Travel Document Number

Date Passport or Travel Document Issued (mm/dd/yyyy) | Date Passport or Travel Document Expires (mm/dd/yyyy) | Country of Issuance for Passport or Travel Document

Current Nonimmigrant Status | Date Status Expires or D/S (mm/dd/yyyy)

Student and Exchange Visitor Information System (SEVIS) Number (if any) | Employment Authorization Document (EAD) Number (if any)

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Policy Memoranda / Guidance:

January 2010 Neufeld Memo

re. Third Party Placements

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Service Center Operations Directorate
Washington, DC 20529-2060

U.S. Citizenship and Immigration Services

JAN 0 8 2010

HQ 70/6.2.8
AD 10-24

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director, Service Center Operations

SUBJECT: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)

I. Purpose

This memorandum is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

II. Background

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as an alien:

> who is coming temporarily to the United States to perform services...in a specialty occupation described in section 1184(i)(1)..., who meets the requirements of the occupation specified in section 1184(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under 1182(n)(1).

The Code of Federal Regulations (C.F.R.) provides that a "United States employer" shall file an [H-1B] petition. 8 C.F.R. 214.2(h)(2)(i)(A).

The term "United States employer", in turn, is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
(1) Engages a person to work within the United States;
(2) Has an **employer-employee relationship** with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
(3) Has an Internal Revenue Service Tax identification number.

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the U.S. employer and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles[1] and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.[2]

The lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The placement of the beneficiary/employee at a work site that is not operated by the petitioner/employer (third-party placement), which is common in some industries, generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist.

While some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. Petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business, and expected to become a part of that business's regular operations. The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists.

Furthermore, USCIS must ensure that the employer is in compliance with the Department of Labor regulations requiring that a petitioner file an LCA specific to each location where the

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[1] USCIS has also relied on the Department of Labor definition found at 20 C.F.R. 655.715 which states: *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968).

[2] Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter Darden) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003) (hereinafter Clackamas).

beneficiary will be working.[3] In some situations, the location of the petitioner's business may not be located in the same LCA jurisdiction as the place the beneficiary will be working.

III. Field Guidance

A. The Employer-Employee Relationship

An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship. USCIS has interpreted this term to be the "conventional master-servant relationship as understood by common-law agency doctrine."[4] The common law test requires that all incidents of the relationship be assessed and weighed with no one factor being decisive. The Supreme Court has stated:

> *we consider the hiring party's **right to control the manner and means by which the product is accomplished**. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.*[5]

Therefore, USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[6] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

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[3] See 20 C.F.R. 655.730(c)(4)(v), 20 C.F.R. 655.730(c)(5) and 20 C.F.R. 655.730(d)(1)(ii)
[4] See Darden at 322-323.
[5] See Darden at 323-324 (Emphasis added.)
[6] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[7]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic location of the employer to

[7] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[8]

Self-Employed Beneficiaries

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee

[8] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[9] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[10]

[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.

[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at

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[9] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[10] In the past, the Administrative Appeals Office (AAO) has issued a limited number of unpublished decisions that addressed whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 decision in *Matter of Allan Gee, Inc.*, the AAO did not reach the question of how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." 17 I&N Dec. 296 (Reg. Comm. 1979). While it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. Starting in 2007, the AAO has utilized the criteria discussed in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) to reach this pivotal analysis.

the client company, the beneficiary reports to a manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[11]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[12] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the

[11] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers**. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

[12] See 8 C.F.R. 214.2(h)(9)(i).

employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[13] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies 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 for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the

[13] See 8 C.F.R. 214.2(h)(4)(ii).

petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[14]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

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[14] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete itinerary of services or engagements that specifies 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 for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

IV. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. 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.

V. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to the Business Employment Services Team in the Service Center Operations Directorate.

AFM UPDATES

Accordingly, the *AFM* is revised as follows:

1. Section (g)(15) of Chapter 31.3 of the *Officer's Field Manual* is added to read as follows:

31.3 H-1B Classification and Documentary Requirements

***

(g) Adjudicative Issues

(15) Evidence of Employer-Employee Relationship

USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[1] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

[1] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[2]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic

[2] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[3]

Self-Employed Beneficiaries

[3] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[4] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[5]
[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.
[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at the client company, the beneficiary reports to a

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[4] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[5] The Administrative Appeals Office (AAO) of USCIS has issued an unpublished decision on the issue of whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions of the AAO correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, the unpublished AAO decision did not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." The AAO decision did not reach this pivotal analysis and thus, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.

manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[6]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[7] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the

[6] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers**. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.
[7] 8 C.F.R. 214.2(h)(9)(i)

employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[8] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies 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 for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools

[8] See 8 C.F.R. 214.2(h)(4)(ii).

needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;

- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[9]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or

[9] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete

itinerary of services or engagements that specifies 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 for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

USCIS Resources

Policy Memoranda / Guidance:

Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2110

U.S. Citizenship and Immigration Services

PM-602-0157

Policy Memorandum

SUBJECT: Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites

Purpose

This policy memorandum (PM) establishes U.S. Citizenship and Immigration Services (USCIS) policy relating to H-1B petitions filed for workers who will be employed at one or more third-party worksites.

Scope

Unless specifically exempted in this memo, this PM applies to and shall be used to guide determinations by all USCIS officers adjudicating Form I-129 H-1B petitions.

Authority

Section 214 of the INA and Title 8, Code of Federal Regulations (CFR), section 214.2(h).

Background

(1) On June 6, 1995, the Office of Adjudications issued a memorandum entitled "Contracts Involving H-1B Petitions" (Contracts Memo).

This memo stated that the former Immigration and Naturalization Service (INS) may request and consider any additional information deemed appropriate to adjudicate a petition. The memo required INS to make such requests, which include requests for third-party contracts, on a case-by-case basis. This PM supersedes the Contracts Memo to the extent that it is contrary to this PM.

(2) On November 13, 1995, the Office of Examinations issued a memorandum entitled "Supporting Documentation for H-1B Petitions" (H-1B Supporting Documents Memo).

This memo stated that "[t]he submission of … contracts [between the employer and the alien worksite] should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor. Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation. The mere fact that a petitioner is an employment contractor is not a reason to request such contracts." It appears that this memo has been interpreted as generally excusing the H-1B petitioner from having to submit third-party contracts despite the director's specific regulatory authorization to require any such evidence that he or she believes is necessary for adjudicating the petition. *See* 8 CFR 214.2(h)(9)(i). This PM supersedes the H-1B Supporting Documents Memo to the extent that it is contrary to this PM.

(3) On December 29, 1995, the Office of Adjudications issued a memorandum entitled "Interpretation Of The Term 'Itinerary' Found in 8 CFR 214.2(h)(2)(i)(B) As It Relates To The H-1B Nonimmigrant Classification" (Itinerary Memo).

This memo stated that, in the case of an H-1B petition filed by an employment contractor, INS could accept a general statement of the alien's proposed or possible employment, since the regulation does not require that the employer provide the *exact* dates and places of employment. Because the Itinerary Memo allows general statements in certain instances instead of exact dates and places of employment, some adjudicators and the public may have incorrectly interpreted the policy as excusing the petitioner from having to submit an itinerary when required under 8 CFR 214.2(h)(2)(i)(B). USCIS now rescinds the Itinerary Memo and this PM will supersede any guidance from that memo.

(4) On January 8, 2010, USCIS issued a memorandum entitled "Determining the Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Employer-Employee Memo).

The Employer-Employee Memo provides guidance on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period. When a beneficiary is placed into another employer's business, the petitioner must establish that it continues to maintain an employer-employee relationship with the beneficiary. USCIS looks at a number of factors to determine whether a valid relationship exists, including whether the petitioner controls when, where, and how the beneficiary performs the job. Finally, the Employer-Employee Memo clarifies that the petitioner must submit an itinerary in compliance with current regulation at 8 CFR 214.2(h)(2)(i)(B), if the beneficiary will be performing services in more than one location. *See also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 548 n.9 (AAO 2015).

This PM is intended to be read together with the Employer-Employee Memo and as a complement to that policy.

USCIS' Mission to Protect the Interests of U.S. Workers

USCIS administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values. Employment-based petitioners who circumvent the worker protections outlined in the nation's immigration laws not only injure U.S. workers (e.g., their wages and job opportunities), but also the foreign workers for whom they are petitioning.

Policy

USCIS has broad statutory and regulatory authority to maintain the integrity of the H-1B program. To establish eligibility for an H-1B petition involving a third-party worksite, the petitioner must establish by a preponderance of the evidence that, among other things:

- The beneficiary will be employed in a specialty occupation. This means that the petitioner has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested in the petition; and

- The employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.[1]

USCIS acknowledges that third-party arrangements may be a legitimate and frequently used business model. These arrangements typically involve a third-party end-client who solicits service providers to deliver a product or fill a position at their worksite. In some cases, the H-1B petitioner may place the beneficiary directly with the client, establishing a *petitioner-client* relationship. In other cases, one or more subcontractors, commonly referred to as vendors, may serve as intermediaries between the end-client and the H-1B petitioner.[2] Ultimately, through a series of legal agreements, the petitioner will provide the H-1B worker to the end-client through a *petitioner-vendor(s)-client* relationship. Scenarios involving a third-party worksite generally make it more difficult to assess whether the petitioner has established that the beneficiary will actually be employed in a specialty occupation or that the requisite employer-employee relationship will exist. The difficulty of this assessment is increased in situations where there are

[1] To determine whether an employer-employee relationship exists, adjudicators should see the Employer-Employee Memo, published on January 8, 2010, for guidance.

[2] The "vendor" concept is frequently referenced in H-1B petitions that involve the information technology (IT) industry. While the terms are not precisely defined, petitions commonly refer to "primary vendors," who have an established or preferred relationship with a client, or "implementing vendors," who bid on an IT project with a client and then implement the contract using their own staff. Primary or implementing vendors may turn to secondary vendors to fill staffing needs on individual projects. *See, e.g.*, *Acclaim Systems, Inc. v. Infosys*, No. Civ.A. 13-7336, 2016 WL 974136 at *2 (E.D. Pa. Mar. 11, 2016). As a result, the ultimate client project may be staffed by a team of H-1B beneficiaries who were petitioned for by different, unrelated employers.

one or more intermediary vendors and where the relationship between the petitioner and the end-client is more attenuated than a direct *petitioner-client* relationship.

Based on the agency's experience in administering the H-1B program, USCIS recognizes that significant employer violations—such as paying less than the required wage, benching employees (not paying workers the required wage while they wait for projects or work) and having employees perform non-specialty occupation jobs—may be more likely to occur when petitioners place employees at third-party worksites. Therefore, in order to protect the wages and working conditions of both U.S. and H-1B nonimmigrant workers and prevent fraud or abuse, USCIS policy should ensure that officers properly interpret and apply the statutory and regulatory requirements that apply to H-1B petitions involving third-party worksites.

Consistent with these overarching goals, this policy memorandum provides clarifying guidance regarding the contracts and itineraries that petitioners submit in third-party worksite cases:

Contracts as evidence to demonstrate the beneficiary will be employed in a specialty occupation.

When a beneficiary will be placed at one or more third-party worksites, the petitioner must demonstrate that it has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested on the petition. The petitioner will need to show that:

- The petitioner has a specific work assignment in place for the beneficiary;
- The petition is properly supported by a Labor Condition Application (LCA) that corresponds to such work; and
- The actual work to be performed by the H-1B beneficiary will be in a specialty occupation based on the work requirements imposed by the end-client who uses the beneficiary's services. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

USCIS notes that H-1B petitions do not establish a worker's eligibility for H-1B classification if they are based on speculative employment or do not establish the actual work the H-1B beneficiary will perform at the third-party worksite. Petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H-1B beneficiary will perform at the third-party worksite. Such statements by the petitioner, without additional corroborating evidence, are often insufficient to establish by a preponderance of the evidence that the H-1B beneficiary will actually perform specialty occupation work.

For such third-party, off-site arrangements, additional corroborating evidence, such as contracts and work orders, may substantiate a petitioner's claim of actual work in a specialty occupation. In all instances, the petitioner's burden of proof is to establish that the H-1B beneficiary will be employed in a specialty occupation and that the petition is properly supported by an LCA that corresponds to the actual work the beneficiary will perform. If the petitioner does not submit corroborating evidence or otherwise demonstrate that there is a specific work assignment for the H-1B beneficiary, USCIS may deny the petition.

In addition to contracts between the petitioner and its client for that worksite, the petitioner may be able to demonstrate that the beneficiary has actual work assignment(s) in a specialty occupation by providing a combination of the following or similar types of evidence:[3]

- Evidence of actual work assignments, which may include technical documentation, milestone tables, marketing analysis, cost-benefit analysis, brochures, and funding documents.

- Copies of relevant, signed contractual agreements between the petitioner and all other companies involved in the beneficiary's placement, if the petitioner has not directly contracted with the third-party worksite.

- Copies of detailed statements of work or work orders signed by an authorized official of the ultimate end-client company where the work will actually be performed by the beneficiary. The statement should detail the specialized duties the beneficiary will perform, the qualifications that are required to perform the job duties, the duration of the job, and the hours to be worked.

- A letter signed by an authorized official of each ultimate end-client company where the beneficiary will actually work. The letter should provide information, such as a detailed description of the specialized duties the beneficiary will perform, the qualifications required to perform those duties, the duration of the job, salary or wages paid, hours worked, benefits, a detailed description of who will supervise the beneficiary and the beneficiary's duties, and any other related evidence.

Contracts as evidence to demonstrate the employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.

As indicated in the Employer-Employee Memo, the placement of the beneficiary/employee at a third-party worksite, which is common in some industries, generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist. As the relationship between the petitioner and beneficiary becomes more attenuated through intermediary contractors, vendors, or brokers, there is a greater need for the petitioner to specifically trace how it will maintain an employer-employee relationship with the beneficiary. Evaluating the chain of contracts and/or legal agreements between the petitioner and the ultimate third-party worksite may help USCIS to determine whether the requisite employer-employee relationship exists and/or will exist.

[3] Submission of a combination of evidence, such as contractual agreements accompanied by detailed statements of work, provides a more comprehensive view of the work available. Contractual agreements that merely set forth the general obligations of the parties to the agreement, and that do not provide specific information pertaining to the actual work to be performed, may be insufficient to establish that the beneficiary will be employed in a specialty occupation.

Itinerary as a regulatory requirement.

Title 8 CFR 214.2(h)(2)(i)(B) requires petitioners to file an itinerary with a petition that requires services to be performed in more than one location. The itinerary must include the dates and locations of the services to be provided. The prior Itinerary Memo's allowance of general statements, as opposed to exact dates and places of employment, seems to have been incorrectly interpreted by some adjudicators, and some members of the general public, as excusing the petitioner from having to submit an itinerary, as required by 8 CFR 214.2(h)(2)(i)(B).

There is no exemption from this regulatory requirement. An itinerary with the dates and locations of the services to be provided must be included in all petitions that require services to be performed in more than one location, such as multiple third-party worksites. The itinerary should detail when and where the beneficiary will be performing services. Adjudicators may deny the petition if the petitioner fails to provide an itinerary, either with the initial petition or in response to a Request for Evidence.[4]

Itinerary as evidence to demonstrate the beneficiary will be employed in a specialty occupation

As mentioned above, in instances when a beneficiary will be placed at one or more third-party worksites, the petitioner must demonstrate that it has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested on the petition. Although the regulations only require that an itinerary contain the dates and locations of the services to be provided when the petition requires the beneficiary to work at multiple worksites, a more detailed itinerary can help to demonstrate that the petitioner has non-speculative employment, even when the beneficiary will only be working at one third-party worksite. For instance, it could help USCIS determine whether there are specific and non-speculative qualifying assignments if the petitioner submits a complete itinerary of services or engagements that specifies:

- The dates of each service or engagement;
- The names and addresses of the ultimate employer(s);
- The names, addresses (including floor, suite, and office) and telephone numbers of the locations where the services will be performed for the period of time requested; and
- Corroborating evidence for all of the above.

[4] When requested evidence may contain trade secrets, for example, the petitioner could choose to redact or sanitize the relevant sections to provide an itinerary or document that is still sufficiently detailed and comprehensive, yet does not reveal sensitive commercial information. However, it is critical that the redacted document contain all information necessary for USCIS to adjudicate the petition. Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977).

Validity period of approved petition

The petitioner must establish that the above elements will more likely than not continue to exist throughout the duration of the requested H-1B validity period. While an H-1B petition may be approved for up to three years, USCIS will, in its discretion, generally limit the approval period to the length of time demonstrated that the beneficiary will be placed in non-speculative work and that the petitioner will maintain the requisite employer-employee relationship, as documented by contracts, statements of work, and other similar types of evidence. 8 CFR 214.2(h)(9)(ii)(A) and (iii).

Extensions

In addition to the above elements that apply to all H-1B third-party worksite petitions, if an H-1B petitioner is applying to extend H-1B employment for a beneficiary who was placed at one or more third-party worksites during the course of past employment with the same petitioner, that petitioner should also establish that the H-1B requirements have been met for the entire prior approval period. This includes establishing that the beneficiary worked in the specialty occupation, that he or she was paid the required wage, and that the employer maintained the right to control the beneficiary's employment. If the petitioner did not comply with the terms and conditions of the original petition and did not file an amended petition on time, USCIS may have eligibility concerns about a subsequent petition filed to extend the beneficiary's employment.[5]

If the terms and conditions of the initial approval period were not met and the petitioner has demonstrated eligibility for the subsequent petition, the extension petition may be approved, but the extension of stay request may be denied. *See* 8 CFR 214.1(c)(4). This applies to petitions where the beneficiary will remain at the same worksite or be placed at a new worksite.

Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. 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.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

[5] For when to file an amended petition, please see USCIS Policy Memorandum, "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," published July 21, 2015.

USCIS Resources

Policy Memoranda / Guidance:

USCIS Final Guidance on When to File an Amended or New H-1B Petition After Matter of Simeio Solutions, LLC

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

July 21, 2015 **PM-602-0120**

Policy Memorandum

SUBJECT: USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*

Purpose

This Policy Memorandum (PM) provides guidance regarding the implementation of *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015).

Scope

This memorandum applies to and shall be used to guide determinations by all U.S. Citizenship and Immigration Services (USCIS) employees. The updated guidance that follows is effective immediately.

Authorities

- Sections 101(a)(15)(H)(i)(b) and 214(a)(1), (c)(1) of the Immigration and Nationality Act (INA), Title 8, United States Code, sections 1101(a)(15)(H)(i)(b) and 1184(a)(1), (c)(1).
- Title 8 Code of Federal Regulations (CFR), section 214.2(h).
- *Matter of Simeio Solutions, LLC* 26 I&N Dec. 542 (AAO 2015).

Policy

On April 9, 2015, USCIS' Administrative Appeals Office (AAO) issued the precedent decision, *Matter of Simeio Solutions, LLC (Simeio)*, which held that an H-1B employer must file an amended or new H-1B petition when a new Labor Condition Application for Nonimmigrant Workers (LCA) is required due to a change in the H-1B worker's place of employment.

Specifically, the decision stated:

1. A change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to the Department of Homeland Security (DHS) with

respect to that beneficiary may affect eligibility for H-1B status; it is therefore a material change for purposes of 8 C.F.R. §§ 214.2(h)(2)(i)(E) and (11)(i)(A) (2014).

2. When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA.

This precedent decision represents the USCIS position that H-1B petitioners are required to file an amended or new petition before placing an H-1B employee at a new place of employment not covered by an existing, approved H-1B petition.

When a petitioner must file an amended or new petition based on *Simeio*

Except as provided below in the *Simeio* compliance section, a petitioner must file an amended or new H-1B petition if the H-1B employee is changing his or her place of employment to a geographical area requiring a corresponding LCA to be certified to USCIS, even if a new LCA is already certified by the U.S. Department of Labor and posted at the new work location.

Note: Once a petitioner properly files the amended or new H-1B petition, the H-1B employee can immediately begin to work at the new place of employment, provided the requirements of section 214(n) of the INA are otherwise satisfied. The petitioner does not have to wait for a final decision on the amended or new petition for the H-1B employee to start work at the new place of employment.

When a petitioner does NOT need to file an amended petition

- **A move within an "area of intended employment":** If a petitioner's H-1B employee is simply moving to a new job location within the same area of intended employment, a new LCA is not generally required. *See* INA section 212(n)(4); 20 CFR 655.734. Therefore, provided there are no changes in the terms and conditions of employment that may affect eligibility for H-1B classification, the petitioner does not need to file an amended or new H-1B petition.

  However, the petitioner must still post the original LCA in the new work location within the same area of intended employment. For example, an H-1B employee presently authorized to work at a location within the New York City metropolitan statistical area (NYC) may not trigger the need for a new LCA if merely transferred to a new worksite in NYC, but the petitioner would still need to post the previously obtained LCA at the new work location. *See* 20 CFR 655.734. This is required regardless of whether an entire office moved from one location to another within NYC, or just the one H-1B employee.

- **Short-term placements:** Under certain circumstances, a petitioner may place an H-1B employee at a new worksite for up to 30 days, and in some cases 60 days (where the employee is still based at the "home" worksite), without obtaining a new LCA. *See* 20 CFR 655.735. In these situations, the petitioner does not need to file an amended or new H-1B

petition provided there are no material changes in the terms and conditions of the H-1B worker's employment.

- **Non-worksite locations:** If H-1B employees are only going to a non-worksite location and there are no material changes in the authorized employment, the petitioner does not need to file an amended or new H-1B petition. A location is considered to be a "non-worksite" if:

  - The H-1B employees are going to a location to participate in employee developmental activity, such as management conferences and staff seminars;

  - The H-1B employees spend little time at any one location; or

  - The job is "peripatetic in nature," such as situations where their job is primarily at one location but they occasionally travel for short periods to other locations "on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding 5 consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations)." *See* 20 CFR 655.715.

Compliance with *Simeio*

As explained in *Simeio*, this USCIS interpretation of the law clarifies, but does not depart from, existing regulations and previous agency policy pronouncements on when an amended H-1B petition must be filed. To accommodate petitioners who need to come into compliance with *Simeio*, USCIS will exercise its discretion as follows:

- **Pre-*Simeio* changes in the place of employment requiring certification of a new LCA:** If a petitioner's H-1B employee moved to a new area of employment (not covered by an existing, approved H-1B petition) on or before the date of publication of *Matter of Simeio Solutions, LLC* (April 9, 2015), USCIS will generally not pursue *new* adverse actions (e.g., denials or revocations) solely based upon a failure to file an amended or new petition regarding that move after July 21, 2015. USCIS will, however, preserve adverse actions already commenced or completed prior to July 21, 2015 and will pursue new adverse actions if other violations are determined to have occurred.

- **Safe harbor period:** If a petitioner wishes, notwithstanding the above statement of discretion, to file an amended or new petition to request a change in the place of employment that occurred on or before the *Simeio* decision, the petitioner may file an amended or new petition by January 15, 2016. USCIS will consider filings during this safe harbor period to be timely for purposes of the regulation and meeting the definition of "nonimmigrant alien" at INA section 214(n)(2). **Note:** See the additional guidance in the table below for situations where a petitioner must file an amended or new petition.

- **Post-*Simeio* changes in the place of employment requiring certification of a new LCA:**

- If by January 15, 2016 (deadline for filing) a petitioner does not file an amended or new petition for an H-1B employee who moved to a new place of employment (not covered by an existing, approved H-1B petition) after the date of publication of *Matter of Simeio Solutions, LLC* (April 9, 2015) but before August 19, 2015, the petitioner will be out of compliance with DHS regulations and the USCIS interpretation of the law, and thus subject to adverse action. Similarly, the petitioner's H-1B employee will not be maintaining nonimmigrant status and will also be subject to adverse action.

- If the change in the place of employment (not covered by an existing, approved H-1B petition) occurs on or after August 19, 2015, then the petitioner must file an amended or new petition before the employee begins working at the new location.

If a petitioner's H-1B employee moved to a new place of employment (not covered by an existing, approved H-1B petition)…	**Then…**
On or before April 9, 2015	The petitioner may choose to file an amended or new petition by January 15, 2016. Such requests to change an H-1B employee's place of employment will be deemed timely. Even if the petitioner does not file the amended or new petition by this date, USCIS will generally not pursue new revocations or denials based upon failure to file an amended or new petition. However, notices of intent to revoke, revocations, requests for evidence, notices of intent to deny, or denials issued prior to July 21, 2015 (date of this final guidance) remain in effect and the petitioner must comply with them. If the petitioner has received a notice of intent to revoke a petition and the response period has not ended, filing an amended or new petition now and providing evidence of that filing prior to the response deadline may avert a revocation. This is only if there are no other grounds for the revocation except the failure to file an amended or new petition for a change to a place of employment not covered

	by an existing, approved H-1B petition. If the petitioner has received a request for evidence or a notice of intent to deny a petition based on a failure to file an amended petition, USCIS may consider the current, pending petition under review to satisfy the safe harbor filing requirement if it included, at the time of filing, a copy of the certified LCA covering the beneficiary's current work location. In these cases, please ensure petitioners provide a copy of this guidance with their response, an explanation that their current petitions satisfy the safe harbor filing requirement for an amended or new petition, and any other evidence requested before the expiration of the response deadline. Note: A petitioner may not amend a pending petition in response to a request for evidence or a notice of intent to deny. In the event there are material changes after the filing of a petition, the petitioner must immediately file an amended or new petition to reflect those changes.
After April 9, 2015 but prior to August 19, 2015	The petitioner **must** file an amended or new petition by January 15, 2016. USCIS will consider filings prior to the deadline for this safe harbor period to be timely for purposes of the regulation. However, if the petitioner does not file the amended or new petition within the time permitted, the petitioner will be out of compliance with DHS regulations. The petitioner's current Form I-129, Petition for a Nonimmigrant Worker, H-1B petition approval will be subject to a notice of intent to revoke and the employee may be found to not be maintaining his or her H-1B status. If the petitioner has received a notice of intent to revoke a petition and the response period

	has not ended, filing an amended or new petition now and providing evidence of that filing prior to the response deadline may avert a revocation. This is only if there are no other grounds for the revocation except the failure to file an amended or new petition for a change to a place of employment not covered by an existing, approved H-1B petition. If the petitioner has received a request for evidence or a notice of intent to deny a petition based on a failure to file an amended petition, USCIS may consider the current, pending petition under review to satisfy the safe harbor filing requirement if it included, at the time of filing, a copy of the certified LCA covering the beneficiary's current work location. In these cases, please ensure petitioners provide a copy of this guidance with their response, an explanation that their current petitions satisfy the safe harbor filing requirement for an amended or new petition, and any other evidence requested before the expiration of the response deadline. As noted above, a petitioner may not amend a pending petition in response to a request for evidence or a notice of intent to deny. In the event there are material changes after the filing of a petition, the petitioner must immediately file an amended or new petition to reflect those changes.
On or after August 19, 2015	The petitioner **must** file an amended or new petition before an H-1B employee starts working at a new place of employment not covered by an existing, approved H-1B petition.

Additional information regarding amended petitions

- **If a petitioner's amended or new H-1B petition is denied**, but the original petition is still valid, the H-1B employee may return to the place of employment covered by the original petition as long as the H-1B employee is able to maintain valid nonimmigrant status at the original place of employment.

- **If an amended or new H-1B petition is still pending**, the petitioner may file another amended or new petition to allow the H-1B employee to change worksite locations immediately upon the latest filing. However, every amended or new H-1B petition must separately meet the requirements for H-1B classification and any requests for extension of stay. In the event that the H-1B nonimmigrant beneficiary's status has expired while successive amended or new H-1B petitions are pending, the denial of any petition or request to amend or extend status will result in the denial of all successive requests to amend or extend status. See Memorandum from Michael Aytes, Acting Director of Domestic Operations (December 27, 2005), for similar instructions about portability petitions.

- **If a petitioner's employee needs to travel while an amended or new H-1B petition is still pending**, please read our past guidance on admission procedures for nonimmigrants claiming portability. See Memorandum from Michael D. Cronin, Executive Associate Commissioner (June 19, 2001).

Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. 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.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate channels to the USCIS Office of Policy and Strategy.

DOL RESOURCES

- DOL: www.dol.gov

- 20 CFR § 655 Subpart H—Labor Condition Applications and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b Visas in Specialty Occupations and as Fashion Models, and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b1 and E-3 Visas in Specialty Occupations: https://www.ecfr.gov/cgi-bin/text-idx?SID=aeb95d49fe8e7f79b7281ef371fbd081&mc=true&node=pt20.3.655&rgn=div5#sp20.3.655.h, see also http://www.gpo.gov/fdsys/pkg/CFR-2008-title20-vol3/pdf/CFR-2008-title20-vol3-sec655-760.pdf

- ETA 9035 Labor Condition Application https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9035.pdf

- ETA 9141 Prevailing Wage Application https://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9141.pdf

- Foreign Labor Certification Data Center Online Wage Library: www.flcdatacenter.com

- Occupational Outlook Handbook: https://www.bls.gov/ooh/

- O*NET Online: https://www.onetonline.org/

- DOL's ETA Prevailing Wage Determination Policy Guidance, Revised 2009 http://www.flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf

DOL Resources

20 CFR § 655 Subpart H:

Labor Condition Applications and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b Visas in Specialty Occupations and as Fashion Models, and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b1 and E-3 Visas in Specialty Occupations

Subpart H—Labor Condition Applications and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b Visas in Specialty Occupations and as Fashion Models, and Requirements for Employers Seeking To Employ Nonimmigrants on H-1b1 and E-3 Visas in Specialty Occupations

SOURCE: 59 FR 65659, 65676, Dec. 20, 1994, unless otherwise noted.

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§655.700 What statutory provisions govern the employment of H-1B, H-1B1, and E-3 nonimmigrants and how do employers apply for H-1B, H-1B1, and E-3 visas?

Under the E-3 visa program, the Immigration and Nationality Act (INA), as amended, permits certain nonimmigrant treaty aliens to be admitted to the United States solely to perform services in a specialty occupation (INA section 101(a)(15)(E)(iii)). Under the H-1B1 visa program, the INA permits nonimmigrant professionals in specialty occupations from countries with which the United States has entered into certain agreements that are identified in section 214(g)(8)(A) of the INA to temporarily enter the United States for employment in a specialty occupation. Employers seeking to employ nonimmigrant workers in specialty occupations under H-1B, H-1B1, or E-3 visas must file a labor condition application with the Department of Labor as described in §655.730(c) and (d). Certain procedures described in this subpart H for obtaining a visa and entering the U.S. after the Department of Labor attestation process, including procedures in §655.705, apply only to H-1B nonimmigrants. The procedures for receiving an E-3 or H-1B1 visa and entering the U.S. on an E-3 or H-1B1 visa after the attestation process is certified by the Department of Labor are identified in the regulations and procedures of the Department of State and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security. Consult the Department of State (*http://www.state.gov/*) and USCIS (*http://www.uscis.gov/*) Web sites and regulations for specific instructions regarding the E-3 and H-1B1 visas.

(a) *Statutory provisions regarding H-1B visas.* With respect to nonimmigrant workers entering the U.S. on H-1B visas, which are available to nonimmigrant aliens in specialty occupations or certain fashion models from any country, the INA, as amended, provides as follows:

(1) Establishes an annual ceiling (exclusive of spouses and children) on the number of foreign workers who may be issued H-1B visas—

(i) 195,000 in fiscal year 2001;

(ii) 195,000 in fiscal year 2002;

(iii) 195,000 in fiscal year 2003; and

(iv) 65,000 in each succeeding fiscal year;

(2) Defines the scope of eligible occupations for which nonimmigrants may be issued H-1B visas and specifies the qualifications that are required for entry as an H-1B nonimmigrant ;

(3) Requires an employer seeking to employ H-1B nonimmigrants to file a labor condition application (LCA) agreeing to various attestation requirements and have it certified by the Department of Labor (DOL) before a nonimmigrant may be provided H-1B status by the United States Citizenship and Immigration Services of the Department of Homeland Security (DHS); and

(4) Establishes an enforcement system under which DOL is authorized to determine whether an employer has engaged in misrepresentation or failed to meet a condition of the LCA, and is authorized to impose fines and penalties.

(b) *Procedure for obtaining an H-1B visa classification.* Before a nonimmigrant may be admitted to work in a "specialty occupation" or as a fashion model of distinguished merit and ability in the United States under the H-1B visa classification, there are certain steps which must be followed:

(1) First, an employer shall submit to the Department of Labor (DOL), and obtain DOL certification of, a labor condition application (LCA). The requirements for obtaining a certified LCA are provided in this subpart. The electronic LCA (Form ETA 9035E) is available at *http://www.lca.doleta.gov.* The paper-version LCA (Form ETA 9035) and the LCA cover pages (Form ETA 9035CP), which contain the full attestation statements incorporated by reference into Form ETA 9035 and Form ETA 9035E, may be obtained from *http://ows.doleta.gov* and from the Employment and Training Administration (ETA) National Office. Employers must file LCAs in the manner prescribed in §655.720.

(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (DHS Form I-129), together with the certified LCA, to DHS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, DHS are set forth in DHS regulations. The DHS petition (Form I-129) may be obtained from an DHS district or area office.

(3) If DHS approves the H-1B classification, the nonimmigrant then may apply for an H-1B visa abroad at a consular office of the Department of State. If the nonimmigrant is already in the United States in a status other than H-1B, he/she may apply to the DHS for a change of visa status.

(c) *Applicability.* (1) This subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the H-1B visa classification in specialty occupations or as fashion models of distinguished merit and ability.

(2) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the North American Free Trade Agreement (NAFTA) apply, this subpart H and subpart I of this part shall apply (except for the provisions relating to the recruitment and displacement of U.S. workers (see §§655.738 and 655.739)) to the entry and employment of a nonimmigrant who is a citizen of Mexico under and pursuant to the provisions of section D or Annex 1603 of NAFTA in the case of all professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA other than registered nurses. Therefore, the references in this part to "H-1B nonimmigrant" apply to any Mexican citizen nonimmigrant who is classified by DHS as "TN." In the case of a registered nurse, the following provisions shall apply: subparts D and E of this part or the Nursing Relief for Disadvantaged Areas Act of 1999 (Public Law 106-95) and the regulations issued thereunder, 20 CFR part 655, subparts L and M.

(3) *E-3 visas:* Except as provided in paragraph (d) of this section, this subpart H and subpart I of this part apply to all employers seeking to employ foreign workers under the E-3 visa classification in specialty occupations under INA section 101(a)(15)(E)(iii) (8 U.S.C. 1101(a)(15)(E)(iii)). This paragraph (c)(3) applies to labor condition applications filed on or after April 11, 2008. E-3 labor

condition applications filed prior to that date but on or after May 11, 2005 (*i.e.*, the effective date of the statute), will be processed according to the E-3 statutory terms and the E-3 processing procedures published on July 19, 2005 in the FEDERAL REGISTER at 74 FR 41434.

(4) *H-1B1 visas:* Except as provided in paragraph (d) of this section, subparts H and I of this part apply to all employers seeking to employ foreign workers under the H-1B1 visa classification in specialty occupations described in INA section 101(a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(H)(i)(b1)), under the U.S.-Chile and U.S.-Singapore Free Trade Agreements as long as the Agreements are in effect. (INA section 214(g)(8)(A) (8 U.S.C. 1184(g)(8)(A)). This paragraph (c)(4) applies to H-1B1 labor condition applications filed on or after November 23, 2004. Further, H-1B1 labor condition applications filed prior to that date but on or after January 1, 2004, the effective date of the H-1B1 program, will be handled according to the H-1B1 statutory terms and the H-1B1 processing procedures as described in paragraph (d)(3) of this section.

(d) *Nonimmigrants on E-3 or H-1B1 visas*—(1) *Exclusions.* The following sections in this subpart and in subpart I of this part do not apply to E-3 and H-1B1 nonimmigrants, but apply only to H-1B nonimmigrants: §§655.700(a), (b), (c)(1) and (2); 655.710(b); 655.730(d)(5) and (e); 655.735; 655.736; 655.737; 655.738; 655.739; 655.760(a)(7), (8), (9), and (10); and 655.805(a)(7), (8), and (9). Further, the following references in subparts H or I of this part, whether in the excluded sections listed above or elsewhere, do not apply to E-3 and H-1B1 nonimmigrants, but apply only to H-1B nonimmigrants: references to fashion models of distinguished merit and ability (H-1B visas, but not H-1B1 and E-3 visas, are available to such fashion models); references to a petition process before USCIS (the petition process applies only to H-1B, but not to initial H-1B1 and E-3 visas unless it is a petition to accord a change of status); references to additional attestation obligations of H-1B-dependent employers and employers found to have willfully violated the H-1B program requirements (these provisions do not apply to the H-1B1 and E-3 programs); and references in §655.750(a) or elsewhere in this part to the provision in INA section 214(n) (formerly INA section 214(m)) (8 U.S.C. 1184(n)) regarding increased portability of H-1B status (by the statutory terms, the portability provision is inapplicable to H-1B1 and E-3 nonimmigrants).

(2) *Terminology.* For purposes of subparts H and I of this part, except in those sections identified in paragraph (d)(1) of this section as inapplicable to E-3 and H-1B1 nonimmigrants and as otherwise excluded:

(i) The term “H-1B” includes “E-3” and “H-1B1” (INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)) (8 U.S.C. 1101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)); and

(ii) The term “labor condition application” or “LCA” includes a labor attestation made under section 212(t)(1) of the INA for an E-3 or H-1B1 nonimmigrant professional classified under INA section 101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1) (8 U.S.C. 1101(a)(15)(E)(iii) and (a)(15)(H)(i)(b1)).

(3) *Filing procedures for E-3 and H-1B1 labor attestations.* Employers seeking to employ an E-3 or H-1B1 nonimmigrant must submit a completed ETA Form 9035 or ETA Form 9035E (electronic) to DOL in the manner prescribed in §§655.720 and 655.730. Employers must indicate on the form whether the labor condition application is for an “E-3 Australia,” “H-1B1 Chile,” or “H-1B1 Singapore” nonimmigrant. Any changes in the procedures and instructions for submitting labor condition applications will be provided in a notice published in the FEDERAL REGISTER and posted on the ETA Web site at *http://www.foreignlaborcert.doleta.gov/.*

(4) *Employer's responsibilities regarding E-3 and H-1B1 labor attestation.* Each employer seeking an E-3 or H-1B1 nonimmigrant in a specialty occupation has several responsibilities, as described more fully in subparts H and I of this part, including the following:

(i) By submitting a signed and completed LCA, the employer makes certain representations and agrees to several attestations regarding the employer's responsibilities, including the wages, working conditions, and benefits to be provided to the E-3 or H-1B1 nonimmigrant. These attestations are specifically identified and incorporated in the LCA, and are fully described on Form ETA 9035CP (cover pages).

(ii) The employer reaffirms its acceptance of all of the attestation obligations by transmitting the certified labor attestation to the nonimmigrant, the Department of State, and/or the USCIS according to the procedures of those agencies.

(iii) The employer shall maintain the original signed and certified LCA in its files, and shall make a copy of the filed LCA, as well as necessary supporting documentation (as identified under this subpart), available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with ETA.

(iv) The employer shall develop sufficient documentation to meet its burden of proof, in the event that such statement or information is challenged, with respect to the validity of the statements made in its LCA and the accuracy of information provided. The employer shall also maintain such documentation at its principal place of business in the U.S. and shall make such documentation available to DOL for inspection and copying upon request.

(5) *Application to Chile.* During the period that the provisions of Chapter 14 and Section D of Annex 14.3 of the United States-Chile Free Trade Agreement (Chile FTA) are in effect, this subpart H and subpart I of this part shall apply (except for the provisions excluded under paragraph (d)(1) of this section) to the temporary entry and employment of a nonimmigrant who is a national of Chile under the provisions of Article 14.9 and Annex 2.1 of the Chile FTA and who is a professional under the provisions of Annex 14.3(D) of the Chile FTA.

(6) *Application to Singapore.* During the period that the provisions of Section IV of Annex 11A of the United States-Singapore Free Trade Agreement (Singapore FTA) are in effect, this subpart H and subpart I of this part shall apply (except for the provisions excluded under paragraph (d)(1) of this section) to the temporary entry and employment of a nonimmigrant who is a national of Singapore under the provisions of Chapter 11 and Section IV of Annex 11A of the Singapore FTA and who is a professional under the provisions of Annex 11A(IV) of the Singapore FTA.

[65 FR 80209, Dec. 20, 2000, as amended at 66 FR 63300, Dec. 5, 2001; 69 FR 68226, Nov. 23, 2004; 70 FR 72560, Dec. 5, 2005; 71 FR 35520, 35521, June 21, 2006; 71 FR 37804, June 30, 2006; 73 FR 19947, Apr. 11, 2008]

DOL Resources

Form ETA 9035:

Labor Condition Application

OMB Approval: 1205-0310
Expiration Date: 10/31/2021

Labor Condition Application for Nonimmigrant Workers
Form ETA-9035 & 9035E
U.S. Department of Labor

Please read and review the filing instructions carefully before completing the Form ETA- 9035 or 9035E. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/. In accordance with Federal Regulations at 20 CFR 655.730(b), incomplete or obviously inaccurate Labor Condition Applications (LCAs) will not be certified by the Department of Labor (DOL). For all submissions, both electronic (Form ETA- 9035E) or paper (Form ETA- Form 9035 where the employer has notified DOL that it will submit this form non-electronically due to a disability or received permission from DOL to file non-electronically due to lack of Internet access), ALL required fields/items containing an asterisk (*) must be completed as well as any fields/items where a response is conditional as indicated by the section (§) symbol.

A. Employment-Based Nonimmigrant Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)*: *	

B. Temporary Need Information

1. Job Title *		
2. SOC (ONET/OES) code *	3. SOC (ONET/OES) occupation title *	
4. Is this a full-time position? * ❑ Yes ❑ No	**Period of Intended Employment**	
	5. Begin Date * *(mm/dd/yyyy)*	6. End Date * *(mm/dd/yyyy)*

7. Worker positions needed/basis for the visa classification supported by this application

☐ **Total Worker Positions Being Requested for Certification ***

Basis for the visa classification supported by this application
(indicate total workers in each applicable category)

☐ a. New employment *	☐ d. New concurrent employment *
☐ b. Continuation of previously approved employment without change with the same employer*	☐ e. Change in employer *
☐ c. Change in previously approved employment *	☐ f. Amended petition *

C. Employer Information

1. Legal business name *		
2. Trade name/Doing Business As (DBA), if applicable		
3. Address 1 *		
4. Address 2		
5. City *	6. State *	7. Postal code *
8. Country *	9. Province	
10. Telephone number *	11. Extension	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

Labor Condition Application for Nonimmigrant Workers
Form ETA-9035 & 9035E
U.S. Department of Labor

D. Employer Point of Contact Information

Important Note: The information contained in this Section must be that of an employee of the employer who is authorized to act on behalf of the employer in labor certification matters. The information in this Section must be different from the agent or attorney information listed in Section E, unless the attorney is an employee of the employer.

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s)
4. Contact's job title *		
5. Address 1 *		
6. Address 2		
7. City *	8. State *	9. Postal code *
10. Country *	11. Province	
12. Telephone number *	13. Extension	14. E-Mail address

E. Attorney or Agent Information (If applicable)

Important Note: The employer authorizes the attorney or agent identified in this section to act on its behalf in connection with the filing of this application.

1. Is the employer represented by an attorney or agent in the filing of this application? * If "Yes," complete the remainder of Section E below.	❑ Yes	❑ No
2. Attorney or Agent's last (family) name §	3. First (given) name §	4. Middle name(s)
5. Address 1 §		
6. Address 2		
7. City §	8. State §	9. Postal code §
10. Country §	11. Province	
12. Telephone number §	13. Extension	14. E-Mail address
15. Law firm/Business name §	16. Law firm/Business FEIN §	
17. State Bar number (only if attorney) §	18. State of highest court where attorney is in good standing (only if attorney) §	
19. Name of the highest State court where attorney is in good standing (only if attorney) §		

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

Labor Condition Application for Nonimmigrant Workers
Form ETA-9035 & 9035E
U.S. Department of Labor

F. Employment and Wage Information

Important Note: The employer must define the intended place(s) of employment with as much geographic specificity as possible. Each intended place(s) of employment listed below must be the worksite or physical location where the work will actually be performed and cannot be a P.O. Box. The employer must identify all intended places of employment, including those of short duration, on the LCA. 20 CFR 655.730(c)(5). If the employer is submitting this form non-electronically and the work is expected to be performed in more than one location, an attachment must be submitted in order to complete this section. An employer has the option to use either a single Form ETA-9035/9035E or multiple forms to disclose all intended places of employment. If the employer has more than ten (10) intended places of employment at the time of filing this application, the employer must file as many additional LCAs as are necessary to list all intended places of employment. See the form instructions for further information about identifying all intended places of employment.

a. ***Place of Employment Information 1***

1. Enter the estimated number of workers that will perform work at this place of employment under the LCA.*	
2. Indicate whether the worker(s) subject to this LCA will be placed with a secondary entity at this place of employment. *	❑ Yes ❑ No
3. If "Yes" to question 2, provide the legal business name of the secondary entity. §	
4. Address 1 *	
5. Address 2	
6. City *	7. County *
8. State/District/Territory *	9. Postal code *
10. Wage Rate Paid to Nonimmigrant Workers * From* $ _____ . _____ To: $ _____ . _____	10a. Per: (Choose only one)* ☐ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year
11. Prevailing Wage Rate * $ _____ . _____	11a. Per: (Choose only one)* ☐ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year

Questions 12-14. Identify the source used for the prevailing wage (PW) *(check and fully complete only one)*: *

12. ☐	**A Prevailing Wage Determination (PWD) issued by the Department of Labor**	a. PWD tracking number §
13. ☐	**A PW obtained independently from the Occupational Employment Statistics (OES) Program**	
	a. Wage Level *(check one):* § ☐ I ☐ II ☐ III ☐ IV ☐ N/A	b. Source Year §
14. ☐	**A PW obtained using another legitimate source (other than OES) or an independent authoritative source**	
	a. Source Type *(check one):* § ☐ CBA ☐ DBA ☐ SCA ☐ Other/ PW Survey	b. Source Year §
	c. If responded "Other/ PW Survey" in question 14.a, enter the name of the survey producer or publisher §	
	d. If responded "Other/ PW Survey" in question 14.a, enter the title or name of the PW survey §	

Labor Condition Application for Nonimmigrant Workers
Form ETA-9035 & 9035E
U.S. Department of Labor

G. Employer Labor Condition Statements

Important Note: In order for your application to be processed, you MUST read Section G of the Form ETA-9035CP - General Instructions for the 9035 & 9035E under the heading "Employer Labor Condition Statements" and agree to all four (4) labor condition statements summarized below:

(1) **Wages:** The employer shall pay nonimmigrant workers at least the prevailing wage or the employer's actual wage, whichever is higher, and pay for non-productive time. The employer shall offer nonimmigrant workers benefits and eligibility for benefits provided as compensation for services on the same basis as the employer offers to U.S. workers. The employer shall not make deductions to recoup a business expense(s) of the employer including attorney fees and other costs connected to the performance of H-1B, H-1B1, or E-3 program functions which are required to be performed by the employer. This includes expenses related to the preparation and filing of this LCA and related visa petition information. 20 CFR 655.731;

(2) **Working Conditions:** The employer shall provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed. The employer's obligation regarding working conditions shall extend for the duration of the validity period of the certified LCA or the period during which the worker(s) working pursuant to this LCA is employed by the employer, whichever is longer. 20 CFR 655.732;

(3) **Strike, Lockout, or Work Stoppage:** At the time of filing this LCA, the employer is not involved in a strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification in the area(s) of intended employment. The employer will notify the Department of Labor within 3 days of the occurrence of a strike or lockout in the occupation, and in that event the LCA will not be used to support a petition filing with the U.S. Citizenship and Immigration Services (USCIS) until the DOL Employment and Training Administration (ETA) determines that the strike or lockout has ended. 20 CFR 655.733; and

(4) **Notice:** Notice of the LCA filing was provided no more than 30 days before the filing of this LCA or will be provided on the day this LCA is filed to the bargaining representative in the occupation and area of intended employment, or if there is no bargaining representative, to workers in the occupation at the place(s) of employment either by electronic or physical posting. This notice was or will be posted for a total period of 10 days, except that if employees are provided individual direct notice by e-mail, notification need only be given once. A copy of the notice documentation will be maintained in the employer's public access file. A copy of this LCA will be provided to each nonimmigrant worker employed pursuant to the LCA. The employer shall, no later than the date the worker(s) report to work at the place(s) of employment, provide a signed copy of the certified LCA to the worker(s) working pursuant to this LCA. 20 CFR 655.734.

1. **I have read and agree to** Labor Condition Statements 1, 2, 3, and 4 above and as fully explained in Section G of the Form ETA-9035CP – General Instructions for the 9035 & 9035E and the Department's regulations at 20 CFR 655 Subpart H. *	❑ Yes ❑ No

H. Additional Employer Labor Condition Statements –H-1B Employers ONLY

Important Note: In order for your H-1B application to be processed, you MUST read Section H – Subsection 1 of the Form ETA 9035CP – General Instructions for the 9035 & 9035E under the heading "Additional Employer Labor Condition Statements" and answer the questions below.

a. Subsection 1

1. At the time of filing this LCA, is the employer H-1B dependent? §	❑ Yes ❑ No
2. At the time of filing this LCA, is the employer a willful violator? §	❑ Yes ❑ No
3. If "Yes" is marked in questions H.1 and/or H.2, you must answer "Yes" or "No" regarding whether the employer will use this application ONLY to support H-1B petitions or extensions of status for exempt H-1B nonimmigrant workers? §	❑ Yes ❑ No
4. If "Yes" is marked in question H.3, identify the statutory basis for the exemption of the H-1B nonimmigrant workers associated with this LCA. §	❑ $60,000 or higher annual wage ❑ Master's Degree or higher in related specialty ❑ Both
H-1B Dependent or Willful Violator Employers -Master's Degree or Higher Exemptions ONLY	
5. Indicate whether a completed Appendix A is attached to this LCA covering any H-1B nonimmigrant worker for whom the statutory exemption will be based **ONLY** on attainment of a Master's Degree or higher in related specialty. §	❑ Yes ❑ No ❑ N/A

Labor Condition Application for Nonimmigrant Workers
Form ETA-9035 & 9035E
U.S. Department of Labor

If you marked "Yes" to questions H.a.1 (H-1B dependent) and/or H.a.2 (H-1B willful violator) and "No" to question H.a.3 (exempt H-1B nonimmigrant workers), you MUST read Section H – Subsection 2 of the Form ETA 9035CP – General Instructions for the 9035 & 9035E under the heading "Additional Employer Labor Condition Statements" and indicate your agreement to all three (3) additional statements summarized below.

b. Subsection 2

A. **Displacement:** An H-1B dependent or willful violator employer is prohibited from displacing a U.S. worker in its own workforce within the period beginning 90 days before and ending 90 days after the date of filing of the visa petition. 20 CFR 655.738(c);

B. **Secondary Displacement:** An H-1B dependent or willful violator employer is prohibited from placing an H-1B nonimmigrant worker(s) with another/secondary employer where there are indicia of an employment relationship between the nonimmigrant worker(s) and that other/secondary employer (thus possibly affecting the jobs of U.S. workers employed by that other employer), unless and until the employer subject to this LCA makes the inquiries and/or receives the information set forth in 20 CFR 655.738(d)(5) concerning that other/secondary employer's displacement of similarly employed U.S. workers in its workforce within the period beginning 90 days before and ending 90 days after the date of such placement. 20 CFR 655.738(d). Even if the required inquiry of the secondary employer is made, the H-1B dependent or willful violator employer will be subject to a finding of a violation of the secondary displacement prohibition if the secondary employer, in fact, displaces any U.S. worker(s) during the applicable time period; and

C. **Recruitment and Hiring:** Prior to filing this LCA or any petition or request for extension of status for nonimmigrant worker(s) supported by this LCA, the H-1B dependent or willful violator employer must take good faith steps to recruit U.S. workers for the job(s) using procedures that meet industry-wide standards and offer compensation that is at least as great as the required wage to be paid to the nonimmigrant worker(s) pursuant to 20 CFR 655.731(a). The employer must offer the job(s) to any U.S. worker who applies and is equally or better qualified for the job than the nonimmigrant worker. 20 CFR 655.739.

6. **I have read and agree** to Additional Employer Labor Condition Statements A, B, and C above and as fully explained in Section H – Subsections 1 and 2 of the Form ETA 9035CP – General Instructions for the 9035 & 9035E and the Department's regulations at 20 CFR 655 Subpart H. §	❑ Yes ❑ No

I. Public Disclosure Information

! **Important Note**: You must select one or both of the options listed in this Section.

1. Public disclosure information in the United States will be kept at: *	❑ Employer's principal place of business ❑ Place of employment

J. Notice of Obligations

A. Upon receipt of the certified LCA, the employer must take the following actions:

- o Print and sign a hard copy of the LCA if filing electronically (20 CFR 655.730(c)(3));
- o Maintain the original signed and certified LCA in the employer's files (20 CFR 655.705(c)(2); 20 CFR 655.730(c)(3); and 20 CFR 655.760); and
- o Make a copy of the LCA, as well as necessary supporting documentation required by the Department of Labor regulations, available for public examination in a public access file at the employer's principal place of business in the U.S. or at the place of employment within one working day after the date on which the LCA is filed with the Department of Labor (20 CFR 655.705(c)(2) and 20 CFR 655.760).

B. The employer must develop sufficient documentation to meet its burden of proof with respect to the validity of the statements made in its LCA and the accuracy of information provided, in the event that such statement or information is challenged (20 CFR 655.705(c)(5) and 20 CFR 655.700(d)(4)(iv)).

C. The employer must make this LCA, supporting documentation, and other records available to officials of the Department of Labor upon request during any investigation under the Immigration and Nationality Act (20 CFR 655.760 and 20 CFR Subpart I).

I declare under penalty of perjury that I have read and reviewed this application and that to the best of my knowledge, the information contained therein is true and accurate. I understand that to knowingly furnish materially false information in the preparation of this form and any supplement thereto or to aid, abet, or counsel another to do so is a federal offense punishable by fines, imprisonment, or both (18 U.S.C. 2, 1001,1546,1621).

1. Last (family) name of hiring or designated official *	2. First (given) name of hiring or designated official *	3. Middle initial §
4. Hiring or designated official title *		
5. Signature *	6. Date signed *	

Case Number:_____ Case Status: _____ Period of Employment: _____ to _____

Labor Condition Application for Nonimmigrant Workers
Form ETA-9035 & 9035E
U.S. Department of Labor

K. LCA Preparer

Important Note: Complete this section if the preparer of this LCA is a person other than the one identified in either Section D (employer point of contact) or E (attorney or agent) of this application.

1. Last (family) name §	2. First (given) name §	3. Middle initial
4. Firm/Business name §		
5. E-Mail address §		

L. U.S. Government Agency Use (ONLY)

By virtue of the signature below, the Department of Labor hereby acknowledges the following:

This certification is valid from _____ to _____.

_____ _____
Department of Labor, Office of Foreign Labor Certification | Certification Date (date signed)

_____ _____
Case number | Case Status

The Department of Labor is not the guarantor of the accuracy, truthfulness, or adequacy of a certified LCA.

M. Signature Notification and Complaints

The signatures and dates signed on this form will not be filled out when electronically submitting to the Department of Labor for processing, but **MUST** be complete when submitting non-electronically. If the application is submitted electronically, any resulting certification **MUST** be signed *immediately upon receipt* from DOL before it can be submitted to USCIS for final processing.

Complaints alleging misrepresentation of material facts in the LCA and/or failure to comply with the terms of the LCA may be filed using the WH-4 Form with any office of the Wage and Hour Division, U.S. Department of Labor. A listing of the Wage and Hour Division offices can be obtained at www.dol.gov/whd. Complaints alleging failure to offer employment to an equally or better qualified U.S. worker, or an employer's misrepresentation regarding such offer(s) of employment, may be filed with the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, 950 Pennsylvania Avenue, NW, # IER, NYA 9000, Washington, DC, 20530, and additional information can be obtained at www.justice.gov. Please note that complaints should be filed with the Civil Rights Division, Immigrant and Employee Rights Section at the Department of Justice only if the violation is by an employer who is H-1B dependent or a willful violator as defined in 20 CFR 655.710(b) and 655.734(a)(1)(ii).

N. OMB Paperwork Reduction Act *(1205-0310)*

These reporting instructions have been approved under the Paperwork Reduction Act of 1995. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Your response is required to receive the benefit of consideration of your application. (Immigration and Nationality Act, Section 212(n) and (t) and 214(c)). Public reporting burden for this collection of information, which is to assist with program management and to meet Congressional and statutory requirements, is estimated to average 75 minutes per response, including the time to review instructions, search existing data sources, gather and maintain the data needed, and complete and review the collection of information.

Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Labor, Employment and Training Administration, Office of Foreign Labor Certification, 200 Constitution Ave., NW, Box PPII 12-200, Washington, DC, 20210. (Paperwork Reduction Project OMB 1205-0310.) **Do NOT send the completed application to this address.**

DOL Resources

Form ETA 9141:

Prevailing Wage Application

OMB Approval: 1205-0508
Expiration Date: 05/31/2019

Application for Prevailing Wage Determination
Form ETA-9141
U.S. Department of Labor

Please read and review the instructions carefully before completing this form and print legibly. A copy of the instructions can be found at http://www.foreignlaborcert.doleta.gov/.

A. Employment-Based Visa Information

1. Indicate the type of visa classification supported by this application *(Write classification symbol)*: *	

B. Requestor Point-of-Contact Information

1. Contact's last (family) name *	2. First (given) name *	3. Middle name(s) *
4. Contact's job title *		
5. Address 1 *		
6. Address 2		
7. City *	8. State *	9. Postal code *
10. Country *	11. Province (if applicable)	
12. Telephone number *	13. Extension	14. Fax Number
15. E-Mail Address		

C. Employer Information

1. Legal business name *		
2. Trade name/Doing Business As (DBA), if applicable §		
3. Address 1 *		
4. Address 2		
5. City *	6. State *	7. Postal code *
8. Country *	9. Province (if applicable)	
10. Telephone number *	11. Extension	
12. Federal Employer Identification Number (FEIN from IRS) *	13. NAICS code (must be at least 4-digits) *	

D. Wage Processing Information

1. Is the employer covered by ACWIA? * ❑ Yes ❑ No	
2. Is the position covered by a Collective Bargaining Agreement (CBA)? *	❑ Yes ❑ No
3. Is the employer requesting consideration of Davis-Bacon (DBA) or McNamara Service Contract (SCA) Acts? *	❑ Yes ❑ No ❑ DBA ❑ SCA

PW Tracking Number:_____ Case Status: _____ Validity Period: _____ to _____

Application for Prevailing Wage Determination
Form ETA-9141
U.S. Department of Labor

D. Wage Processing Information (cont.)

4. Is the employer requesting consideration of a survey in determining the prevailing wage? *	❑ Yes ❑ No
4a. Survey Name: §	
4b. Survey date of publication: §	

E. Job Offer Information

a. Job Description:

1. Job Title *	
2. *Suggested* SOC (ONET/OES) code *	2a. *Suggested* SOC (ONET/OES) occupation title *
3. Job Title of Supervisor for this Position (if applicable) §	
4. Does this position supervise the work of other employees? * ❑ Yes ❑ No	4a. If "Yes", number of employees worker § will supervise: _____
4b. If "Yes", please indicate the level of the employees to be supervised:	❑ Subordinate ❑ Peer
5. Job duties – Please provide a description of the duties to be performed with as much specificity as possible, including details regarding the areas/fields and/or products/industries involved. A description of the job duties to be performed **MUST** begin in this space. *	
6. Will travel be required in order to perform the job duties? * ❑ Yes ❑ No	6a. If "Yes", please provide details of the travel required, such as the area(s), frequency and nature of the travel. §

Application for Prevailing Wage Determination
Form ETA-9141
U.S. Department of Labor

E. Job Offer Information (cont.)

b. Minimum Job Requirements:

1. Education: minimum U.S. diploma/degree required *

☐ None ☐ High School/GED ☐ Associate's ☐ Bachelor's ☐ Master's ☐ Doctorate (PhD) ☐ Other degree (JD, MD, etc.)

1a. If "Other degree" in question 1, specify the diploma/ degree required §	1b. Indicate the major(s) and/or field(s) of study required § (May list more than one related major and more than one field)

2. Does the employer require a second U.S. diploma/degree? *	❑ Yes ❑ No

2a. If "Yes" in question 2, indicate the second U.S. diploma/degree and the major(s) and/or field(s) of study required §

3. Is training for the job opportunity required? *	❑ Yes ❑ No

3a. If "Yes" in question 3, specify the number of months of training required §	3b. Indicate the field(s)/name(s) of training required § (May list more than one related field and more than one type)

4. Is employment experience required? *	❑ Yes ❑ No

4a. If "Yes" in question 4, specify the number of months of experience required §	4b. Indicate the occupation required §

5. Special Requirements - List specific skills, licenses/certificates/certifications, and requirements of the job opportunity. *

c. Place of Employment Information:

1. Worksite address 1 *

2. Address 2

3. City *	4. County *
5. State/District/Territory *	6. Postal code *
7. Will work be performed in multiple worksites within an area of intended employment or a location(s) other than the address listed above? *	❑ Yes ❑ No

7a. If "Yes", identify the geographic place(s) of employment indicating each metropolitan statistical area (MSA) or the independent city(ies)/township(s)/county(ies) (borough(s)/parish(es)) and the corresponding state(s) where work will be performed. If necessary, submit a second completed Form ETA-9141 with a listing of the additional anticipated worksites. Please note that wages cannot be provided for unspecified/unanticipated locations.§

PW Tracking Number:_____ Case Status: _____ Validity Period: _____ to _____

OMB Approval: 1205-0508
Expiration Date: 05/31/2019

Application for Prevailing Wage Determination
Form ETA-9141
U.S. Department of Labor

F. Prevailing Wage Determination

FOR OFFICIAL GOVERNMENT USE ONLY

1. PW tracking number	2. Date PW request received
3. SOC (ONET/OES) code	3a. SOC (ONET/OES) occupation title
4. Prevailing wage $ _____ . _____	4a. OES Wage level ☐ I ☐ II ☐ III ☐ IV ☐ N/A
5. Per: (Choose only one) ☐ Hour ☐ Week ☐ Bi-Weekly ☐ Month ☐ Year ☐ Piece Rate	
5a. If Piece Rate is indicated in question 2, specify the wage offer requirements :*	
6. Prevailing wage source (Choose only one) ❑ OES (All Industries) ❑ OES (ACWIA – Higher Education) ❑ CBA ❑ DBA ❑ SCA ❑ Other/Alternate Survey	
6a. If "Other/Alternate Survey" in question 7, specify	
7. Additional Notes Regarding Wage Determination	
8. Determination date	9. Expiration date

G.OMB Paperwork Reduction Act *(1205-0508)*

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondent's reply to these reporting requirements is mandatory to obtain the benefits of temporary employment certification (Immigration and Nationality Act, Section 101). Public reporting burden for this collection of information is estimated to average 55 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate to the Office of Foreign Labor Certification * U.S. Department of Labor * Box 12 - 200 * 200 Constitution Ave., NW, * Washington, DC * 20210. **Do NOT send the completed application to this address.**

PW Tracking Number:_____ Case Status: _____ Validity Period: _____ to _____

DOL Resources

DOL's ETA Prevailing Wage Determination Policy Guidance, Revised 2009

Employment and Training Administration
Prevailing Wage Determination Policy Guidance
Nonagricultural Immigration Programs
Revised November 2009

The publication of the H-2B regulation in December 2008 and the corresponding changes to PERM, H-1B, H-1B1, H-1C and E-3 regulations governing temporary professional, non-agricultural or registered nursing programs changed the roles of the SWAs and NPCs in the prevailing wage determination process and necessitated the issuance of policy and procedural guidance to be used by the National Prevailing Wage and Helpdesk Center (NPWHC).

The H-2B regulation became effective on January 19, 2009. Pursuant to that Final Rule, the transition of the prevailing wage function from the State Workforce Agencies will be completed by December 31, 2009. As of January 1, 2010, the NPWHC will receive and make prevailing wage determinations for all non-agricultural temporary and permanent programs.

The major changes affecting prevailing wage determinations that became effective as a result of the H-2B Final Rule include:

1. Federalizing PWDs. Employers will now file requests and obtain PWDs directly with NPWHC.
2. Use of standard Prevailing Wage Request Form 9141 for all non-agricultural prevailing wage requests.

The PERM regulation lists professional O*NET-SOC occupations and their designated education and training categories. Those education and training categories shall be used when considering the education and training generally required for performance in that occupation (see Appendix D). This guidance has been divided into several sections for easy reference:

III. Procedures

A. Filing
B. NPWHC Response
C. NPWHC Responsibilities

IV. Challenges to NPWHC Determinations

Appendices

A. OES Prevailing Wage Guidance
B. Check Sheet for Use in Determining OES Wage Level
C. Worksheet for Use in Determining OES Wage Level
D. Professional Occupations - Education and Training Categories
E. Specific Vocational Preparation (SVP)
F. Check Sheet for Employer-Provided Wage Surveys
G. Prevailing Wage Determination Request Form

I. Policy Guidance

A. Background

The Department of Labor, Bureau of Labor Statistics (BLS) has provided wage data collected under the Occupational Employment Statistics (OES) Program for use in the Foreign Labor Certification process since 1998. Occupational wage data collected under that program is now available at the four levels required by the H-1B Visa Reform Act for state and sub-state geographic areas for the purpose of making prevailing wage determinations. The wage data is now available on the Foreign Labor Certification Data Center On-Line Wage Library (OWL), found on the Division's website at http://www.flcdatacenter.com/.

Since September 1999, the Standard Occupational Classification (SOC) has been used by the OES program to classify occupational wage information. The SOC provides a common language for categorizing occupations. The SOC also serves as the framework for information being gathered through the Department of Labor's Occupational Information Network (O*NET®) which supersedes the Dictionary of Occupational Titles (DOT) as the resource to be consulted for occupational information for the Foreign Labor Certification process. Developed by the Department of Labor, the O*NET system provides the general public information on skills, abilities, knowledge, tasks, work activities, and the specific vocational preparation levels associated with occupations. The O*NET information can be found at http://online.onetcenter.org. Wage data from the OES survey and occupational information in O*NET are both classified by the SOC, reducing the need to use crosswalks to connect wages to occupational requirements.

B. Prevailing Wage Factors

The regulatory scheme at 20 CFR 655.10/11 or 20 CFR 656.40/41 must be followed in determining the prevailing wage. The same policies and procedures shall be followed for the permanent labor certification program, the nonimmigrant program pertaining to H-1B or H-1B1 professionals in specialty occupations or as fashion models, and the H-2B temporary nonagricultural labor certification program.

The step-by-step process described in Section II. B. represents the approach for determining the appropriate prevailing wage. All prevailing wage determinations shall start with an entry level wage and progress to a wage that is commensurate with that of a qualified, experienced, or fully competent worker only after considering the experience, education, and skill requirements of an employer's job description (opportunity).

Under § 656.40, the relevant factors in determining a prevailing wage rate are the nature of the job offer, the area of intended employment, and jobs duties for workers that are similarly employed.

"*Nature of the Job Offer*"

In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer's job offer shall be used to identify the appropriate occupational classification. The NPWHC can identify the appropriate O*NET occupation using O*NET OnLine (http://online.onetcenter.org/) and entering the employer's job title to search for the appropriate O*NET-SOC occupation and code.

If the employer's prevailing wage request contains only a code from the Dictionary of Occupational Titles (DOT) rather than a job title, the DOT to O*NET-SOC crosswalk found on the On-Line Wage Library shall be used to identify the related O*NET-SOC code.

If the employer's job opportunity has worker requirements described in a combination of O*NET occupations, the NPWHC should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer's job offer is for an engineer-pilot, the NPWHC shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

"*Area of Intended Employment*"

The definition of "area of intended employment" at 20 CFR 656.3 states: *Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. The On-Line Wage Library has been developed to account for these requirements. A more detailed explanation is provided in section II C. 2. for use in making prevailing wage determinations that are based on employer-provided surveys.

"*Similarly Employed*"

Section 656.40 defines "*similarly employed*" as having:

- substantially comparable jobs in the occupational category in the area of intended employment, except that if no such workers are employed by employers other than the employer applicant in the area of intended employment, it means:
- jobs requiring a substantially similar level of skill within the area of intended employment; or
- substantially comparable jobs in the occupational category as employers outside of the area of intended employment if there are no substantially comparable jobs in the area of intended employment.

In computing the prevailing wage for a job opportunity in an occupational classification in an area of intended employment for an employee of:

- an institution of higher education;
- an affiliated or related nonprofit entity;
- a nonprofit research organization; or
- a governmental research organization;

the prevailing wage level should take into account the wage levels of employees only at such institutions and organizations found in the area of intended employment (see General Administration Letter No. 1-00).

II. Making Determinations

The NPWHC shall make prevailing wage determinations as follows:

A. If the NPWHC determines the job opportunity is covered by a collective bargaining agreement negotiated at arm's length and a wage rate has been negotiated under the agreement as evidenced by information provided by the employer, that wage rate shall be controlling.

B. In the absence of a wage determined under a collective bargaining agreement, NPWHC is to determine prevailing wage rates using wage surveys conducted under the wage component of the OES program.

C. If in the absence of a wage rate determined under a collective bargaining agreement, the employer provides the NPWHC with a survey, whether public or private, which meets the requirements of the regulations, that rate shall be used by the NPWHC as the prevailing wage determination in response to that particular request. In addition, an employer can elect to use a current wage rate in the area of intended employment under the Davis-Bacon or the McNamara Service Contract Acts.

The NPWHC shall specify the validity period of the prevailing wage which shall not be ***less than 90 days or more than 1 year*** from the determination date (see Federal Register Vol. 65 No. 245 Page 80196).

A. Wage Rates Covered by Collective Bargaining Agreements

If the job opportunity is in an occupation covered by a collective bargaining agreement (CBA) negotiated between a union and the employer, the wage rate in the agreement shall be considered the prevailing wage in making prevailing wage determinations.

If the job opportunity is for a professional athlete and is covered by a sports league's rules or regulations, the wage rate set forth in those rules or regulations including union agreements shall be considered the prevailing wage.

B. Wage Determinations Using BLS OES Wage Data

If the job offer is for an occupation not covered by a collective bargaining agreement and the employer does not choose to provide a survey or request use of a current wage determination in the area under the Davis-Bacon or McNamara-O'Hara Service Contract Acts, the wage component of the BLS OES survey shall be used to determine the prevailing wage for an employer's job offer. The OES survey is a national survey managed by the Bureau of Labor Statistics which provides a large enough sample to allow BLS to determine a prevailing wage for most occupations in every area of intended employment in the United States.

The OES wage data is made available at the state and sub-state areas so the NPWHC can select the geographic area of intended employment. The On-Line Wage Library has been developed to account for these requirements. The NPWHC should select the state and sub-state area that represents the area for the employer's job offer.

1. OES Wage Levels

The new requirements specify that determinations using a government survey shall be made available for each occupation at 4 levels of wages commensurate with experience, education, and the level of supervision. The NPWHC shall make a prevailing wage determination selecting one of the four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements: tasks, knowledge, skills, and specific vocational preparation (education, training, and experience) generally required for acceptable performance in that occupation.

It is important to remember that wage levels are determined only after selecting the most relevant O*NET-SOC occupational code classification. The selection of the O*NET-SOC code should not be based solely on the title of the employer's job offer. The NPWHC should consider the particulars of the employer's job offer and compare the full description to the tasks, knowledge, and work activities generally associated with an O*NET-SOC occupation to insure the most relevant occupational code has been selected.

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

Level III (experienced) wage rates are assigned to job offers for experienced employees who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst), 'senior' (senior programmer), 'head' (head nurse), 'chief' (crew chief), or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification, and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

2. Process for Determining Wage Level

The NPWHC shall use O*NET information to identify the tasks, work activities, knowledge, and skills generally required for performance in an occupation. A comparison between the particulars of the employer's job offer to the requirements for similar (O*NET) occupations shall be used to determine the appropriate wage level. It

is important, therefore, that the job description included in an employer's request for a prevailing wage determination include sufficient information to determine the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. NPWHC may need to contact employers for additional information to obtain this information, if needed.

Information contained in the O*NET Job Zones provides guidance in determining whether the job offer is for an entry level, qualified, experienced, or fully competent employee for making the determination of wage level. Employer requirements in a job offer that are at the upper range of the requirements and preparation generally required for performance in an occupation are indicators that a prevailing wage determination at a higher level should be considered. The O*NET Job Zones were developed to transition from the Specific Vocational Preparation (SVP), as shown in the Dictionary of Occupational Titles (DOT), to measures of experience, education, and job training included in the O*NET database. A listing of SVPs and their definitions can be found in Appendix E of this document.

A step-by-step process for arriving at the appropriate wage level is described below. Points are awarded based on the comparison of an employer's job offer requirements to the general requirements for similar occupations. The points are entered on a worksheet then added to arrive at the wage level. NPWHC should follow the step-by-step process while completing the worksheet.

The appendices section of this document provides several guides that can be used for reference during the process:

Appendix A: OES Prevailing Wage Guidance repeats the step-by-step process and can be used as a reference guide.

Appendix B: Check Sheet for Use in Determining OES Wage Level has been provided to track the process.

Appendix C: Worksheet for Use in Determining OES Wage Level provides an example of a worksheet that NPWHC might use for determining the appropriate wage level.

All employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage. The employer's requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in O*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level.

All prevailing wage determinations start with a Level I determination; therefore, the check sheet and worksheet have a 1 entered in the Wage Level Column.

Step 1 – Enter the O*NET Requirements on the Worksheet

- Use the O*NET OnLine 'Find Occupations' feature (http://online.onetcenter.org) to determine the appropriate O*NET-SOC code based on the job title provided on the prevailing wage determination request form.

- Enter the job title from the employer's job offer into the Quick Search box and click on Go.

- Select the O*NET occupation that most closely matches the employer's request from the resulting list of occupations.

- Review the Tasks, Knowledge, Work Activities, and Job Zone information contained in the O*NET summary report to gain an understanding of what is generally required for vocational preparation and performance in that occupation.

Enter the O*NET education and experience requirements on the Worksheet.

Step 2 – Complete the Experience Section of the Worksheet

Compare the overall experience described in the O*NET Job Zone to the years of experience required by the employer on the prevailing wage determination request form.

For occupations contained in Job Zone 1, if the employer's experience requirement is equivalent to that described in an:

- SVP of 1 (experience requirement of a short duration), enter a 0 in the Wage Level Column.

- SVP of 2 (experience requirement of anything beyond short duration and up to 1 month), enter a 1 in the Wage Level Column.

- SVP of 3 (experience requirement of over 1 month up to and including 3 months), enter a 2 in the Wage Level Column.

- SVP of 4 (experience requirement of over 3 months up to and including 6 months), enter a 3 in the Wage Level Column.

Refer to Appendix E: Specific Vocational Preparation (SVP) for an explanation of the experience requirements related to an SVP level.

For occupations in Job Zones 2 through 5, if the employer's experience requirement is:

- At or below the level of experience and SVP range, make no entry in the Wage Level Column.

- In the low end of the experience and SVP range, enter a 1 in the Wage Level Column.

- In the high end of the experience and SVP range, enter a 2 in the Wage Level Column.

- Greater than the experience and SVP range, enter a 3 in the Wage Level Column.

Points should be added for the amount of experience only if the required work experience is above the starting point of the O*NET job zone range. ***Education required for the job is addressed in Step 3 of the worksheet, and therefore the years of education required should not be considered in Step 2. However, if education is considered as an equivalent amount of experience in Step 2, it should not also be considered in Step 3.***

Step 3 – Complete the Education Section of the Worksheet

Compare the education requirement generally required for an occupation to the education requirement in the employer's job offer.

Determine if the level required by the employer's job offer is greater than what is generally required.

Professional Occupations by O*NET-SOC category and the related education and training category code are listed in Appendix A to the Preamble of the PERM regulations. The education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations. A listing of occupations designated as professional occupations and the related education and training category can be found in Appendix D of this document.

For professional occupations:

- If the education required on the prevailing wage determination request form is equal to or less than the usual education contained in Appendix D, make no entry in the Wage Level Column.

- If the education required on the prevailing wage determination request form is more than the usual education contained in Appendix D by one category, enter a 1 on the worksheet in the Wage Level Column.

- If the education required is more than the usual education contained in Appendix D by more than one category, enter a 2 on the worksheet in the Wage Level Column.

Example: If the occupation generally requires a Bachelor's degree and the employer's job offer requires a Master's degree, enter a 1; if the job offer requires a Ph.D., enter a 2.

For all other occupations, use the education level for what 'most of these occupations' require or 'these occupations usually require' described in the O*NET Job Zone for that occupation.

- If the education or training is equal to or less than what 'most occupations require' or the level that these occupations 'usually' require, make no entry in the Wage Level Column.

- If the education or training is more than what 'most occupations require' or the level that these occupations 'usually' require, enter a 1 on the worksheet in the Wage Level Column.

- If the education or training required on the prevailing wage determination request form is more than the level described by what 'some may require,' enter a 2 on the worksheet in the Wage Column.

Experience required for the job is addressed in Step 2 of the worksheet, and therefore the years of experience required should not be considered in Step 3.

Step 4 – Complete the Special Skills and Other Requirements Section of the Worksheet

- Review the job title, job description (duties), and special requirements on the prevailing wage determination request form to identify the tasks, work activities, knowledge, and skills required. An employer's requirement for an occupational license and/or certification should be evaluated to determine if they are indicators of a requirement for special skills warranting the award of a point or points on the worksheet. They may not necessarily be such an indicator.

- Make note of machines, equipment, tools, or computer software used. Consider how the employer's requirements compare to the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples. Consider whether the employer's requirements indicate the need for skills beyond those of an entry-level worker.

- In situations where the employer's requirements are not listed in the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, then the requirements should be evaluated to determine if they represent special skills. The requirement of a specific skill not listed in the

O*NET does not necessitate that a point be added. If the specific skills required for the job are generally encompassed by the O*NET description for the position, no point should be added. However, if it is determined that the requirements are indicators of skills that are beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column.

Note: A language requirement other than English in an employer's job offer shall generally be considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers, and a point should be entered on the worksheet.

It is recognized, however, that there may be circumstances where a foreign language is required for the job, but that requirement does not sufficiently increase the seniority and complexity of the position such that a point must be added for the foreign language requirement (e.g. Specialty Cooks).

- If the employer's job opportunity requires the possession of a license or certification, the NPWHC must give careful consideration to the occupation in question and the education, training, and experience requirements of the license or certification to evaluate whether possession of a license or certification is an indicator that the offer of employment is for an experienced worker.

- An employer's requirement for the possession of an occupational license or certification does not constitute a situation where a point must automatically be awarded. The NPWHC should look at the employer's job description and stated requirements to evaluate, along with other factors, whether the position is closely supervised, involves only moderately complex duties, and allows limited exercise of independent judgment. If the license or certification is a normal requirement to perform the job duties as an entry level worker, no point should be added on the worksheet in the Wage Column, e.g., attorney, teacher, registered nurse.

- Some occupations have more than one license and the requirements of the license provide an indicator of the level of independent judgment and complexity of tasks required of the licensee, e.g., Journeyman Plumber or Master Plumber. The NPWHC must consider the education, training, and experience requirements of the license or certification to determine when points should be entered on the worksheet in the Wage Column.

If a substantial amount of work experience, education, or training is required to obtain a license or certification and this results in the total amount of necessary work experience being on the high end of the O*NET job zone range, ***a point could be added either in Step 2 for the work experience, or in Step 3 for the education or training, or in Step 4 for the license. A point or points should not be added in every step***.
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Step 5 – Complete the Supervisory Duties Section of the Worksheet

- Review the prevailing wage determination request form to determine the number or range of people to be supervised to determine if there is a supervisory requirement; and

- If the number is greater than 0, then enter a 1 on the worksheet in the Wage Level Column.

Exception: If supervision is a customary duty for the O*NET occupation (e.g., First-line Supervisors/Managers occupations), do not enter a 1 on the worksheet in the Wage Level Column.

Note: Previous guidance suggested that an employer's job offer that included supervisory duties should be assigned the higher of the two previous wage levels. In this new guidance, an employer's job requirement for supervisory duties will not automatically warrant a determination of the highest wage level because the wages for supervisory occupations already account for the supervision of employees. The guidance contained above for evaluating education, experience, and skills required in an employer's job offer should be used to determine the appropriate wage level for supervisory occupations.

Determine the wage level by summing the numbers in the Wage Level Column of the worksheet. The sum total shall equal the wage for the prevailing wage determination. If the sum total is greater than 4, then the wage level shall be Level 4.

The process described above should not be implemented in an automated fashion. The NPWHC must exercise judgment when making prevailing wage determinations. The wage level should be commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity.

3. Foreign Labor Certification Data Center On-line Wage Library

Use the On-line Wage Library (OWL) found on the Foreign Labor Certification Data Center website (http://www.flcdatacenter.com/) to select the prevailing wage for the occupation.

Use the OES Search Wizard to:

- Select the state and geographic area from the drop-down lists.
- Select the occupation using the first 6 digits of the O*NET-SOC code, OR
- Select the occupation from the drop-down list or enter the title in the key word search box.
- Select a data year.
- Select a data source.

- Click on search.

C. Wage Determinations Using Employer-Provided Wage Surveys

If the job opportunity is in an occupation not covered by a collective bargaining agreement, the NPWHC shall also consider wage data that has been furnished by the employer; i.e., wage data contained in a published wage survey that has been provided by the employer, or wage data contained in a survey that has been conducted or funded by the employer. The employer can elect to use a current wage determination in the area of intended employment under the Davis-Bacon or McNamara-O'Hara Service Contract Acts. An employer survey can be submitted either initially or after the NPWHC issues a prevailing wage determination. If the employer provides a wage survey after the NPWHC makes a prevailing wage determination, the new wage data from the employer-provided survey shall be considered a new prevailing wage request.

The use of such employer-provided wage data is an employer option. However, in each case where the employer submits wage data for consideration, it will be incumbent upon the employer to make a written showing that the survey or other wage data meet the criteria outlined below. The employer must provide the NPWHC with enough information about the survey methodology (e.g., sample size and source, sample selection procedures, survey job descriptions) to allow the NPWHC to make a determination with regard to the adequacy of the data provided and the validity of the statistical methodology used in conducting the survey.

Criteria for Employer-Provided Surveys

(1) The survey must be recent.

If the employer submits a published survey, that survey must:

- have been published within 24 months of the date of submission of the prevailing wage request;
- be the most current edition of the survey; and
- be based on data collected within 24 months of the date of the publication of the survey.

If the employer submits a survey conducted by the employer, the survey must be based on data collected within 24 months of the date of submission of the prevailing wage request.

(2) The wage data submitted by the employer must reflect the area of intended employment.

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment.

- If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment.

- All locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distances for prevailing wage purposes.

- The borders of PMSAs, MSAs, or CMSAs are not controlling in the identification of the normal commuting area; an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance.

The terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB); however, ETA will continue to recognize the use of these area concepts as well as their replacements.

(3) The job description applicable to wage data submitted by the employer must be adequate to determine that the data represents workers who are similarly employed. *Similarly employed* means jobs requiring substantially similar levels of skills.
(4) The wage data must have been collected across industries that employ workers in the occupation.

(5) The prevailing wage determination should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment. If the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, the median wage shall be used as the basis for making a prevailing wage determination.

(6) In all cases where an employer provides the NPWHC with wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample), including its adherence to these standards for the acceptability of employer-provided wage data. It is important to note that a prevailing wage determination based upon the acceptance of employer-provided wage data for the specific job opportunity at issue does not supersede the OES wage rate for subsequent requests for prevailing wage data in that occupation.

Information from employers that consists merely of speculation, subjective impressions, or pleas that it cannot afford to pay the prevailing wage rate determined by the NPWHC

will not be taken into consideration in making a wage determination. If the NPWHC does not find the employer-provided wage survey acceptable, the NPWHC must notify the employer in writing and include the reasons the survey was not found to be acceptable. Upon receiving this determination, the employer may provide supplemental information, file a new request, or appeal the determination.

In issuing wage determinations, the NPWHC may be required to convert an hourly rate to a weekly, monthly, or annual rate, or to convert a weekly, monthly, or annual rate to an hourly rate. As a matter of policy, such conversions shall be based on 2,080 hours of work in a year.

Factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR 655.10 and 20 CFR 656.40. As noted above, the relevant factors are the job, the geographic locality of the job, and the level of skill required to perform independently on the job.

III. Procedures

A. Filing

Employers must request and receive the determination of the prevailing wage from the NPWHC. The NPWHC shall enter its wage determination on the ETA Form 9141 return the form to the employer. To enable NPWHC to provide employers or their representatives accurate wage determinations that take into account the employer's particular job and its requirements, all requests for and responses to wage determinations will be in writing. If the employer does not present sufficient information with its request – the particulars of the job offer or sufficient information about employer-provided wage data – the NPWHC shall request such additional information from the employer as may be necessary to make the determination.

B. NPWHC Response

The NPWHC responses shall state the specific wage rate applicable to the employer's job opportunity and indicate the source of such information. The response shall also specify the dates the prevailing wage is valid – the validity period begin and end dates.

It is important to note that §655.10 and 656.40 provide that a prevailing wage determination for labor certification purposes shall not permit an employer to pay a wage lower than that required under any other Federal, state, or local law. For example, if the wage rate in the OES or employer-provided survey is lower than the Federal, state, or local minimum wage, the response to the employer’s request should indicate that the employer must offer and pay at least the minimum wage provided by

Federal, state, or local law, whichever is higher. Since the OES wage data or data in an employer-provided survey are collected in the year or years prior to the data being available to the NPWHC, this may occur in some instances.

C. NPWHC Responsibilities

It is incumbent upon NPWHC to organize the prevailing wage function and establish controls that will enable them to provide information regarding a particular prevailing wage determination, to answer questions if it is required in an enforcement action conducted by the Department of Labor, and to provide information to the certifying officer to be used before the Board of Alien Labor Certification Appeals. Requests from employers for wage determinations shall be filed in writing with the organizational subcomponent of the NPWHC responsible for alien labor certification prevailing wage determinations. Only that component should respond to requests for wage information for immigration purposes. A dated copy of the prevailing wage determination provided to the employer should be maintained by the NPWHC for two years. The relevant portions of an employer-provided survey must also be maintained with the determination for the requisite period.

IV. Challenges to Prevailing Wage Determinations

The employer has the option of requesting a redetermination from the CO who issued the determination by submitting supplemental documentation under 655.10(g) or 656.40(h).

The employer may challenge the CO's PWD by requesting review by the Center Director under 655.11(a) or 656.41(a).

The employer may appeal the Center Director's determination by requesting review by the Board of Alien Labor Certification Appeals under 655.11(e) or 656.41(d).

The NPWHC must administer the above requests in accordance with the specific provisions of the appropriate regulation.

Appendix A: OES Prevailing Wage Guidance

All employer applications for a prevailing wage determination shall initially be considered an entry level or Level I wage. The employer's requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in O*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level.

All prevailing wage determinations start with a Level I determination; therefore, the check sheet and worksheet have a 1 entered in the Wage Level Column.

Step 1 – Enter the O*NET Requirements on the Worksheet

- Use the O*NET OnLine 'Find Occupations' feature (http://online.onetcenter.org) to determine the appropriate O*NET-SOC code based on the job title provided on the prevailing wage determination request form.

- Enter the job title from the employer's job offer into the Quick Search box and click on Go.

- Select the O*NET occupation that most closely matches the employer's request from the resulting list of occupations.

- Review the Tasks, Knowledge, Work Activities, and Job Zone information contained in the O*NET summary report to gain an understanding of what is generally required for vocational preparation and performance in that occupation.

Enter the O*NET education and experience requirements on the Worksheet.

Step 2 – Complete the Experience Section of the Worksheet

Compare the overall experience described in the O*NET Job Zone to the years of experience required by the employer on the prevailing wage determination request form.

For occupations contained in Job Zone 1, if the employer's experience requirement is equivalent to that described in an:

- SVP of 1 (experience requirement of a short duration), enter a 0 in the Wage Level Column.

- SVP of 2 (experience requirement of anything beyond short duration and up to 1 month), enter a 1 in the Wage Level Column.

- SVP of 3 (experience requirement of over 1 month up to and including 3 months), enter a 2 in the Wage Level Column.

- SVP of 4 (experience requirement of over 3 months up to and including 6 months), enter a 3 in the Wage Level Column.

Refer to Appendix E: Specific Vocational Preparation (SVP) for an explanation of the experience requirements related to an SVP level.

For occupations in Job Zones 2 through 5, if the employer's experience requirement is:

- At or below the level of experience and SVP range, make no entry in the Wage Level Column.

- In the low end of the experience and SVP range, enter a 1 in the Wage Level Column.

- In the high end of the experience and SVP range, enter a 2 in the Wage Level Column.

- Greater than the experience and SVP range, enter a 3 in the Wage Level Column.

Points should be added for the amount of experience only if the required work experience is above the starting point of the O*NET job zone range. ***Education required for the job is addressed in Step 3 of the worksheet, and therefore the years of education required should not be considered in Step 2. However, if education is considered as an equivalent amount of experience in Step 2, it should not also be considered in Step 3.***

Step 3 – Complete the Education Section of the Worksheet

Compare the education requirement generally required for an occupation to the education requirement in the employer's job offer.

Determine if the level required by the employer's job offer is greater than what is generally required.

Professional Occupations by O*NET-SOC category and the related education and training category code are listed in Appendix A to the Preamble of the PERM regulations. The education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations. A listing of occupations designated as professional occupations and the related education and training category can be found in Appendix D of this document.

For professional occupations:

- If the education required on the prevailing wage determination request form is equal to or less than the usual education contained in Appendix D, make no entry in the Wage Level Column.

- If the education required on the prevailing wage determination request form is more than the usual education contained in Appendix D by one category, enter a 1 on the worksheet in the Wage Level Column.

- If the education required is more than the usual education contained in Appendix D by more than one category, enter a 2 on the worksheet in the Wage Level Column.

Example: If the occupation generally requires a Bachelor's degree and the employer's job offer requires a Master's degree, enter a 1; if the job offer requires a Ph.D., enter a 2.

For all other occupations, use the education level for what 'most of these occupations' require or 'these occupations usually require' described in the O*NET Job Zone for that occupation.

- If the education or training is equal to or less than what 'most occupations require' or the level that these occupations 'usually' require, make no entry in the Wage Level Column.

- If the education or training is more than what 'most occupations require' or the level that these occupations 'usually' require, enter a 1 on the worksheet in the Wage Level Column.

- If the education or training required on the prevailing wage determination request form is more than the level described by what 'some may require,' enter a 2 on the worksheet in the Wage Column.

Experience required for the job is addressed in Step 2 of the worksheet, and therefore the years of experience required should not be considered in Step 3.

Step 4 – Complete the Special Skills and Other Requirements Section of the Worksheet

- Review the job title, job description (duties), and special requirements on the prevailing wage determination request form to identify the tasks, work activities, knowledge, and skills required. An employer's requirement for an occupational license and/or certification should be evaluated to determine if they are indicators of a requirement for special skills warranting the award of a point or points on the worksheet. They may not necessarily be such an indicator.

- Make note of machines, equipment, tools, or computer software used. Consider how the employer's requirements compare to the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples. Consider whether the employer's requirements indicate the need for skills beyond those of an entry-level worker.

- In situations where the employer's requirements are not listed in the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, then the requirements should be evaluated to determine if they represent special skills. The requirement of a specific skill not listed in the O*NET does not necessitate that a point be added. If the specific skills required for the job are generally encompassed by the O*NET description for the position, no point should be added. However, if it is determined that the requirements are indicators of skills that are beyond those of an entry level worker, consider whether a point should be entered on the worksheet in the Wage Level Column.

Note: A language requirement other than English in an employer's job offer shall generally be considered a special skill for all occupations, with the exception of Foreign Language Teachers and Instructors, Interpreters, and Caption Writers, and a point should be entered on the worksheet.

It is recognized, however, that there may be circumstances where a foreign language is required for the job, but that requirement does not sufficiently increase the seniority and complexity of the position such that a point must be added for the foreign language requirement (e.g. Specialty Cooks).

- If the employer's job opportunity requires the possession of a license or certification, the NPWHC must give careful consideration to the occupation in question and the education, training, and experience requirements of the license or certification to evaluate whether possession of a license or certification is an indicator that the offer of employment is for an experienced worker.

- An employer's requirement for the possession of an occupational license or certification does not constitute a situation where a point must automatically be awarded. The NPWHC should look at the employer's job description and stated requirements to evaluate, along with other factors, whether the position is closely supervised, involves only moderately complex duties, and allows limited exercise of independent judgment. If the license or certification is a normal requirement to perform the job duties as an entry level worker, no point should be added on the worksheet in the Wage Column, e.g., attorney, teacher, registered nurse.

- Some occupations have more than one license and the requirements of the license provide an indicator of the level of independent judgment and complexity of tasks required of the licensee, e.g. Journeyman Plumber or Master Plumber. The NPWHC must consider the education, training and experience requirements of the license or certification to determine when points should be entered on the worksheet in the Wage Column.

If a substantial amount of work experience, education or training is required to obtain a license or certification and this results in the total amount of necessary work experience being on the high end of the O*NET job zone range, ***a point could be added either in Step 2 for the work experience, or Step 3 for the education or training, or in Step 4 for the license. A point or points should not be added in every step***.

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Step 5 – Complete the Supervisory Duties Section of the Worksheet

- Review the prevailing wage determination request form to determine the number or range of people to be supervised to determine if there is a supervisory requirement; and

- If the number is greater than 0, then enter a 1 on the worksheet in the Wage Level Column.

Exception: If supervision is a customary duty for the O*NET occupation (e.g., First-line Supervisors/Managers occupations), do not enter a 1 on the worksheet in the Wage Level Column.

Note: Previous guidance suggested that an employer's job offer that included supervisory duties should be assigned the higher of the two previous wage levels. In this new guidance, an employer's job requirement for supervisory duties will not automatically warrant a determination of the highest wage level because the wages for supervisory occupations already account for the supervision of employees. The guidance contained above for evaluating education, experience, and skills required in an employer's job offer should be used to determine the appropriate wage level for supervisory occupations.

Determine the wage level by summing the numbers in the Wage Level Column of the worksheet. The sum total shall equal the wage for the prevailing wage determination. If the sum total is greater than 4, then the wage level shall be Level 4.

The process described above should not be implemented in an automated fashion. The NPWHC must exercise judgment when making prevailing wage determinations. The wage level should be commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity.

Appendix B: Check Sheet for Use in Determining OES Wage Level

Indicator	Job Offer Requirements	O*NET-Usual Requirements	Instruction	Wage Level Result
Step 1. Requirements				1
Step 2. Experience	Enter the years of experience required by the employer.	Job Zone (overall experience, job training)	If the years of required experience in the job order are greater than the low end of the O*NET usual requirements, enter 1, 2, or 3.	
Step 3. Education	Enter the education or training required by the employer.	Professional Occupations Appendix D Other occupations - Job Zone (overall experience, job training, education)	If the years of required education in the job order are greater than the Categories for Professional Occupations OR O*NET usual requirements for non-professional occupations, enter 1 or 2.	
Step 4. Special Skills (Y/N)	Note special requirements from the job description or other special requirements including licensure or certification.	O*NET Tasks, Knowledge, and Work Activities. National or state licensing/ certification requirements.	Consider if skills, knowledge, work activities, tasks, licensure or certification requirements indicate a higher level of complexity or decision-making. Enter 1 or 2 as appropriate.	
Step 5. Supervisory duties (Y/N)	Note any supervisory duties indicated in the job duties or description.		If Yes, enter a 1 – UNLESS supervision is generally required by the O*NET occupation.	
			Sum:	

Appendix C: Worksheet for Use in Determining OES Wage Level

Employer's Job Title:

O*NET Title: **Date:**

O*NET Code: **Reviewer:**

Indicator	Job Offer Requirements	O*NET-Usual Requirements	Comments	Wage Level Result
Step 1. Requirements				1
Step 2. Experience				
Step 3. Education				
Step 4. Special Skills and Other Requirements? (Y/N)				
Step 5. Supervisory duties (Y/N)				
			Sum:	

Appendix D: Professional Occupations
Education and Training Categories

Code	Definition
1	First professional degree. Completion of the academic program usually requires at least 6 years of full-time equivalent academic study, including college study prior to entering the professional degree program.
2	Doctoral degree. Completion of the degree program usually requires at least 3 years of full-time equivalent academic work beyond the bachelor's degree.
3	Master's degree. Completion of the degree program usually requires 1 or 2 years of full-time equivalent study beyond the bachelor's degree.
4	Work experience, plus a bachelor's or higher degree. Most occupations in this category are managerial occupations that require experience in a related non-managerial position.
5	Bachelor's degree. Completion of the degree program generally requires at least 4 years but not more than 5 years of full-time equivalent academic work.

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
21-2011.00	Clergy	1
23-1011.00	Lawyers	1
29-1011.00	Chiropractors	1
29-1021.00	Dentists, General	1
29-1022.00	Oral and Maxillofacial Surgeons	1
29-1023.00	Orthodontists	1
29-1024.00	Prosthodontists	1
29-1041.00	Optometrists	1
29-1051.00	Pharmacists	1
29-1061.00	Anesthesiologists	1
29-1062.00	Family and General Practitioners	1
29-1063.00	Internists, General	1
29-1064.00	Obstetricians and Gynecologists	1
29-1065.00	Pediatricians, General	1
29-1066.00	Psychiatrists	1
29-1067.00	Surgeons	1
29-1081.00	Podiatrists	1

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
29-1131.00	Veterinarians	1
15-1011.00	Computer and Information Scientists, Research	2
19-1021.01	Biochemists	2
19-1021.02	Biophysicists	2
19-1022.00	Microbiologists	2
19-1042.00	Medical Scientists, Except Epidemiologists	2
19-2011.00	Astronomers	2
19-2012.00	Physicists	2
19-3031.00	Clinical, counseling, and school psychologists	2
19-3031.01	Educational Psychologists	2
19-3031.02	Clinical Psychologists	2
19-3031.03	Counseling Psychologists	2
25-1021.00	Computer Science Teachers, Postsecondary	2
25-1022.00	Mathematical Science Teachers, Postsecondary	2
25-1032.00	Engineering Teachers, Postsecondary	2
25-1041.00	Agricultural Sciences Teachers, Postsecondary	2
25-1042.00	Biological Science Teachers, Postsecondary	2
25-1043.00	Forestry and Conservation Science Teachers, Postsecondary	2
25-1052.00	Chemistry Teachers, Postsecondary	2
25-1054.00	Physics Teachers, Postsecondary	2
25-1071.00	Health Specialties Teachers, Postsecondary	2
25-1072.00	Nursing Instructors and Teachers, Postsecondary	2
25-1121.00	Art, Drama, and Music Teachers, Postsecondary	2
25-1191.00	Graduate Teaching Assistants	2
15-2021.00	Mathematicians	3
15-2031.00	Operations Research Analysts	3
15-2041.00	Statisticians	3
19-1041.00	Epidemiologists	3
19-2041.00	Environmental Scientists and Specialists, Including Health	3
19-2042.00	Geoscientists, Except Hydrologists and Geographers	3
19-2042.01	Geologists	3
19-2043.00	Hydrologists	3
19-3011.00	Economists	3
19-3021.00	Market Research Analysts	3
19-3022.00	Survey Researchers	3
19-3032.00	Industrial-Organizational Psychologists	3
19-3041.00	Sociologists	3
19-3051.00	Urban and Regional Planners	3
19-3091.01	Anthropologists	3

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
19-3091.02	Archeologists	3
19-3092.00	Geographers	3
19-3093.00	Historians	3
19-3094.00	Political Scientists	3
21-1011.00	Substance Abuse and Behavioral Disorder Counselors	3
21-1012.00	Educational, Vocational, and School Counselors	3
21-1013.00	Marriage and Family Therapists	3
21-1014.00	Mental Health Counselors	3
21-1015.00	Rehabilitation Counselors	3
21-1023.00	Mental Health and Substance Abuse Social Workers	3
21-1091.00	Health Educators	3
25-4011.00	Archivists	3
25-4012.00	Curators	3
25-4021.00	Librarians	3
25-9031.00	Instructional Coordinators	3
29-1121.00	Audiologists	3
29-1123.00	Physical Therapists	3
29-1127.00	Speech-Language Pathologists	3
11-1011.00	Chief Executives	4
11-1011.01	Government Service Executives	4
11-1011.02	Private Sector Executives	4
11-1021.00	General and Operations Managers	4
11-2011.00	Advertising and Promotions Managers	4
11-2021.00	Marketing Managers	4
11-2022.00	Sales Managers	4
11-2031.00	Public Relations Managers	4
11-3011.00	Administrative Services Managers	4
11-3021.00	Computer and Information Systems Managers	4
11-3031.00	Financial Managers	4
11-3031.01	Treasurers, Controllers, and Chief Financial Officers	4
11-3031.02	Financial Managers, Branch or Department	4
11-3040.00	Human Resources Managers	4
11-3041.00	Compensation and Benefits Managers	4
11-3042.00	Training and Development Managers	4
11-3061.00	Purchasing Managers	4
11-9011.00	Farm, Ranch, and Other Agricultural Managers	4
11-9011.01	Nursery and Greenhouse Managers	4
11-9011.02	Agricultural Crop Farm Managers	4
11-9011.03	Fish Hatchery Managers	4

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
11-9031.00	Education Administrators, Preschool and Child Care Center/Program	4
11-9032.00	Education Administrators, Elementary and Secondary School	4
11-9033.00	Education Administrators, Postsecondary	4
11-9041.00	Engineering Managers	4
11-9111.00	Medical and Health Services Managers	4
11-9121.00	Natural Sciences Managers	4
13-1011.00	Agents and Business Managers of Artists, Performers, and Athletes	4
13-1111.00	Management Analysts	4
15-2011.00	Actuaries	4
23-1021.00	Administrative Law Judges, Adjudicators, and Hearing Officers	4
23-1022.00	Arbitrators, Mediators, and Conciliators	4
23-1023.00	Judges, Magistrate Judges, and Magistrates	4
25-2023.00	Vocational Education Teachers, Middle School	4
25-2032.00	Vocational Education Teachers, Secondary School	4
27-1011.00	Art Directors	4
27-2012.00	Producers and Directors	4
27-2012.01	Producers	4
27-2012.02	Directors - Stage, Motion Pictures, Television, and Radio	4
27-2012.03	Program Directors	4
27-2012.04	Talent Directors	4
27-2012.05	Technical Directors/Managers	4
27-2041.00	Music Directors and Composers	4
27-2041.01	Music Directors	4
27-2041.02	Music Arrangers and Orchestrators	4
27-2041.03	Composers	4
27-3020.00	News Analysts, Reporters and Correspondents	4
27-3021.00	Broadcast News Analysts	4
27-3022.00	Reporters and Correspondents	4
11-3051.00	Industrial Production Managers	5
11-9021.00	Construction Managers	5
11-9141.00	Property, Real Estate, and Community Association Managers	5
11-9151.00	Social and Community Service Managers	5
13-1071.00	Employment, Recruitment, and Placement Specialists	5
13-1071.01	Employment Interviewers, Private or Public Employment Service	5

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
13-1071.02	Personnel Recruiters	5
13-1072.00	Compensation, Benefits, and Job Analysis Specialists	5
13-1073.00	Training and Development Specialists	5
13-1121.00	Meeting and Convention Planners	5
13-2011.01	Accountants	5
13-2011.02	Auditors	5
13-2031.00	Budget Analysts	5
13-2041.00	Credit Analysts	5
13-2051.00	Financial Analysts	5
13-2052.00	Personal Financial Advisors	5
13-2053.00	Insurance Underwriters	5
13-2061.00	Financial Examiners	5
13-2071.00	Loan Counselors	5
13-2072.00	Loan Officers	5
13-2081.00	Tax Examiners, Collectors, and Revenue Agents	5
15-1021.00	Computer Programmers	5
15-1031.00	Computer Software Engineers, Applications	5
15-1032.00	Computer Software Engineers, Systems Software	5
15-1051.00	Computer Systems Analysts	5
15-1061.00	Database Administrators	5
15-1071.00	Network and Computer Systems Administrators	5
15-1071.01	Computer Security Specialists	5
15-1081.00	Network Systems and Data Communications Analysts	5
17-1011.00	Architects, Except Landscape and Naval	5
17-1012.00	Landscape Architects	5
17-1021.00	Cartographers and Photogrammetrists	5
17-1022.00	Surveyors	5
17-2011.00	Aerospace Engineers	5
17-2021.00	Agricultural Engineers	5
17-2031.00	Biomedical Engineers	5
17-2041.00	Chemical Engineers	5
17-2051.00	Civil Engineers	5
17-2061.00	Computer Hardware Engineers	5
17-2071.00	Electrical Engineers	5
17-2072.00	Electronics Engineers, Except Computer	5
17-2081.00	Environmental Engineers	5
17-2111.00	Health and Safety Engineers, Except Mining Safety Engineers and Inspectors	5
17-2111.01	Industrial Safety and Health Engineers	5
17-2111.02	Fire-Prevention and Protection Engineers	5

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
17-2111.03	Product Safety Engineers	5
17-2112.00	Industrial Engineers	5
17-2121.00	Marine Engineers and Naval Architects	5
17-2121.01	Marine Engineers	5
17-2121.02	Marine Architects	5
17-2131.00	Materials Engineers	5
17-2141.00	Mechanical Engineers	5
17-2151.00	Mining and Geological Engineers, Including Mining Safety Engineers	5
17-2161.00	Nuclear Engineers	5
17-2171.00	Petroleum Engineers	5
19-1010.00	Agricultural and Food Scientists	5
19-1011.00	Animal Scientists	5
19-1012.00	Food Scientists and Technologists	5
19-1013.01	Plant Scientists	5
19-1013.02	Soil Scientists	5
19-1020.00	Biological Scientists	5
19-1020.01	Biologists	5
19-1023.00	Zoologists and Wildlife Biologists	5
19-1031.00	Conservation Scientists	5
19-1031.01	Soil Conservationists	5
19-1031.02	Range Managers	5
19-1031.03	Park Naturalists	5
19-1032.00	Foresters	5
19-2021.00	Atmospheric and Space Scientists	5
19-2031.00	Chemists	5
19-2032.00	Materials Scientists	5
21-1021.00	Child, Family, and School Social Workers	5
21-1022.00	Medical and Public Health Social Workers	5
21-1092.00	Probation Officers and Correctional Treatment Sp	5
21-2021.00	Directors, Religious Activities and Education	5
23-2092.00	Law Clerks	5
25-2012.00	Kindergarten Teachers, Except Special Education	5
25-2021.00	Elementary School Teachers, Except Special Education	5
25-2022.00	Middle School Teachers, Except Special and Vocational Education	5
25-2031.00	Secondary School Teachers, Except Special and Vocational Education	5
25-2041.00	Special Education Teachers, Preschool, Kindergarten and Elementary	5
25-2042.00	Special Education Teachers, Middle School	5

O*NET-SOC Code	O*NET-SOC Title	Education & Training Category Code
25-2043.00	Special Education Teachers, Secondary School	5
25-3011.00	Adult Literacy, Remedial Education, and GED Teachers and Instructors	5
25-4013.00	Museum Technicians and Conservators	5
25-9021.00	Farm and Home Management Advisors	5
27-1014.00	Multi-Media Artists and Animators	5
27-1021.00	Commercial and Industrial Designers	5
27-1022.00	Fashion Designers	5
27-1024.00	Graphic Designers	5
27-1025.00	Interior Designers	5
27-1027.00	Set and Exhibit Designers	5
27-1027.01	Set Designers	5
27-1027.02	Exhibit Designers	5
27-3031.00	Public Relations Specialists	5
27-3041.00	Editors	5
27-3042.00	Technical Writers	5
27-3043.00	Writers and Authors	5
27-4032.00	Film and Video Editors	5
29-1031.00	Dietitians and Nutritionists	5
29-1071.00	Physician Assistants	5
29-1122.00	Occupational Therapists	5
29-1125.00	Recreational Therapists	5
29-2011.00	Medical and Clinical Laboratory Technologists	5
29-2091.00	Orthotists and Prosthetists	5
29-9010.00	Occupational Health and Safety Specialists and Technicians	5
29-9091.00	Athletic Trainers	5
33-3021.03	Criminal Investigators and Special Agents	5
39-9032.00	Recreation Workers	5
41-3021.00	Insurance Sales Agents	5
41-3031.01	Sales Agents, Securities and Commodities	5
41-3031.02	Sales Agents, Financial Services	5
41-9031.00	Sales Engineers	5
53-2011.00	Airline Pilots, Copilots, and Flight Engineers	5

Appendix E: SPECIFIC VOCATIONAL PREPARATION (SVP)

Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

This training may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

Specific vocational training includes training given in any of the following circumstances:

a. Vocational education (high school; commercial or shop training; technical school; art school; and that part of college training which is organized around a specific vocational objective);

b. Apprenticeship training (for apprenticeable jobs only);

c. In-plant training (organized classroom study provided by an employer);

d. On-the-job training (serving as learner or trainee on the job under the instruction of a qualified worker);

e. Essential experience in other jobs (serving in less responsible jobs which lead to the higher grade job or serving in other jobs which qualify).

The following is an explanation of the various levels of specific vocational preparation:

Level	*Time*
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months
4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years

Note: The levels of this scale are mutually exclusive and do not overlap.

Source: *DICTIONARY OF OCCUPATIONAL TITLES (4th Ed., Rev. 1991)* -- APPENDIX C

Appendix F: Check Sheet for Employer-Provided Wage Surveys

Employer-provided surveys cannot be considered if a union agreement covers the wage rates for the job opportunity where the worker will be employed.

Current wage determination in the area under the Davis-Bacon or McNamara-O'Hara Service Contract Acts can be submitted.

Published surveys or surveys conducted by employers can be submitted.

Written documentation on the methodology of how the survey was conducted and the validity of the statistical methodology used to determine the wage must be made available when submitting a survey for consideration.

Surveys Must Meet the Following Criteria

- Data on which the wage is based must have been collected within 24 months of the publication date of the survey or, if the employer itself conducted the survey, within 24 months of the date the employer submits the survey to the NPWHC.

- A published survey must have been published within 24 months of the date of submission and it must be the most current edition of the survey with wage data that meet the criteria under this section.

- The survey data must represent similar jobs in the area of intended employment - the area within normal commuting distance of the place (address) of intended employment. The area surveyed can be expanded if the employer can show that there are an insufficient number of workers in the original area.
    - If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment.
    - All locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distances for prevailing wage purposes.
    - The borders of PMSAs, MSAs, or CMSAs are not controlling in the identification of the normal commuting area; an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance.

- The survey's job description must match the job description contained in the employer's request for acceptance to use the survey or other wage data for prevailing wage purposes.
    - The job description submitted on the request for acceptance of an employer-provided survey or other wage data will be used in determining the appropriate level of skill to be applied.

- Cross Industry Wage Data - The wage data must have been collected across industries that employ workers in the occupation.

- The survey should produce an arithmetic mean (weighted average) of wages for workers in the appropriate occupational classification in the area of intended employment. If a mean is not available, the median can be used.

- The survey must identify a statistically valid methodology that was used to collect the data.

Suggested Survey Methodology

The following are suggested actions that should be taken to conduct a valid wage survey:

Obtain a valid directory of employers in the area of intended employment (or expanded area) that would most likely employ the occupation to be surveyed.

Identify the industries in which the occupation is likely to be found. Use the industry/occupation matrix available from the state's labor market information agency.

Count (or estimate) the number of employers in the applicable area.

Decide how many employers must be contacted to produce usable wage results from at least three employers and at least 30 workers. Results for 30 workers is the minimum acceptable sample; for most occupations there should be wage data for many more workers.

Divide the number of employers to be contacted (the sample) by the number of employers in the applicable industry (the universe).

Use the number calculated in this last step to methodically select a random sample of employers to contact. For example, if the number is one-tenth, select every tenth employer in the universe or listing of employers in the industry.

Design a survey form which includes: the definition of the particular occupation (see Appendix G for Terms and Definitions), the number of workers in the occupation, and the wage rate.

Contact all the employers in the sample (call, write, or fax) to obtain the wage rate and employment data for the occupation surveyed.

Prepare a summary table of the data collected. There should be columns for: the employer, number of workers, the wage rate, and the product of multiplying the number of workers times the wage rate. There should be a row for each employer that

responded to the survey. Add the data in the column showing the number of workers to get the total number of workers. Add the data in the column showing the product of workers times wage rate.

Calculate the weighed mean by dividing the total product by the total number of workers.

Survey Documentation

Provide documentation to include the:

- Sample frame size and source, sample selection procedures, survey job descriptions, and related information to allow a determination with regard to the adequacy of the data provided and its adherence to the criteria; and
- Methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample).

Appendix G: Prevailing Wage Determination Request Form

This appendix was superseded by putting the ETA Form 9141 into use for all non-agricultural prevailing wage requests as of January 01, 2010. The form and instructions can be found at the OFLC forms web site:
http://www.foreignlaborcert.doleta.gov/form.cfm

The form is at:
http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9141.pdf

The instructions at:
http://www.foreignlaborcert.doleta.gov/pdf/ETA_Form_9141_General_Instructions.pdf

CASE LAW

- Matter of Simeio: https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/04/16/3832.pdf

- Kutty v. U.S. Department of Labor, No. 11-6120 (6th Cir. 2014): https://www.govinfo.gov/content/pkg/USCOURTS-ca6-11-06120/pdf/USCOURTS-ca6-11-06120-0.pdf

Case Law

Matter of Simeio

Matter of SIMEIO SOLUTIONS, LLC

Decided April 9, 2015

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office

(1) A change in the place of employment of a beneficiary to a geographical area requiring a corresponding Labor Condition Application for Nonimmigrant Workers ("LCA") be certified to the U.S. Department of Homeland Security with respect to that beneficiary may affect eligibility for H-1B status; it is therefore a material change for purposes of 8 C.F.R. §§ 214.2(h)(2)(i)(E) and (11)(i)(A) (2014).

(2) When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H−1B petition with the corresponding LCA.

ON BEHALF OF PETITIONER: Candie Tou Clement, Esquire, Clawson, Michigan

The California Service Center Director ("Director") revoked the petitioner's nonimmigrant visa petition and certified the decision to the Administrative Appeals Office ("AAO") for review. The AAO finds that the petitioner has not overcome the specified grounds for revocation.[1] Accordingly, the Director's decision will be affirmed and the petition's approval will be revoked.

I. PROCEDURAL AND FACTUAL BACKGROUND

The petitioner filed a Petition for a Nonimmigrant Worker (Form I-129) to classify the beneficiary as an H−1B temporary nonimmigrant worker pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2012). In support of the petition, the petitioner submitted a certified Department of Labor ("DOL") Labor Condition Application for Nonimmigrant Workers (ETA Form 9035/9035E) ("LCA"). On the Form I-129, the petitioner described itself as an enterprise that provides information technology services. At the time the petition was filed, the beneficiary maintained nonimmigrant status as an

[1] The AAO conducts appellate review on a de novo basis. *See Dor v. Dist. Dir., INS*, 891 F.2d 997, 1002 n.9 (2d Cir. 1989).

F−1 student and was employed by the petitioner pursuant to post-degree optional practical training.

On the Form I-129, in the LCA, and in a letter of support, the petitioner attested that it would employ the beneficiary to serve on an in-house project at the petitioner's facility, with an annual salary of $50,232. The petitioner identified an address in Long Beach, California (Los Angeles-Long Beach-Santa Ana, CA Metropolitan Statistical Area) as the beneficiary's place of employment.[2] The petitioner stated that the beneficiary would provide services for a specific client and emphasized that "[the beneficiary] is and will continue to work from [the petitioner's] Long Beach office." The petitioner did not request other worksites and did not submit an itinerary. *See* 8 C.F.R. § 214.2(h)(2)(i)(B) (2014) (requiring an itinerary for services performed in more than one location). Based upon this record, the Director approved the Form I-129 petition.

After working for the petitioner in H−1B status for approximately 2 months, the beneficiary departed from the United States and applied for an H−1B visa at the United States Embassy in New Delhi, India, based on the approved petition. After interviewing the beneficiary, the Department of State consular officer requested additional documentation, including a letter from the petitioner's client regarding the work to be performed by the beneficiary. The petitioner did not submit the requested documentation and, instead, indicated that the beneficiary provided services to clients not previously identified in the approved petition. The Embassy returned the petition to the Director for review, stating that during the course of the visa interview process, the beneficiary and the petitioner presented information that was not available to the Director at the time the petition was approved.

Thereafter, officers of the United States Citizenship and Immigration Services ("USCIS") conducted a site visit at the petitioner's Long Beach facility, the place of employment specified in the H−1B petition and supporting documents.[3] The officers' site visit report is summarized in

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[2] With certain limited exceptions, the applicable DOL regulations define the term "place of employment" as the worksite or physical location where the work actually is performed by the H−1B nonimmigrant. *See* 20 C.F.R. § 655.715 (2014). The Office of Management and Budget established Metropolitan Statistical Areas to provide nationally consistent geographic delineations for collecting, tabulating, and publishing statistics. *See* 31 U.S.C. § 1104(d) (2012); 44 U.S.C. § 3504(e)(3) (2012); Exec. Order No. 10,253, 16 Fed. Reg. 5605 (June 11, 1951); 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, 75 Fed. Reg. 37,246, 37,246–52 (June 28, 2010) (discussing and defining, inter alia, Metropolitan Statistical Areas).

[3] Although the petitioner bears the burden to establish eligibility for the benefit sought, USCIS may verify information submitted to meet that burden. Agency verification methods may include, but are not limited to, review of public records and information; (continued . . .)

relevant part as follows: Unable to locate the petitioner's office at the address identified in the petition and LCA, the officers ascertained from the property manager that the petitioner had vacated the facility 2 months after the start date of the beneficiary's H−1B employment. The officers then contacted the petitioner's director of operations, the Form I-129 petition signatory, who indicated that the company currently utilized an employee's home as the company address. The officers then visited the company's newly provided address, at which the resident-employee stated that the petitioner employed approximately 45 to 50 people, the beneficiary was assigned to the petitioner's Los Angeles office, and all employees assigned to that office either worked from home or from a client worksite.

Thereafter, the Director issued a notice of intent to revoke the approval of the petition ("NOIR"). The NOIR provided a detailed statement of the related revocation ground and afforded the petitioner an opportunity to provide a rebuttal. *See* 8 C.F.R. § 214.2(h)(11)(iii)(B).

In response, the petitioner confirmed that the beneficiary was no longer working on the project or at the location specified in the original petition. The petitioner stated that the beneficiary's services had been used for "various end users" and that he had worked either out of the petitioner's Long Beach office or from his home office. With its response, the petitioner submitted a new LCA that provided two new worksites—in Camarillo, California (Oxnard-Thousand Oaks-Ventura Metropolitan Statistical Area), and Hoboken, New Jersey (New York-Newark-Jersey City, NY-NJ-PA Metropolitan Statistical Area)—as the beneficiary's places of employment. Both worksites are located in metropolitan statistical areas different from the worksite listed on the original petition.

The Director concluded that the changes in the beneficiary's places of employment constituted a material change to the terms and conditions of employment as specified in the original petition. Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(E), the petitioner was required to file an amended Form I-129 corresponding to a new LCA that reflects these changes. The petitioner failed to file an amended petition, and accordingly, the Director revoked the nonimmigrant visa petition and certified the decision to the AAO.

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contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. *See generally* sections 103, 204, 205, 214, 291 of the Act; 8 U.S.C. §§ 1103, 1154, 1155, 1184, 1361 (2012); 8 C.F.R. § 103.2(b)(7) (2014).

II. LCA AND H–1B VISA PETITION PROCESS

In pertinent part, the Act defines an H–1B nonimmigrant worker as

> an alien . . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . who meets the requirements for the occupation specified in section 214(i)(2) . . . and with respect to whom *the Secretary of Labor determines and certifies to the [Secretary of Homeland Security] that the intending employer has filed with the Secretary [of Labor] an application under section 212(n)(1).*

Section 101(a)(15)(H)(i)(b) of the Act (emphasis added).[4]

In turn, section 212(n)(1)(A)(i) of the Act, 8 U.S.C. § 1182(n)(1)(A)(i) (2012), requires an employer to pay an H–1B worker the higher of either the prevailing wage for the occupational classification in the "area of employment" or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services.[5] *See* 20 C.F.R. § 655.731(a) (2014); *see also Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 422 & n.3 (4th Cir. 2005); *Michal Vojtisek-Lom & Adm'r Wage & Hour Div. v. Clean Air Tech. Int'l, Inc.*, No. 07-097, 2009 WL 2371236, at *8 (Dep't of Labor Admin. Rev. Bd. July 30, 2009).

Implemented through the LCA certification process, section 212(n)(1) is intended to protect United States workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. *See, e.g.*, Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H–1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110–11, 80,202 (Dec. 20, 2000) (Supplementary Information). The LCA currently requires petitioners to describe, inter alia, the number of workers sought, the pertinent visa classification for such workers, their job title and occupational classification, the prevailing wage, the actual rate of pay, and the place(s) of employment.

[4] Pursuant to section 1517 of the Homeland Security Act of 2002 ("HSA"), Pub. L. No. 107-296, 116 Stat. 2135, 2311 (codified at 6 U.S.C. § 557 (2012)), any reference to the Attorney General in a provision of the Act describing functions that were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA "shall be deemed to refer to the Secretary" of Homeland Security. *See also* 6 U.S.C. § 542 note (2012); 8 U.S.C. § 1551 note (2012).

[5] The prevailing wage may be determined based on the arithmetic mean of the wages of workers similarly employed in the area of intended employment. 20 C.F.R. § 655.731(a)(2)(ii) (2014).

To promote the United States worker protection goals of a statutory and regulatory scheme that allocates responsibilities sequentially between DOL and the Department of Homeland Security ("DHS"), a prospective employer must file an LCA and receive certification from DOL before an H−1B petition may be submitted to USCIS. 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b)(2) (2014).[6] If an employer does not submit the LCA to USCIS in support of a new or amended H−B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security. *See* section 101(a)(15)(H)(i)(b) of the Act; 8 C.F.R. § 214.2(h)(4)(i)(B)(1); 20 C.F.R. § 655.700(b); *see also* Labor Condition Applications and Requirements for Employers Using Aliens on H−1B Visas in Specialty Occupations and as Fashion Models, 57 Fed. Reg. 1316, 1318 (Jan. 13, 1992) (Supplementary Information) (discussing filing sequence); Labor Condition Applications and Requirements for Employers Using Aliens on H−1B Visas in Specialty Occupations, 56 Fed. Reg. 37,175, 37,177 (Aug. 5, 1991) (Supplementary Information).

In the event of a material change to the terms and conditions of employment specified in the original petition, the petitioner must file an amended or new petition with USCIS with a corresponding LCA. Specifically, the pertinent regulation requires the following:

> The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H–1C, H–1B, H–2A, or H–2B petition must be accompanied by a current or new Department of Labor determination. *In the case of an H–1B petition, this requirement includes a new labor condition application.*

8 C.F.R. § 214.2(h)(2)(i)(E) (emphasis added). Furthermore, petitioners must "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility" for H−1B status and, if they will continue to employ the beneficiary, file an amended petition. 8 C.F.R. § 214.2(h)(11)(i)(A).

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[6] Upon receiving DOL's certification, the prospective employer then submits the certified LCA to USCIS with an H−1B petition on behalf of a specific worker. 8 C.F.R. § 214.2(h)(2)(i)(A), (2)(i)(E), (4)(iii)(B)(1). DOL reviews LCAs "for completeness and obvious inaccuracies" and will certify the LCA absent a determination that the application is incomplete or obviously inaccurate. Section 212(n)(1)(G)(ii) of the Act. In contrast, USCIS must determine whether the attestations and content of an LCA correspond to and support the H−1B visa petition, including the specific place of employment. 20 C.F.R. § 655.705(b) (2014); *see also* 8 C.F.R. § 214.2(h)(4)(i)(B).

A change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to DHS with respect to that beneficiary may affect eligibility for H−1B status; it is therefore a material change for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E) and (11)(i)(A).[7] When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H−1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E).

III. ANALYSIS

In this matter, the petitioner claimed in both the Form I-129 petition and the certified LCA that the beneficiary's place of employment was located in Long Beach, California (Los Angeles-Long Beach-Santa Ana, CA Metropolitan Statistical Area). After conducting the site visit, USCIS determined that the beneficiary was not employed at that designated place of employment. In response to the Director's NOIR, the petitioner indicated the beneficiary's places of employment as Camarillo, California (Oxnard-Thousand Oaks-Ventura Metropolitan Statistical Area), and Hoboken, New Jersey (New York-Newark-Jersey City, NY-NJ-PA Metropolitan Statistical Area).[8] No other locations were provided.

[7] This interpretation of the regulations clarifies, but does not depart from, the agency's past policy pronouncements that "[t]he mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition, provided the initial petitioner remains the alien's employer and, provided further, the supporting labor condition application remains valid." Memorandum from T. Alexander Aleinikoff, INS Exec. Assoc. Comm'r, Office of Programs (Aug. 22, 1996), at 1–2 (Amended H−1B Petitions), *reprinted in* 73 *Interpreter Releases* No. 35, Sept. 16, 1996, app. III at 1222, 1231–32; *see also* Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,420 (June 4, 1998) (Supplementary Information) (stating in pertinent part that the "proposed regulation would not relieve the petitioner of its responsibility to file an amended petition when required, for example, when the beneficiary's transfer to a new work site necessitates the filing of a new labor condition application"). To the extent any previous agency statements may be construed as contrary to this decision, those statements are hereby superseded. *See, e.g.*, Letter from Efren Hernandez III, Dir., Bus. and Trade Branch, USCIS, to Lynn Shotwell, Am. Council on Int'l Pers., Inc. (Oct. 23, 2003). We need not decide here whether, for purposes of 8 C.F.R. § 214.2(h)(2)(i)(E), there may be material changes in terms and conditions of employment that do not affect the alien's eligibility for H−1B status but nonetheless require the filing of an amended or new petition.

[8] The record indicates that the new places of employment were not short-term placements. *See generally* 20 C.F.R. §§ 655.715, 655.735 (2014). The petitioner did not claim, and the AAO does not find, that these new work locations fall under "non-worksite" locations, as described at 20 C.F.R. § 655.715, or short-term placements or assignments, as described at 20 C.F.R. § 655.735.

A change in the terms and conditions of employment of a beneficiary that may affect eligibility under section 101(a)(15)(H) of the Act is a material change. *See* 8 C.F.R. § 214.2(h)(2)(i)(E); *see also* 8 C.F.R. § 214.2(h)(11)(i)(A) (requiring that a petitioner file an amended petition to notify USCIS of any material changes affecting eligibility of continued employment or be subject to revocation).

Because section 212(n) of the Act ties the prevailing wage to the "area of employment," a change in the beneficiary's place of employment to a geographical area not covered in the original LCA would be material for both the LCA and the Form I-129 visa petition, since such a change may affect eligibility under section 101(a)(15)(H) of the Act. *See, e.g.*, 20 C.F.R. § 655.735(f) (2014). If, for example, the prevailing wage is higher at the new place of employment, the beneficiary's eligibility for continued employment in H−1B status will depend on whether his or her wage for the work performed at the new location will be sufficient. Fundamentally, for an LCA to be effective and correspond to an H−1B petition, it must specify the beneficiary's place(s) of employment.[9]

Here, the Form I-129 and the originally submitted LCA identified the Long Beach, California, facility as the place of employment. The LCA did not cover either the Camarillo, California, or the Hoboken, New Jersey, addresses requested in response to the NOIR. In addition, the petitioner attested on the Form I-129 that it would pay the beneficiary a salary approximately $9,000 less than would be required for the subsequently identified places of employment in Camarillo, California, and Hoboken, New Jersey, contrary to sections 101(a)(15)(H)(i)(b) and 212(n)(1) of the Act.[10] Such changes in the terms and conditions of the beneficiary's employment may, and in this case did, affect eligibility under section 101(a)(15)(H) of the Act.

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[9] A change in the beneficiary's place of employment may impact other eligibility criteria, as well. For example, at the time of filing, the petitioner must have complied with the DOL posting requirements at 20 C.F.R. § 655.734. Additionally, if the beneficiary will be performing services in more than one location, the petitioner must submit an itinerary with the petition listing the dates and locations. 8 C.F.R. § 214.2(h)(2)(i)(B); *see also* 8 C.F.R. § 103.2(b)(1).

[10] The LCAs list the prevailing wage for the designated occupational category as $50,232 per year in Long Beach, California (Los Angeles-Long Beach-Santa Ana, CA Metropolitan Statistical Area); $59,904 per year in Camarillo, California (Oxnard-Thousand Oaks-Ventura Metropolitan Statistical Area); and $59,613 per year in Hoboken, New Jersey (New York-Newark-Jersey City, NY-NJ-PA Metropolitan Statistical Area). On each LCA, the petitioner identified the source of the prevailing wage as the DOL Office of Foreign Labor Certification's Occupational Employment Statistics.

Having materially changed the beneficiary's authorized place of employment to geographical areas not covered by the original LCA, the petitioner was required to immediately notify USCIS and file an amended or new H–1B petition, along with a corresponding LCA certified by DOL, with both documents indicating the relevant change.[11] 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By failing to file an amended petition with a new LCA, or by attempting to submit a preexisting LCA that has never been certified to USCIS with respect to a specific worker, a petitioner may impede efforts to verify wages and working conditions. Full compliance with the LCA and H–1B petition process, including adhering to the proper sequence of submissions to DOL and USCIS, is critical to the United States worker protection scheme established in the Act and necessary for H–1B visa petition approval.

IV. CONCLUSION

It is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361 (2012); *Matter of Skirball Cultural Center*, 25 I&N Dec. 799, 806 (AAO 2012). Here, that burden has not been met. The AAO will affirm the decision of the Director. The Form I-129 petition's approval is revoked pursuant to 8 C.F.R. § 214.2(h)(11)(iii)(A)(1), (A)(3), and (A)(4).[12]

ORDER: The Director's decision is affirmed. The petition is revoked.

[11] Here, the petitioner submitted a new LCA certified for the beneficiary's places of employment in Camarillo, California, and Hoboken, New Jersey, in response to the NOIR. This LCA was not previously certified to USCIS with respect to the beneficiary and, therefore, it had to be submitted to USCIS as part of an amended or new petition before the beneficiary would be permitted to begin working in those places of employment. *See* 8 C.F.R. § 214.2(h)(2)(i)(E).

[12] Since the identified ground for revocation is dispositive of the petitioner's continued eligibility, the AAO need not address any additional issues in the record of proceeding.

Case Law

Kutty v. U.S. Department of Labor,
No. 11-6120 (6th Cir. 2014)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 14a0196p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MOHAN KUTTY, M.D.,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF LABOR,

Defendant-Appellee.

No. 11-6120

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 3:05-cv-510—Thomas W. Phillips, District Judge.

Argued: January 29, 2013

Decided and Filed: August 20, 2014

Before: MOORE, WHITE, and LUCERO, Circuit Judges.*

COUNSEL

ARGUED: Russell Reid Abrutyn, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Troy, Michigan, for Amicus Curiae. W. Tyler Chastain, BERNSTEIN, STAIR & MCADAMS LLP, Knoxville, Tennessee, for Appellant. Geoffrey Forney, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellee. **ON BRIEF:** W. Tyler Chastain, BERNSTEIN, STAIR & MCADAMS LLP, Knoxville, Tennessee, for Appellant. Geoffrey Forney, Paul L. Frieden, Mary E. McDonald, UNITED STATES DEPARTMENT OF LABOR, Washington, D.C., for Appellee. Russell Reid Abrutyn, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, Troy, Michigan, for Amicus Curiae.

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*The Honorable Carlos F. Lucero, Circuit Judge for the United States Court of Appeals for the Tenth Circuit, sitting by designation.

OPINION

HELENE N. WHITE, Circuit Judge. Dr. Mohan Kutty appeals the district court's affirmance of the Department of Labor (DOL) Administrative Review Board's (ARB) determination that he is personally liable for back wages, including expenses physicians hired by his clinics incurred in obtaining their J-1 waivers and H-1B visas, and civil penalties. Kutty ran medical clinics in Tennessee and Florida under several corporate entities. Ten physicians employed by the clinics filed a complaint with the DOL claiming wage violations under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq*. The Administrator of the Wage and Hour Division determined that Kutty and the medical clinics violated numerous INA provisions. An Administrative Law Judge (ALJ) affirmed, found the clinics liable for back wages and the costs of obtaining J-1 waivers and H-1B visas, held Kutty personally liable for the violations, and assessed a civil penalty. The ARB affirmed the ALJ's decision, and the district court dismissed Kutty's petition for review and affirmed the ARB's decision. Kutty appeals and we AFFIRM.

I.

A.

Kutty and his wife jointly own and serve as the only officers and directors of the Center for Internal Medicine, Inc., a Florida corporation. From 1998 to 2000, Kutty opened five medical clinics in rural areas in Tennessee and hired eighteen physicians to staff the Tennessee clinics, seventeen of whom are the subject of this litigation. Kutty used at least twelve wholly-owned corporate identities to employ the Tennessee physicians. Kutty also made all major decisions about the operation of the Tennessee medical clinics: he hired physicians, determined how many staff members would be employed, and determined staff and physician compensation. Either Kutty or his wife signed all paychecks and Kutty handled all billing disputes and employee questions.

The seventeen physicians employed by Kutty originally entered the United States on J-1 nonimmigrant foreign-medical-graduate visas, 8 U.S.C. § 1182(j)(1). These visas allow physicians to remain in the United States for their graduate and medical training, but require them to return to their home country for an aggregate of two years following their J-1 visa's expiration upon completion of their studies. After this two-year period, physicians become eligible to apply for H-1B or L-1 visas, Lawful Permanent Resident status, or a change in nonimmigrant status. *See* 8 U.S.C. § 1182(e). The INA provides, however, that the two-year home-return requirement of the J-1 visas may be waived for physicians when an interested state or federal agency requests J-1 waivers on the physicians' behalf. A J-1 waiver on this basis requires the non-resident physician to submit a waiver application to the U.S. Department of State (with a filing fee) that demonstrates that the physician has a contract to practice medicine for at least three years in an area designated by the Secretary of Health and Human Services as having a shortage of health-care professionals. *See* 8 U.S.C. § 1184(l [letter el])(1); 8 C.F.R. § 212.7(c)(9)(i). Physicians with J-1 waivers are immediately eligible to apply for H-1B visas for nonimmigrants "coming temporarily to the United States to perform services . . . in a specialty occupation." 8 U.S.C. § 1101(a)(15)(H)(i)(b); *see* 8 U.S.C. § 1184(l)(l)(2)(A).

Each of the seventeen physicians Kutty employed obtained a J-1 waiver based on a contract of employment with Kutty to provide medical services in an underserved area. In order to employ H-1B nonimmigrants, employers must complete and file with the DOL a Labor Condition Application (LCA) that provides for wage-level guarantees, and have it certified by the DOL. 20 C.F.R. § 655.700(a)(3). The LCA certifies that the H-1B worker will be paid the greater of either the actual wage level the employer paid to other individuals with similar experience for the type of employment at issue or the prevailing wage level for the occupational classification in the area of employment. 8 U.S.C. § 1182(n)(1)(A)(i)(I)–(II). Kutty, acting as the medical director for the employing corporate entities, signed and filed the LCAs for the physicians, and the DOL certified the applications. The applicable wage rates specified on the LCAs ranged from $52,291 to $115,357.

Kutty attested in the LCAs that the information provided was "true and correct," that he would comply with DOL regulations, and that he would pay the wage rates required by law.

Kutty also signed and filed the physicians' H-1B nonimmigrant-worker petitions, in which he agreed to the terms of the LCAs "for the duration of the alien's authorized period of stay for H-1B employment." The Immigration and Naturalization Service (INS) approved the petitions and changed the visa status of the seventeen physicians from J-1 to H-1B.

Kutty also required the physicians to sign individual employment agreements that were almost identical to one another. Each contract was "contingent upon Employee obtaining a J-1 visa waiver of residency requirement and H-1B visa, Employee's certification by the State of Tennessee, and . . . subject to obtaining local hospital privileges and the necessary HMO, Medicare, and Medicaid approvals;" the physicians were required to devote forty hours per week to the practice of medicine for the Employer for an annual salary of $80,000; the terms of employment varied from three to five years, and could be terminated by Kutty without cause at any time by delivery of a signed and dated written notice of termination sixty days prior to the intended date of termination, or could be terminated immediately upon the occurrence of one or more of several events.[1]

In March 2000, Kutty hired Basvaraj Hooli (Hooli) as the administrator of his Tennessee operations. By late 2000, Hooli became aware that the Medical Clinics were encountering financial difficulties. Hooli visited and monitored the Tennessee clinics and reported to Kutty that the physicians were either absent or arriving late. Kutty and Hooli accused the physicians of lying about how many hours they were working and did not accept the physicians' explanations, for example, that they were visiting patients in the hospital when they were not in the clinic.

In January 2001, Kutty began withholding the physicians' salaries, which he released when they began seeing more patients. An attorney representing eight of the physicians sent

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[1]The events included:

> 10:02. If Employee fails or refuses to comply with any policy, standard or regulation of Employer; or
>
> 10:07. If Employee fails or refuses to faithfully or diligently perform the provisions of this Agreement or the usual and customary duties of employment; or
>
> 10:12. If Employee exhibits undue absenteeism, fails to participate in continuing medical education programs to maintain current CME Certificate[.]

Employment Agreement, Appx. at 757–58.

Kutty a letter demanding "immediate payment of all amounts due, being the difference between the amounts previously paid and the rate of $115,000 per year as set forth in [the LCA.]" The letter warned Kutty that if he did not pay the requested amounts within one week, the physicians would contact the DOL. The letter also informed Kutty that he was prohibited from discriminating against the physicians for complaining about violations of the INA. After receiving the letter, Kutty stopped paying the eight physicians' salaries, except for one partial payment. Kutty continued to pay the physicians who did not join in the letter.

B.

On February 28, 2001, eight of the physicians filed a complaint with the DOL. On March 21, 2001, the Wage and Hour Division of the DOL's Employment Standards Administration conducted an on-site record inspection of the Sumeru Health Care Group, one of Kutty's medical facilities in Tennessee. That day, two additional physicians faxed Kutty a letter demanding back wages, and those physicians were added to the DOL complaint the following day. Kutty fired seven of the ten physicians included in the DOL complaint.

The Administrator of the Wage and Hour Division determined that Kutty and the Medical Clinics had violated numerous provisions of the INA by willfully failing to pay required wages to the physicians, failing to make LCAs available for public examination, failing to maintain payroll records, and retaliating against nine of the physicians for engaging in protected activity under the INA.[2]

Kutty appealed the Administrator's decision and the ALJ assigned to the case conducted hearings over fourteen days in June 2001. After the fourth day of the proceedings, Kutty was admitted to the hospital. The hearings continued in Kutty's absence at the suggestion of his attorney, and Kutty did not attend any additional hearing sessions. During the hearings, the ALJ admitted into evidence Kutty's deposition testimony from a prior related proceeding.

Hearings were scheduled to resume on November 26, 2001. On October 17, 2001, Kutty's counsel filed a motion to withdraw because Kutty had not paid his legal bills and there

[2]The Administrator determined that nine, not seven, physicians were terminated, as she deemed the failure to pay salaries to two physicians who resigned to be constructive discharges.

had been a breakdown in the attorney-client relationship. The ALJ granted the motion to withdraw on November 19, and the hearings resumed on December 4, 2001. At the beginning of the proceedings, the ALJ asked Kutty whether he wished to proceed without an attorney and Kutty stated that he wished to represent himself. Hooli, a non-attorney, was also present as the corporate representative.

The ALJ determined that Kutty and the medical clinics violated the INA by failing to pay required wages to the seventeen physicians, retaliating against nine of the physicians for engaging in protected activity under the INA, failing to make LCAs available for public examination, and failing to maintain payroll records.[3] The ALJ ordered Kutty and the medical clinics to pay back wages, including the costs of obtaining J-1 waivers and H-1B visas, totaling $1,044,294, and assessed $108,800 in civil penalties. In addressing the expenses for obtaining the J-1 waivers, the ALJ reasoned that the expense of obtaining the waivers is an unauthorized business deduction, reducing the wages below the required LCA rates. The ALJ also concluded that Kutty should be held personally liable for the violations because his violation of the INA was willful and because he acted as the alter ego of the corporations named on the LCAs. Finally, the ALJ barred Kutty from employing aliens for two years pursuant to 8 U.S.C. § 1182(n)(2)(C)(ii).

On May 31, 2005, the ARB affirmed the ALJ's decision. Kutty petitioned for review of the ARB's decision.[4] On August 19, 2011, the district court issued an order dismissing Kutty's petition and affirming the ARB's decision. Kutty timely appealed.

II.

This court reviews de novo a district court's determination regarding final agency actions. *See Cole v. Astrue*, 661 F.3d 931, 937 (6th Cir. 2011); *Elaine's Cleaning Serv., Inc. v. United States Dep't. of Labor*, 106 F.3d 726, 728 (6th Cir. 1997). The ARB acts for the Secretary of Labor and is responsible for issuing "final agency decisions." *Sasse v. United States*

[3]No civil penalties were assessed for failure to maintain payroll records.

[4]Kutty petitioned for review to the United States Court of Appeals for the District of Columbia, which transferred the petition to the Eastern District of Tennessee.

Dep't of Labor, 409 F.3d 773, 778 (6th Cir. 2005) (citation omitted). This court will uphold the ARB's decision if it "is supported by substantial evidence," *Cole*, 661 F.3d at 937 (citation omitted), and if the decision is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998). To satisfy the substantial evidence standard, the ARB's decision must be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *ITT Auto v. NLRB,* 188 F.3d 375, 384 (6th Cir. 1999). A decision is not arbitrary or capricious "when it is possible to offer a reasoned, evidence-based explanation for a particular outcome." *R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 548 (6th Cir. 2002) (citations omitted).

This court gives "considerable weight and due deference to [the Secretary of Labor's] interpretation of the statute it administers unless its statutory construction is plainly unreasonable." *Id.* (citations omitted). An agency's interpretation of its own regulations "merit[s] even greater deference than its interpretation of the statute that it administers." *Id.* (citing *Buffalo Crushed Stone, Inc. v. Surface Transp. Bd.*, 194 F.3d 125, 128 (D.C. Cir. 1999)). Thus, where the meaning of regulatory language is not free from doubt, the reviewing court should give effect to the agency's interpretation so long as it is reasonable. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150 (1991).

III.

A.

Under the INA, employer-sponsors of H-1B nonimmigrants must pay a fee to file an H-1B petition on behalf of a nonimmigrant, and may not be reimbursed by their employees for "part or all of the cost" of that fee. *See* 8 U.S.C. § 1182(n)(2)(C)(vi)(II); 8 U.S.C. § 1184(c)(9). Implementing regulations clarify that employers may not deduct these costs—or other "business expenses"—from the nonimmigrant employees' wages, if such a deduction reduces the wage below the required level specified in the LCA. 20 C.F.R. § 655.731(c)(1). Under 20 C.F.R. § 655.731(c)(1), employers of nonimmigrants must pay the required wage to their employees "cash in hand, free and clear, when due, except that deductions made in accordance with

paragraph (c)(9) of this section may reduce the cash wage below the level of the required wage." Paragraph (c)(9), in turn, notes that such a deduction may *not* be:

> a recoupment of the employer's business expenses (e.g., tools and equipment; transportation costs where such transportation is an incident of, and necessary to, the employment; living expenses when the employee is traveling on the employer's business; *attorney fees and other costs connected to the performance of H-1B program functions which are required to be performed by the employer (e.g., preparation and filing of LCA and H-1B petition)).* (For purposes of this section, initial transportation from, and end-of-employment travel, to the worker's home country shall not be considered a business expense.) 20 C.F.R. § 655.731(c)(9)(iii)(C) (emphasis added); *see also* 20 C.F.R. § 655.731(c)(7) (1995).[5]

When an employer's imposition of such business expenses on its nonimmigrant employees results in their receiving less than the required wage, "the Department will consider the amount to be an unauthorized deduction . . . even if the matter is not shown in . . . payroll records as a deduction." 20 C.F.R. § 655.731(c)(12); 20 C.F.R. § 655.731(c)(9) (1995).

Based on these regulations, the ARB affirmed the ALJ's conclusion that the physicians were entitled to reimbursement for fees, including attorney's fees expended in obtaining H-1B visas. The ARB noted that the regulations and related commentary specifically provide that attorneys' fees and costs associated with filing the H-1B petition are considered business expenses of the employer that may not be deducted.

Kutty argues that the costs of the H-1B visas are not business expenses because the "H-1B physicians were not required to obtain H-1B visas to work lawfully in the United States, since they were already in the U.S. and were eligible to have their nonimmigrant status changed from J-1 to H-1B." He asserts that, "The physicians would only have needed to obtain H-1B

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[5]The current version of the regulation was implemented in early 2001, *see* 65 Fed. Reg. 801101-01, after most of the H-1B petitions were approved. The prior version of the regulation stated that employers may not deduct "business expenses" but, unlike the current regulation, did not provide as an example of such expenses the costs associated with filing H-1B visas. *See* 20 C.F.R. § 655.731(c)(7)(ii)–(iii) (1995). However, we agree that application of the current regulation raises no retroactivity concerns because it merely clarifies a pre-existing requirement and does not "attach[] new legal consequences to events completed before its enactment." *See National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 860 (D.C. Cir. 2002) (citation omitted). In any event, Kutty does not argue on appeal that the newer regulation is inapplicable.

visas if they intended to travel outside of the United States . . . and as such, must not be considered a business expense."

This argument is unavailing. First, Kutty misstates the law, contending that the physicians "were not required to obtain H-1B visas to work lawfully in the United States." A nonimmigrant foreign medical graduate on a J-1 visa who seeks a waiver of the two-year home-return requirement on the ground that he will work in an underserved area for three years "may only fulfill the requisite 3-year employment contract as an H-1B nonimmigrant." 8 C.F.R. § 212.7(c)(9)(iii). Moreover, the business expense regulation plainly prohibits employers from passing on the costs of business expenses such as H-1B fees to their employees where those costs would reduce wages below the required rates. 20 C.F.R. § 655.731(c)(9)(iii)(C). Nothing in the regulations suggests that employers are exempted from this requirement if they hire nonimmigrants who are already in the United States on a separate visa. In promulgating the interim final rule that became the current version of the regulations, the DOL specifically clarified that the costs of filing LCAs and H-1B petitions "are the responsibility of the employer regardless of whether the INS filing is to bring an H-1B nonimmigrant into the United States, or to amend, change, or extend an H-1B nonimmigrant's status." Interim Final Rule Implementing Recent Legislation and Clarifying Existing Department Rules, 65 Fed. Reg. 80,110, 80,199 (Dec. 20, 2000). This court must give the DOL's interpretation of its own regulation "controlling weight unless plainly erroneous or inconsistent with the regulation," *Elaine's Cleaning Serv., Inc.*, 106 F.3d at 729 (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)) (internal quotation marks omitted), which it clearly is not. Accordingly, the ARB's determination that the costs—including attorneys' fees—of obtaining H-1B visas are business expenses within the meaning of 20 C.F.R. § 655.731(c)(9)(iii)(C) is neither arbitrary nor an abuse of discretion.[6] Nor is the regulation inconsistent with the statute. 8 U.S.C. § 1182(n)(2)(C)(i)(II).

[6]Amici assert that the regulation prohibiting deduction of "business expenses" is invalid because it exceeds the DOL's statutory authority. *See* Amicus Br. at 19–20 (*comparing* 20 C.F.R. § 655.731(c)(9)(ii) *with* 8 U.S.C. § 1182(n)(2)(C)(vi)). However, as both the Secretary and Amici point out, this issue was not raised by the parties below or on appeal. Accordingly, we decline to address whether the business expenses regulation goes beyond the DOL's statutory authority.

B.

The Administrator also treated the costs associated with obtaining J-1 waivers as business expenses of the clinics improperly passed on to the physicians. Recognizing that the statute and regulations are silent on whether the employer must bear the expense of obtaining a J-1 waiver, and that while LCAs and H-1B applications are filed by the employer, the employee files for the J-1 waiver, the ALJ concluded:

> While it could be argued either way whether fees paid for obtaining J-1 waivers were the employers' or the employees' expenses, I cannot say that including J1 waiver costs in the category of employer business expenses is unreasonable, as the J1 waiver must be obtained before an H-1B visa can be issued. I conclude that including J1 waiver fees and costs as employer expenses, as the Administrator has done in this case, is a reasonable interpretation of the law and the regulations, and within the Secretary's discretion.

[App'x at 1276.]

In affirming the ALJ, the ARB observed that

> only upon receiving a J1 waiver is a nonimmigrant alien J1 visa holder eligible to obtain an H-1B visa. Moreover, if a State health agency makes a request for a J1 waiver on behalf of a J1 visa holder, as was done for the nonimmigrant doctors here, the application process requires a "letter from the facility that wishes to hire physicians" and a "signed contract" with "signatures of [the] physician and head of the facility." See Frequently Asked Questions, U.S. State Dep't, http://travel.state.gov/visa/temp/info/info_1294.html#types. The record shows that either Kutty or his representative referred the doctors to a business, HealthIMPACT America, which would assist them in applying for a J1 waiver. [citation omitted]. Dr. Manole referred to HealthIMPACT as Kutty's "business partner." HR at 298. Kutty also filed letters and employment agreements with the Tennessee Department of Health in support of the doctors' applications for J1 waivers for the doctors he sought to hire.
>
> Again, since the Administrator is vested with enforcement discretion in assessing appropriate remedies and may impose remedies she deems appropriate, we hold that the Administrator's determination that the doctors were entitled to reimbursement of the J1 waiver costs was neither arbitrary nor an abuse of the Administrator's discretion. See 20 C.F.R. § 655.810(e)(2).

[Citations omitted.]

We note that we understand the ARB's decision on the J1 waiver expenses to be based on the facts of this case and the propriety of the remedy based on those facts, and not a

determination that the Administrator has the discretion to treat J1 waiver expenses as business expenses of the employer in *every* case, regardless of the facts. We will not assume that the ARB would so decide, and leave that question to a case in which it is properly presented.

Under the circumstances presented here, the ARB's determination that the Administrator did not abuse its discretion or act arbitrarily in ordering reimbursement of the J1 waiver costs is supported by substantial evidence and is not contrary to law. Kutty's business plan contemplated the employment of nonimmigrant physicians under the H-1B program. It was not coincidence that all but one of the doctors, who happened to have a green card, were nonimmigrant physicians hired under contracts that made their employment contingent on their receipt of both an H-1B visa and a J-1 waiver. In addition, as the ARB observed, the record supports that in most cases, either Kutty or his in-house attorney pressured the physicians to hire HealthIMPACT, which apparently had some relationship to Kutty, to process their applications for the J1 waivers. Under these facts, the ARB's conclusion that the Administrator did not err in including the physicians' J-1 waiver application costs as a business expense is adequately supported.

IV.

Kutty next challenges the imposition of personal liability on him for the back wages and penalties. He asserts that the INA does not provide authority to pierce the corporate veil and impose personal liability and that, even assuming such authority, Tennessee law would not support piercing the veil under these circumstances. We disagree.

A.

Kutty asserts that the INA does not permit piercing the corporate veil because the statute addresses only violations by an "employer" and is silent with respect to personal liability. Although no case directly applies veil-piercing liability under the INA, in *United States v. Bestfoods*, 524 U.S. 51 (1998), the Supreme Court held that assuming the corporate veil may be pierced under applicable common-law principles, a parent corporation may be held responsible for its subsidiary's actions under the Comprehensive Environmental Response, Compensation,

and Liability Act (CERCLA). *Id.* at 62–64. CERCLA is silent, as is the INA, on the question of personal liability for an employer's violation. The Court noted:

> CERCLA is thus like many another congressional enactments in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute, and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.

Id. at 63 (alterations, citations, and internal quotation marks omitted). Thus, where a statute is silent as to personal liability, *Bestfoods* permits a court to impose liability on the principal to the extent common-law principles permit.

We have similarly imposed individual shareholder liability for corporate violations of federal law where the statute does not explicitly mention personal liability. In *Carter Jones Lumber Co. v. LTV Steel Co.*, we relied on *Bestfoods* to find that a shareholder could be personally liable under CERCLA, despite the statute's silence on personal liability, because *Bestfoods* "makes it clear that courts should continue to look to the common law to determine whether to hold a corporate shareholder personally liable for the acts of the corporation. . . ." 237 F.3d 745, 750 (6th Cir. 2001). Using this analysis, we applied Ohio common-law to affirm the defendant shareholder's liability on the CERCLA claim.[7] *Id.* at 750–51; *see also United States v. WRW Corp.*, 986 F.2d 138 (6th Cir. 1993) (applying Kentucky law in an enforcement action under the Federal Mine Safety and Health Act, holding that the corporate veil could be pierced to hold shareholders liable); *Mich. Carpenters Council Health & Welfare Fund v. C.J. Rogers, Inc.*, 933 F.2d 376, 384 (6th Cir. 1991) (using veil-piercing analysis in an Employee Retirement Income Security Act claim).

[7]Although *Bestfoods* left open the question whether state or federal common-law should govern these types of veil-piercing claims, this court in *Carter Jones* held that state common law principles should apply. *Carter Jones*, 237 F.3d at 746 n.1; *see also Donahey v. Bogle*, 129 F.3d 838, 843 (6th Cir.1997), *vacated on other grounds*, 524 U.S. 924 (1998), *reinstated*, 16 F. App'x 283 (6th Cir. 2000) (holding in this CERCLA case that "federal courts must look to state law" when determining "the requisite standard for piercing the veil.").

Thus, because the INA is silent on individual personal liability, it does not preclude piercing the corporate veil if supported by the common law. *See Carter Jones*, 237 F.3d at 750; *Bestfoods*, 524 U.S. at 62–63.

B.

Kutty further contends that the district court erred in its application of the Tennessee standard for piercing the corporate veil. Under Tennessee law, because there is a presumption of corporate regularity, "[t]he principle of piercing the corporate veil is to be applied with great caution and not precipitately," and each case "must rest upon its special facts." *Muroll Gesellschaft M.B.H. v. Tenn. Tape, Inc.*, 908 S.W.2d 211, 213 (Tenn. Ct. App. 1995) (citation omitted). However, corporate identity may be disregarded and the owners of the stock and assets may be treated as identical to the corporation "upon a showing that it is a sham or a dummy or where necessary to accomplish justice." *Schlater v. Haynie*, 833 S.W.2d 919, 925 (Tenn. Ct. App. 1991) (citation omitted). The "[c]onditions under which the corporate entity will be disregarded vary according to the circumstances present in the case, and the matter is particularly within the province of the [t]rial [c]ourt." *Muroll Gesellschaft*, 908 S.W.2d at 213 (citation omitted).

Although no single factor is conclusive, *Schlater*, 833 S.W.2d at 925, Tennessee courts rely on the following factors when determining whether to pierce the corporate veil:

> Factors . . . include not only whether the entity has been used to work a fraud or injustice in contravention of public policy, but also (1) whether there was a failure to collect paid in capital; (2) whether the corporation was grossly undercapitalized; (3) the nonissuance of stock certificates; (4) the sole ownership of stock by one individual; (5) the use of the same office or business location; (6) the employment of the same employees or attorneys; (7) the use of the corporation as an instrumentality or business conduit for an individual or another corporation; (8) the diversion of corporate assets by or to a stockholder or other entity to the detriment of creditors, or the manipulation of assets and liabilities in another; (9) the use of the corporation as a subterfuge in illegal transactions; (10) the formation and use of the corporation to transfer to it the existing liability of another person or entity; and (11) the failure to maintain arms length relationships among related entities.

Boles v. Nat'l Dev. Co., Inc., 175 S.W.3d 226, 245–46 (Tenn. Ct. App. 2005) (citing *Federal Deposit Ins. Corp. v. Allen*, 584 F. Supp. 386, 397 (E.D. Tenn. 1984)); *see Oceanics Schools, Inc. v. Barbour*, 112 S.W.3d 135, 140 (Tenn. Ct. App. 2003).

The ALJ, ARB and district court did not err in concluding that a majority of these factors are present. Kutty set up a web of corporate entities, with the help of his attorney, in order to hire the nonimmigrant physicians. Kutty was the sole owner and investor in these entities. He made all the companies' major decisions regarding salaries and staffing from a single office in Florida, and he and his wife were the only officers and directors. There is no evidence that any of the corporations issued stock certificates and Kutty did not know whether they issued financial statements. Kutty treated the corporations as an extension of himself. The corporations appear to have been undercapitalized, as Kutty could not state how much money was used to start the clinics, or whether money was contributed as capital or loans.

In addition, there is support for the conclusion that the corporations were interchangeable and did not deal at arms length with each other. During the administrative proceedings, the ALJ found that, on various documents, multiple entities were represented as the employer of the same physician, and physicians that were employed by one corporation were often paid by another.[8] The ALJ noted that the documents signed by Kutty evidenced significant confusion with respect to "which corporate entities were acting as the H-1B physicians' employers."

Kutty cites cases supporting that several of the factors, standing alone, are insufficient to pierce the corporate veil.[9] However, these cases are inapposite because the record here supports

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[8]The ALJ decision includes a chart depicting the overlapping relationships between the corporate entities and the physicians. As an example of how the entities were used interchangeably, the Secretary notes that Dr. Chicos's LCA lists "Sumeru Health Care Group" as his employer, but his paychecks were issued by "Sumeru Health Care Group, Inc." (a separate entity) and by "Center for Internal Medicine and Pediatrics, Inc.," his W-2 form was issued by "Center for Internal Medicine and Pediatrics, P.C.," and he was terminated by "Maya Health Care."

[9]*See* Kutty Br. at 27–30 (citing *Tenn. Racquetball Investors, Ltd. v. Bell*, 709 S.W.2d 617, 622 (Tenn. Ct. App. 1986) (finding that "mere dominance, standing alone," is insufficient to hold a corporate director responsible for corporate debts where control was not used to commit a fraud or wrong and the control did not proximately cause the injury complained of); *Capital Mgmt. Partners v. Eggleston*, No. W2004-01207-COA-R3-CV, 2005 WL 1606066, at *11 (Tenn. Ct. App. July 7, 2005) (unreported) (concluding that, although "some corporate formalities were disregarded during the early years of [the company's] existence," the company, which had a "cadre of experienced investors" who had "significant say in how the company was operated," was "anything but a sham or alter ego of [the company]"); *Schlater*, 833 S.W.2d at 925–27 (concluding that mere control or domination of a

the finding that nearly all of the factors are present and dispositive weight was not placed on any single factor.[10]

Kutty also argues that the corporate veil may not be pierced because the record does not support a finding of fraud.[11] Tennessee law allows piercing of the corporate veil only where control over a corporation has "been used to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of third parties' rights." *Cont'l Bankers Life Ins. Co. of the S. v. Bank of Alamo*, 578 S.W.2d 625, 632 (Tenn. 1979). Here, the ALJ made—and the ARB affirmed—several findings that sufficiently qualify as "wrongs." Kutty and his medical clinics failed to pay the H-1B physicians the wages promised to them and required under the INA, 8 U.S.C. § 1182(n)(1)(A), including during periods in which the physicians were awaiting their credentials, in violation of the INA's "no-benching" provision, 8 U.S.C. § 1182(n)(2)(C)(vii)(I)–(IV) (requiring that H-1B employees be paid during periods of non-productivity due to a decision by the employer or due to the employees' lack of a license); and when the physicians complained, Kutty retaliated against them for engaging in protected conduct, 8 U.S.C. § 1182(n)(2)(C)(iv) (prohibiting employers from "discharg[ing] or in any other manner discriminat[ing] against an employee . . . because the employee has disclosed information . . . that the employee reasonably believes evidences a violation of this subsection"). The ALJ further found that "Kutty admitted that he knew he was not going to pay the physicians the amounts listed in the LCAs . . . despite having signed a

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company was not sufficient to pierce the corporate veil, and further concluding that an inability to collect a debt owed by a corporation is insufficient to establish liability for the debt against its officers or shareholders)).

[10]Kutty argues that he owned all of the shares in the corporate entities in an attempt to comply with various provisions of the Tennessee Code, and therefore his organizational structure of choice "cannot be considered to work a fraud or injustice in contravention of public policy." Kutty's argument misses the point. The ALJ did not hold Kutty personally liable merely because he exercised control over the companies. Nothing in the statutory provisions Kutty cites suggest that the organizational structure of professional corporations precludes holding shareholders personally liable when otherwise appropriate under Tennessee Law. *See, e.g.*, Tenn. Code. Ann. § 48-101-606–08.

[11]The Secretary argues that Kutty waived the argument that the DOL failed to prove fraud by failing to raise it before the ARB. However, Kutty argued before the ARB that he acted in good faith and that the fact that his clinics were unprofitable was not sufficient grounds to pierce the corporate veil. This is essentially the same argument he makes here; thus there was no waiver.

declaration that the information on the LCAs was correct, and despite having signed an agreement to abide by the terms of the LCAs when he signed the H-1B petitions."

Kutty contends that the ALJ did not take into account that the physicians violated their employment contract by not working the requisite number of hours. However, the ALJ rejected this argument, finding that "there is little evidence of good faith efforts to comply with the law on the part of Dr. Kutty [and] his explanations provide inadequate justification for his actions." Under the INA and implementing regulations, Kutty was required to pay the rates specified in the LCA. Kutty neither paid the H-1B physicians the LCA rates, nor the (in many cases, lower) rates specified in the employment contracts and repeatedly promised to them. The INA is clear that Kutty was not permitted to withhold funds from the physicians except in limited circumstances, none of which were present here. *See* 20 C.F.R. § 655.731 (permitting wages to be withheld if an employee is nonproductive because of voluntary reasons unrelated to employment, if the employee has been rendered unable to work, or if there has been a bona fide termination of the employment relationship, in the event of which DHS must be notified and the employee must be provided reasonable transportation costs home).

Accordingly, because the record supports that nearly all of the Tennessee factors for piercing the corporate veil were present and the entities were used to commit a "wrong," we conclude that the ALJ did not err in deciding to pierce the corporate veil and hold Kutty personally liable.

V.

Kutty's final argument is that the ALJ violated his right to due process by (a) allowing Kutty and Hooli, both non-lawyers, to represent Kutty and the corporate entities; (b) failing to postpone the hearing after Kutty was hospitalized and required surgery; (c) relying instead on Kutty's prior deposition and other testimony; and (d) finding Kutty personally liable in his absence. Kutty also asserts, generally, that the ALJ failed to adequately consider his arguments and explain her decision.

Kutty's due process claims lack merit. His argument that he and Hooli should not have been permitted to represent Kutty and the medical clinics because they were not licensed to

practice law fails because regulations governing ALJ hearings are clear that "[a]ny party shall have the right to appear at a hearing in person, by counsel, or by other representative . . . ." 29 C.F.R. § 18.34(a). The regulation permits "[p]ersons not attorneys" to appear in a representative capacity in adjudicative proceedings provided they apply prior to the hearings or to the ALJ at the commencement of the hearing. *Id.* at § 18.34(g). Here, after Kutty's counsel was granted permission to withdraw, the ALJ postponed the hearing to give Kutty time to find new counsel and asked Kutty whether he would like to seek legal representation. Kutty opted to represent himself, as was his prerogative. Thus, Kutty received due process.

Nor did the ALJ violate Kutty's due process rights by failing to postpone the hearing when Kutty was hospitalized. Kutty was represented by counsel at the time of his hospitalization, and the attorney noted that Kutty wished the hearings to proceed in his absence, a fact that Kutty does not dispute.[12] Further, the ALJ did not violate Kutty's due process rights by relying on Kutty's prior deposition testimony. The regulations governing ALJ hearings permit the depositions of parties or authorized agents of a corporation to be used "by any other party for any purpose." 29 C.F.R. § 18.23(a)(3). The depositions of witnesses may also be used when they are unavailable to testify due to illness. *Id.* at § 18.23(a)(4)(iii).

Kutty's claim that liability cannot be assessed against him in his absence also fails. Kutty did, in fact, appear at the hearings in early June and again when they resumed in December, when he made a closing statement to the ALJ. Both the substance of that closing statement and the fact that Kutty was there to make it, undermine the due process claims he now makes.

Finally, Kutty's suggestion that the ALJ violated his due process rights by failing to consider Kutty's argument that the physicians were not living up to their end of the bargain is unavailing. The ALJ's 104-page decision demonstrates thoughtful and careful consideration of the issues, including specific consideration of Kutty's claims that the physicians were breaching their employment contracts. (*See* ALJ Decision, Appx. at 1276–79 (crediting Kutty's testimony that he believed the doctors were not working hard enough, but finding that Kutty had

[12]The Secretary also provides evidence contradicting Kutty's claim that he did not attend the hearings because he was ill all summer; Kutty's medical records suggest he traveled to India for vacation after his hospitalization.

"unreasonable expectations and exaggerated isolated incidents in an attempt to scapegoat the doctors for problems with administration of the clinics").). Accordingly, we find that Kutty's due process claims are meritless.

VI.

For the foregoing reasons, we AFFIRM.

LAWYER RESOURCES

- Redacted "Kitchen-Sink" Request for Evidence re. Specialty Occupation
- Redacted "Kitchen-Sink" Request for Evidence re. Employer Control
- Links to H-1B Timelines, Checklists, www.uslegalimmigration.com

Redacted "Kitchen-Sink" Request for Evidence re. Specialty Occupation

August 27, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
California Service Center
Laguna Niguel, CA 92607-0590

U.S. Citizenship and Immigration Services

[redacted]
c/o MIRA MDIVANI
MDIVANI CORPORATE IMMIGRATION
7007 COLLEGE BLVD STE 460
OVERLAND PARK, KS 66211

Form I-129, Petition for a Nonimmigrant Worker

[redacted]

REQUEST FOR EVIDENCE

IMPORTANT: THIS NOTICE CONTAINS YOUR UNIQUE NUMBER. THE ORIGINAL NOTICE MUST BE SUBMITTED WITH THE REQUESTED EVIDENCE.

You are receiving this notice because U.S. Citizenship and Immigration Services (USCIS) requires additional evidence to process your form. Please provide the evidence requested below. Include duplicate copies if you are requesting consular notification.

Your response must be received in this office by November 22, 2018.

Please note that you have been allotted the maximum period allowed for responding to a Request for Evidence (RFE). The time period for responding cannot be extended. Title 8, Code of Federal Regulations (8 CFR) § 103.2(b)(8)(iv). Because many immigration benefits are time sensitive, you are encouraged to respond to this request as early as possible, but no later than the deadline provided above. If you do not respond to this notice within the allotted time, your case may be denied. The regulations do not provide for an extension of time to submit the requested evidence.

You must submit all requested evidence at the same time. If you submit only some of the requested evidence, USCIS will consider your response a request for a decision on the record. 8 CFR § 103.2(b)(11).

If you submit a document in any language other than English, the document must be accompanied by a full and **complete** English translation. The translator must certify that the translation is accurate and he or she is competent to translate from that language to English. **If you submit a foreign language translation in response to this request for evidence, you must also include a copy of the foreign language document.**

Processing of your Form I-129 will resume upon receipt of your response. If you have not heard from USCIS within **60 days of responding**, you may contact the USCIS Contact Center at **1-800-375-5283**. If you are hearing impaired, please call the USCIS Contact Center TDD at **1-800-767-1833.**

On April 12, 2018, your organization, [redacted], filed a Petition for a Nonimmigrant Worker (Form I-129), with U.S. Citizenship and Immigration Services (USCIS), seeking to classify [redacted] (beneficiary) as a temporary worker in a specialty occupation (H-1B) under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA).

[redacted]

A specialty occupation is one that requires the theoretical and practical application of a body of highly specialized knowledge and that requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent, as a minimum, for entry into the occupation in the United States.

You seek new employment for the beneficiary and requested that USCIS change the beneficiary's status.

You stated on the Form I-129 that you are [redacted] with [redacted] employees. You seek to employ the beneficiary as a Marketing and Data Analyst from October 1, 2018 to September 3, 2021.

To process your petition and determine whether your organization and the beneficiary are eligible, additional information is required. This request provides suggested evidence that you may submit to satisfy each requested item. You may:

- Submit one, some, or all of these items;
- Submit none of the suggested items and instead submit other evidence to satisfy the request;
- Explain how the evidence in the record already establishes eligibility; or
- Request a decision based on the record.

Please note that you are responsible for providing evidence showing that your organization and the beneficiary meet all requirements and are eligible for the requested benefit at the time you filed the Form I-129. Also, note that statements made in cover letters should be supported with additional documentary evidence.

Specialty Occupation

You must establish that the beneficiary's proffered position is a specialty occupation. A specialty occupation is one that requires the theoretical and practical application of a body of highly specialized knowledge and that requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

To satisfy this requirement, you submitted:

- Description of the beneficiary's duties;
- A certified Labor Condition Application (LCA); and
- Information about your organization's products or services.

Qualifying Criteria

To qualify as a specialty occupation, the position must meet at least one of the following criteria.

USCIS will discuss each of the qualifying criteria for specialty occupation below. With your response, identify which of the specialty occupation qualifying criteria you believe has been satisfied. If you believe the offered position satisfies multiple criteria, identify the evidence that you believe satisfies each criterion.

1. Degree is Normally Minimum Requirement

You may establish eligibility by showing that a bachelor's degree or higher in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

The evidence you submitted is insufficient to establish eligibility under this criterion.

USCIS recognizes the *Occupational Outlook Handbook* ("OOH"), a publication of the U.S. Department of Labor (DOL), as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. You provided a certified Labor Condition Application (LCA) from the DOL that the proffered position is a Market Research Analysts and Marketing Specialists position. The OOH does not contain descriptions for this occupation. You did not provide other evidence to show that a bachelor's degree or higher or its equivalent in a specific specialty is normally required for entry into the position.

As such, you have not sufficiently established that a bachelor's degree or higher in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

You may still submit evidence to establish eligibility under this criterion. Evidence may include, but is not limited to:

- Relevant documentation from an authoritative career resource, such as the *OOH*, which list the duties, work environment, education, training, skills, and other qualification requirements for the occupation. Include a statement describing how the particular position relates to the occupation listed in the career guide and how the information in the career guide demonstrates that a bachelor's or higher degree in a specific specialty or its equivalent is normally the minimum requirement for the particular position.
- Any evidence you believe will establish that a bachelor's or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.

2.a. <u>Degree Common to the Industry</u>

You may establish eligibility by showing that the degree requirement of a bachelor's degree or higher in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations.

You did not submit any evidence for this criterion. Thus, you have not established eligibility under this criterion.

You may still submit evidence to establish eligibility under this criterion. Evidence may include, but is not limited to:

- Job postings or advertisements showing a degree requirement of a bachelor's degree or higher in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations. Any job postings or advertisements should be supported by documentation of the following:
  - The date and source of the job posting or announcement;
  - A detailed description of the duties of the position and the educational, training, and experience requirements of the position;
  - The company or firm offering the position in these job postings or announcements is within your industry and is similar to your organization; and
  - The job postings or advertisements represent the industry standards for the position.
- Letters from an industry-related professional association indicating that similar organizations routinely employ and recruit only individuals with a bachelor's degree or higher in a specific specialty, or its equivalent for parallel positions.

- Copies of letters or affidavits from firms or individuals in the industry attesting that similar organizations routinely employ and recruit only individuals with a bachelor's degree or higher in a specific specialty, or its equivalent for parallel positions. Any letter or affidavit should be supported by documentation of the following:
    - The writer's qualifications as an expert;
    - How the writer's conclusions were reached; and
    - The basis for the writer's conclusions, supported by copies or citations of any materials used.

2.b. <u>Position So Complex or Unique</u>

You may establish eligibility by showing that the particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree or higher in a specific specialty, or its equivalent.

The position description you provided does not show that the particular position is so complex or unique that the position requires a bachelor's degree or higher or its equivalent in a specific specialty. Thus, you have not established eligibility under this criterion.

Further, the LCA you submitted certified that the position was a "Wage Level I" position. Such "Wage Level I" certification does not show that the position is more complex or specialized than similar positions within the occupation. According to U.S. Department of Labor (DOL) guidelines on wage determinations, a Wage Level I is used for the following:

> Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

See DOL's *Employment and Training Administration Prevailing Wage Determination Policy Guidance Nonagricultural Immigration Programs, Rev. November, 2009.*

In comparison, a level II certification is for "qualified" employees who have "attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment." A level III certification is for "experienced" employees "who have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff." A level IV certification is for "fully competent" employees who "use advanced skills and diversified knowledge to solve unusual and complex problems."

The record indicates that you certified to DOL that you were seeking to fill an entry level position, one that has "only a basic understanding of the occupation...performs routine tasks that require limited, if any, exercise of judgment" resulting in the lowest prevailing wage possible for the position and area. Thus, the LCA does not show that the proffered position is more complex or unique that only an individual with a bachelor's degree or higher in a specific specialty can perform them.

You may still submit evidence to establish eligibility under this criterion. Evidence may include, but is not limited to:

- Letters from an industry-related professional association indicating that the particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree or higher in a specific specialty, or its equivalent.
- Copies of letters or affidavits from firms or individuals in the industry attesting that the particular position is so complex or unique that it can be performed only by an individual with a bachelor's degree or higher in a specific specialty, or its equivalent. Any letter or affidavit should be supported by documentation of the following:
  - The writer's qualifications as an expert;
  - The writer's knowledge of your business;
  - How the writer's conclusions were reached; and
  - The basis for the writer's conclusions, supported by copies or citations of any materials used.
- Copies of trade publications or other articles within your industry which demonstrate and highlight the specific complex or unique functions of the particular position, which can only be performed only by an individual with a bachelor's degree or higher in a specific specialty, or its equivalent.

3. Employer Normally Requires Degree or its Equivalent

You may establish eligibility by showing that you normally require a bachelor's degree or higher in a specific specialty, or its equivalent, for the position.

You did not submit any evidence for this criterion. Thus, you have not established eligibility under this criterion.

You may still submit evidence to establish eligibility under this criterion. Evidence may include, but is not limited to:

- An organizational chart showing your hierarchy and staffing levels with corresponding educational and experience requirements for the positions. The educational requirements should include the field of study (e.g. computer science) in addition to the educational level (e.g. bachelor's degree).
- Copies of present and past job postings or announcements for the proffered position showing that you require or, if the beneficiary will perform services for an end-client, the end-client requires applicants to have a minimum of a bachelor's or higher degree in a specific specialty or its equivalent.
- Documentary evidence of your past employment practices for the position, including:
  - Documentation which lists the number of employees hired in the most recent two years for the position;
  - Copies of employment or pay records identifying past and present employees in this position;
  - Copies of degrees and/or transcripts to verify the level of education and field of study of each individual hired for this position in the last two years. Additionally, provide evidence to establish the duties that the individuals performed, such as official position descriptions, job offer letters, job postings, or performance reviews; and
  - An organizational chart or diagram, showing your organizational structure and staffing levels.
- Documentation which lists the educational, experience, training, and skills requirements of the

offered position, such as official position descriptions, job offer letters, or job postings.

4. Nature of Specific Duties So Specialized and Complex

You may establish eligibility by demonstrating that the nature of the specific duties of the offered position are so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent.

Here, you have not shown that the duties of the position are so specialized and complex that the knowledge required to perform these duties is usually associated with the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent. Thus, you have not established eligibility under this criterion.

You may still submit evidence to establish eligibility under this criterion. Evidence may include, but is not limited to:

- An explanation of the specific duties, as they relate to your products and services, and how the nature of those duties of the offered position are so specialized and complex, that they are usually associated with the attainment of a bachelor's degree or higher in a specific field of study; provide an explanation of what differentiates your products and services from other employers in the same industry. Be specific and provide documentation to support any explanation of specialization and complexity.
- Copies of letters or affidavits from firms, individuals, professional associations, or customers attesting that the nature of your products and services are so specialized and complex that a bachelor's level of education, or higher, in a specific field of study is a prerequisite for entry into the offered position. Any letter or affidavit should be supported by documentation of the following:
  - The writer's qualifications as an expert;
  - How the writer's conclusions were reached; and
  - The basis for the writer's conclusions, supported by copies or citations of any materials used.
- Copies of trade publications or other articles about your company that highlights the nature of your products and services and demonstrates that the specific duties of the offered position are so specialized and complex that a bachelor's level of education, or higher, in a specific field of study is a prerequisite for entry into the position.

PLEASE RETURN THE REQUESTED INFORMATION AND ALL SUPPORTING DOCUMENTS WITH THIS ORIGINAL REQUEST ON TOP TO:

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
P.O. BOX 10590
LAGUNA NIGUEL, CA. 92607-0590

Sincerely,

Kathy A. Baran
Director, California Service Center

Redacted “Kitchen-Sink” Request for Evidence re. Control

March 28, 2018

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
California Service Center
Laguna Niguel, CA 92607-0590

U.S. Citizenship and Immigration Services

[redacted]
c/o MIRA MDIVANI
MDIVANI CORPORATE IMMIGRATION
7007 COLLEGE BLVD STE 460
OVERLAND PARK, KS 66211

Form I-129, Petition for a Nonimmigrant Worker

[redacted]

REQUEST FOR EVIDENCE

IMPORTANT: THIS NOTICE CONTAINS YOUR UNIQUE NUMBER. THE ORIGINAL NOTICE MUST BE SUBMITTED WITH THE REQUESTED EVIDENCE.

You are receiving this notice because U.S. Citizenship and Immigration Services (USCIS) requires additional evidence to process your form. Please provide the evidence requested below. Include duplicate copies if you are requesting consular notification.

Your response must be received in this office by June 20, 2018.

Please note that you have been allotted the maximum period allowed for responding to a Request for Evidence (RFE). The time period for responding cannot be extended. Title 8, Code of Federal Regulations (8 CFR) § 103.2(b)(8)(iv). Because many immigration benefits are time sensitive, you are encouraged to respond to this request as early as possible, but no later than the deadline provided above. If you do not respond to this notice within the allotted time, your case may be denied. The regulations do not provide for an extension of time to submit the requested evidence.

You must submit all requested evidence at the same time. If you submit only some of the requested evidence, USCIS will consider your response a request for a decision on the record. 8 CFR § 103.2(b)(11).

If you submit a document in any language other than English, the document must be accompanied by a full and **complete** English translation. The translator must certify that the translation is accurate and he or she is competent to translate from that language to English. **If you submit a foreign language translation in response to this request for evidence, you must also include a copy of the foreign language document.**

Processing of your Form I-129 will resume upon receipt of your response. If you have not heard from USCIS within **60 days of responding**, you may contact the USCIS National Customer Service Center (NCSC) at **1-800-375-5283**. If you are hearing impaired, please call the NCSC TDD at **1-800-767-1833.**

On March 16, 2018, your organization, [redacted], filed a Petition for a Nonimmigrant Worker (Form I-129), with U.S. Citizenship and Immigration Services (USCIS), seeking to classify [redacted] (beneficiary) as a temporary worker in a specialty

occupation (H-1B) under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA).

A specialty occupation is one that requires the theoretical and practical application of a body of highly specialized knowledge and that requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent, as a minimum, for entry into the occupation in the United States.

You seek new employment for the beneficiary and requested that USCIS extend the beneficiary's stay.

You stated on the Form I-129 that you are an information technology consulting services firm with [redacted] employees. You seek to employ the beneficiary as a Test Manager from 3/15/2018 to 3/14/2021.

To process your petition and determine whether your organization and the beneficiary are eligible, additional information is required. This request provides suggested evidence that you may submit to satisfy each requested item. You may:

- Submit one, some, or all of these items;
- Submit none of the suggested items and instead submit other evidence to satisfy the request;
- Explain how the evidence in the record already establishes eligibility; or
- Request a decision based on the record.

Please note that you are responsible for providing evidence showing that your organization and the beneficiary meet all requirements and are eligible for the requested benefit at the time you filed the Form I-129. Also, note that statements made in cover letters should be supported with additional documentary evidence.

Employer-Employee Relationship

As an employer who seeks to sponsor a temporary worker in an H-1B specialty occupation, you must establish that you employ the beneficiary in a specialty occupation position and that you have a valid employer-employee relationship with the beneficiary by having the right to control the beneficiary's work, which may include the ability to hire, fire, or supervise the beneficiary. Also, you should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period.

USCIS must determine if you satisfy all of the above elements through evidence that describes (with no one factor being decisive or exhaustive):

- the skill required to perform the specialty occupation;
- the source of the instrumentalities and tools required to perform the specialty occupation;
- the location of the work;
- the duration of the relationship between you and the beneficiary;
- whether you have the right to assign additional work to the beneficiary;
- the extent of the beneficiary's discretion over when and how long to work;
- the method of payment of the beneficiary's salary;
- the beneficiary's role in hiring and paying assistants;
- whether the specialty occupation work is part of your regular business;
- whether you are in business;
- the provision of employee benefits;
- the tax treatment of the beneficiary;
- whether you can hire or fire the beneficiary or set rules and regulations on the beneficiary's work;

- whether, and if so, to what extent you supervise the beneficiary's work; and/or
- whether the beneficiary reports to someone higher in your organization.

To satisfy this requirement, you submitted:

- Your support letter dated 3/02/2018.

The following item(s) explain why the submitted evidence is deficient and requests additional evidence to render a final decision.

Right to Control: To qualify as a U.S. employer, you must establish that you have the right to control the beneficiary.

The evidence is insufficient to establish that a valid employer-employee relationship will exist for the duration of the requested validity period.

Your petition does not establish for whom the beneficiary is assigned to work pursuant to an end-client engagement for the requested validity period. You have not documented the end-client, the end-client's vendor through whom the beneficiary is assigned to work (if applicable), the contracted dates of service. Part 5 of your petition indicates the work location as [redacted] with no other information about the employer at this address aside from the physical location.

You may submit additional evidence to satisfy this requirement. Evidence may include, but is not limited to:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of any end-client where the services will be performed for the requested employment period of time requested.
- A copy of a signed Employment Agreement between you and the beneficiary detailing the terms and conditions of employment.
- A copy of an employment offer letter that describes in detail the nature of the employer-employee relationship and the services to be performed by the beneficiary.
- A copy of relevant portions of valid contracts between you and the end-client that establishes that while your employees are placed at the third-party work site, you will continue to have the right to control your employees.
- Copies of signed contractual agreements, statements of work, work orders or service agreements between you and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary. The documentation should provide information such as:
    - a detailed description of the duties the beneficiary will perform;
    - the qualifications that are required to perform the job duties;
    - salary or wages paid, hours worked, benefits;
    - a brief description of who will supervise the beneficiary; and
    - any other related evidence.
- A copy of the end client's position description and/or any other documentation that describes:
    - the skills required to perform the job;
    - the source of the instrumentalities and tools needed to perform the job;
    - the product to be developed or the service to be provided;
    - the location where the beneficiary will perform the duties;
    - the duration of the relationship between you and beneficiary;
    - whether you have the right to assign additional duties;

- the extent of your discretion over when and how long the beneficiary will work;
- the method of payment;
- your role in paying and hiring assistants to be utilized by the beneficiary;
- whether the work to be performed is part of your regular business;
- the provision of employee benefits; and/or
- the tax treatment of the beneficiary in relation to you.

- A description of the performance review process.
- A copy of your organizational chart, demonstrating the beneficiary's supervisory chain.
- Any other evidence you feel will meet the requirement.

RETURN ADDRESS

If your response is more than 15 pages, please return the requested information and all supporting documents with this original request on top to:

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
P.O. BOX 10825
LAGUNA NIGUEL, CA. 92607-0825

If you choose to send by express delivery, the address is:

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
24000 AVILA ROAD, 2ND FLOOR, ROOM 2302
LAGUNA NIGUEL, CA. 92677

If your response is 15 pages or less, please reply by fax:

(949) 389-3460

If you have any questions, you may contact the Premium Processing Team via e-mail at: **CSC-PREMIUM.PROCESSING@USCIS.DHS.GOV** or call our toll-free number **(866) 315-5718.**

Sincerely,

Kathy A. Baran
Director, California Service Center

Mdivani & Atchison's H-1B Visa Demystified: A Step-by-Step Guide for U.S. Employers

This book is a practical guide for U.S. businesses on how to navigate the maze of the H-1B process. H-1B experts, Mira Mdivani & Danielle Atchison share their expertise and insights in the hopes of simplifying the process for in-house lawyers and HR professionals charged with the task of bringing international personnel to the United States.

Business immigration lawyers **Mira Mdivani** and **Danielle Atchison** are experts in global mobility issues involved in employing international personnel in the United States and in matters of U.S. corporate immigration compliance. The authors are colleagues at the Mdivani Corporate Immigration Law Firm. They co-teach business immigration law courses at the University of Missouri – Kansas City School of Law.

Mdivani and Atchison have also co-authored **U.S. VISAS FOR INTERNATIONAL PERSONNEL & FOREIGN INVESTORS: A BUSINESS POINT OF VIEW.**

Mdivani's books include: **EMPLOYER IMMIGRATION COMPILAINCE PLANS, POLICIES** and **PROCEDURES, and I-9 AUDITS: THE BEST WAY TO PREVENT I-9 DISASTERS.**

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IMMIGRATION LAW