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New H-2B Visa Rule from the U.S. Department of Homeland Security

"Modernizing H-2 Program Requirements, Oversight, and Worker Protections"

Proposed September 2023. Finalized December 2024. Effective January 17, 2025.

Comparison of selected current rules to new rules [1]

Benefits to Employers and H-2B Workers

Topic	Current rule	New rule	Why this matters
Grace period for workers after end of H-2B employment period	Government has authority to issue 10-day grace period to remain in U.S. and seek change/extension of status after H-2B employment period ends. This grace period is not always consistently issued.	Government has authority to issue 30-day grace period to remain in U.S. and seek change/extension of status after H-2B employment period ends. The original proposed rule stated that "USCIS will include such grace period when extending . . . or changing . . . status." (*emphasis added*) The grace period would not be issued (or would be shortened) in the case of workers who will be reaching their three-year limit at the end of the upcoming employment period.	-Over the past couple of years, the government has increasingly been denying extensions for H-2B visa workers who have gaps between seasons. A longer grace period will help to bridge some of the gaps and make it easier for many employers to hire in-country workers – even those with gaps of up to 30 days. -Additionally, as a result of extreme government delays, some workers risk falling out of legal status while waiting for their next employer's transfer petition to be filed. This provision will hopefully alleviate that risk and provide peace of mind to workers and employers.

[1] Note: the rule applies to both H-2A and H-2B classifications. However, this chart focuses primarily on the changes to the H-2B program. This chart also highlights selected key regulations from the new rule and is not an exhaustive list.

Grace period for workers after early separation/termination of H-2B employment	No grace period exists. Workers must leave the U.S. immediately upon separation from employment.	Workers have a 60-day grace period after ending employment (resignation, termination, or otherwise) to seek to change/extend status. The H-2B worker would not be considered out-of-status during this time. Grace period would last 60-days or until the end of the worker's approved period of stay, whichever is sooner.	Organizations often ask if they can petition to hire workers who have been fired or have quit due to unfair treatment at their current employer, and unfortunately our answer is "no" because they are out of status as soon as they end employment. With this provision, our answer would change to "yes," as long as the end of employment was less than 60 days before filing the transfer petition. This would also be extremely beneficial for workers in abusive employment situations, as it reduces fear of being unlawfully present in the U.S. after resignation.
Making H-2B portability permanent	H-2B portability is authorized as a temporary COVID-19 flexibility, set to expire in January 2025.	H-2B portability becomes permanent. Allows workers to begin working with new employer upon U.S. Citizenship & Immigration Services (USCIS) receipt of a timely-filed change-of-employer petition (i.e., work upon receipt, rather than waiting for approval).	Approval from USCIS is not needed for in-country transfer/extension workers. Rather, workers can start working upon receipt of the petition by USCIS. This saves about 2 weeks of processing, which is so important due to the major delays that are happening throughout the H-2B visa petition process.

Reducing the time abroad needed to "reset" the three-year limit on H-2B time	H-2B time in the U.S. is limited at 3 years. To reset the three-year limit, a worker must remain outside the U.S. for no less than 3 consecutive months.	The three-year limit is reset after a consecutive period of 60 days outside the U.S.	This rule provides clarification of exactly how long a worker must remain outside the United States to reset their three-year limit and makes it easier to do so. Assuming thorough communication with employers and proper timing, some workers may be able to reset their three-year limit between seasons without having to take an entire season off from work to reset.
Green card impacts on H-2B petitions	An H-2B worker becoming the beneficiary of an approved permanent labor certification or immigrant petition could cause H-2B denials.	DOL approval of a PERM labor certification or filing of an immigrant petition, by itself, would not be a violation of H-2B status, show intent to abandon a foreign residence, or be basis for denying an H-2B petition or H-2B status. Instead, USCIS would consider such facts, together with all other facts presented, in determining whether the beneficiary maintains temporary intent in the U.S.	Employers are increasingly filing green card applications on behalf of H-2B visa workers. This rule makes it easier to do so. Specifically, it will be easier for workers to stay in the U.S. on H-2B extensions while a green card process is pending, and there will be less risk that a worker will be denied entry to the United States if they depart the U.S. on an H-2B visa during the green card application process.

Potential Dangers to Employers

Topic	Current Rule	New Rule	Why this Matters

Charging prohibited fees or penalties to H-2B workers	Prohibits charging fees to H-2B workers "as a condition of" securing employment. H-2B approval can be revoked for noncompliance.	More extensive obligations and enforcement: • Any fee charged to H-2B workers that is "related to" securing employment is a potential violation (unless primarily for the benefit of the worker, e.g., a passport fee). • No "breach of contract" fees can be charged (e.g., for not completing employment period). • Includes fees charged by agents, including recruiters, attorneys, and other third parties. • Employers must conduct due diligence to confirm that recruiters or other agents will not charge fees to H-2B workers (lack of knowledge is not a defense). • Penalties include petition revocation/denial, plus 1-year ban (and possibility of up to a 4-year ban) on using H-2B visa programs. • H-2B employers should maintain detailed contact information for workers to facilitate reimbursement for any unpaid fees or undistributed earnings (proof will be required to avoid further penalties).	Employers must be even more careful to ensure that H-2B workers do not bear the burden of any fees that are expended in the process of securing employment. The purpose of the rule is to emphasize that H-2B workers should not incur any expenses associated with securing H-2B employment and arriving in the U.S. This includes (but is not necessarily limited to) recruitment fees, petition fees, visa application fees, transportation fees, and meal fees. However, fees primarily for the worker's benefit, such as passport renewal fees, are not the employer's responsibility. When working with a recruiter, employers should be extra careful in vetting recruiters, understanding their process, and understanding whether they charge any fees directly to the employees at any point (even if those fees are simply for arranging and paying the $205 visa application fee at the embassy/consulate). Employers who work with a recruiter directly for processing of H-2B applications (which is not recommended) should ensure that there is an attorney on staff at the recruiting organization who you can speak to.

Denial of H-2B Petitions for Past Violations – Mandatory Denial	No mandatory denial unless employer was previously barred (and even then, denial is still discretionary).	Authorizes mandatory H-2B petition denial for any employer that has been debarred from the H-2B program by the DOL, has been found to have committed fraud or willful misrepresentation in the prior 3 years, or is found to have violated legal provisions prohibiting trafficking or harboring undocumented individuals during the prior 3 years.	Mandatory future denial is reserved for very serious violations that would likely result in debarment from the H-2B program anyway. Therefore, although this provision does increase enforcement tools for USCIS, it does not have the teeth of the below changes, such as the discretionary denial mechanism.

Denial of H-2B Petitions for Past Violations – Discretionary Denial	No formal mechanism for discretionary denial based on past violations.	Authorizes discretionary H-2B petition denial if an employer has been sanctioned by the DOL or has had a petition revoked by USCIS for committing certain lesser violations of the H-2B programs in the prior three (3) years. USCIS discretionary denial bases include: • A beneficiary was working in different capacity than was specified in the petition (e.g., performing different duties or working in a different location); • the statement of facts contained in the petition or application was not accurate; • the petitioner violated terms and conditions of the approved petition (e.g., paying less than the prevailing wage); • the petitioner committed a violation regarding the H-2B status of a worker (e.g., employing a worker outside of their period of approved H-2B status); or • the petitioner has been found to have violated any employment-related laws (e.g., health and safety laws).	This is an extremely important new compliance tool for USCIS. It allows USCIS to deny petitions, at their discretion, for a broad swath of past program violations. Employers must be extremely careful to follow the legal regulations, especially those outlined in the rule, as summarized in this chart. We have heard countless stories of organizations employing H-2B workers at the wrong worksite, or in incorrect or "flexible" job roles, or having workers cover shifts outside of their job duties when short staffed. This rule significantly increases the potential repercussions of such decisions. We have seen USCIS and DOL both increasing audit initiatives in recent years. If a violation is found during an audit process, even if the penalties assessed during the audit are minor, those violations could still serve as the basis for discretionary denial of H-2B petitions for the next 3 years. Therefore, it is more important than ever that you understand the obligations of the program (especially those outlined in the bullets to the left) and importantly, educate your managers and department heads on what they can and cannot do with H-2B workers, as this is critical.

USCIS Investigation and Verification Authority	USCIS conducts inspections, evaluations, verifications, and compliance reviews to ensure compliance.	No change, but the rule formalizes this authority. Additionally, states that USCIS has authority to revoke a petition simply because a petitioner is not responsive or does not comply with a compliance review or request for information/documentation.	No significant change, but again, this emphasizes the seriousness of audits and that USCIS is taking its enforcement role seriously.
Miscellaneous Provisions			
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H-2B Whistleblower Protection	No rule designed for whistleblower protection.	If a worker is terminated for reporting an employer's potential violation of the regulations, the worker may receive forgiveness of any unlawful presence and waiver of expired status when seeking to change status or to transfer to another employer.	No significant impact on employers, but provides helpful and needed relief for workers who are worried about reporting labor abuses for fear of losing H-2B status.
Removal of the H-2B Eligible Countries List	Only workers on the "eligible countries" list are eligible for H-2B visas, unless a waiver is granted.	The lists would be eliminated entirely and workers from any country would be eligible for H-2B visas.	This helps by broadening the worker recruiting pool. Importantly, it would be of great benefit to J-1 employers, as it would potentially allow them to bring back any J-1 intern as an H-2B after the end of the J-1 period (without regard to whether they are from an eligible country).