U.S. Citizenship and Immigration Services

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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS 1769-96]

RIN 1115-AE-38

Petitioning Requirements for the H Nonimmigrant Classification

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend the Immigration and Naturalization Service's (Service) regulations

to accommodate the needs of certain United States employers with respect to the filing of new and amended petitions for H-1B nonimmigrant workers. This rule was written in response to a number of complaints received from certain industries which asserted that the current H regulations contain requirements with which some U.S. employers cannot comply. In addition, the current regulations contain certain procedures which are burdensome to both the Service and to the public. Specifically, this rule proposes to amend the Service's regulation with regard to the submission of itineraries with certain H-1B petitions and to amend the Service's regulations regarding the H-1B classification by allowing petitioners to obtain and submit the required certified labor condition application after the petition is initially filed with the Service, but before the petition is adjudicated. Finally, this rule proposes to amend the Servic e's regulation regarding the revocation of approved H petitions where the beneficiary is no longer employed by the petitioner. This rule will make the H-1B nonimmigrant classification easier for certain U.S. employers to use and will make the requirements for the H-1B nonimmigrant classification more consistent with the practices of the business world.

DATES: Written comments must be submitted on or before August 3, 1998.

ADDRESSES: Please submit written comments, in triplicate, to the Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW., Room 5307, Washington, DC 20536. To ensure proper handling, please reference the INS number 1769-96 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: John W. Brown, Adjudications Officer, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., Room 3214, Washington, DC 20536, telephone (202) 514-3240.

SUPPLEMENTARY INFORMATION: The current regulation at 8 CFR 214.2(h)(2)(i)(B) provides that an H petition which requires an alien beneficiary to perform services in more than one location must include an itinerary with dates and locations of the services or training to be performed. This regulatory provision was promulgated primarily to address certain practices in the entertainment industry, which, prior to the passage of the Immigration Act of 1990, was one of the largest users of the H-1B classification. (Entertainers now typically enter the United States in the O and P nonimmigrant classifications.) Specifically, this regulation was intended to preclude foreign entertainers who were admitted in H classification for the purpose of performing at a specific engagement from engaging in freelance work in this country subsequent to their admission. The regulation was designed to ensure that aliens seeking H nonimmigrant status have an actual job offer and are not coming to the United States for the purpose of seeking employment following arrival in this country.

Since promulgation of this regulation, however, many industries in the United States, such as the health care and computer consulting industries, have begun to rely more frequently on the use of contract workers. It has been the experience of the Service that many bona fide businesses which provide contract workers to certain industries under the H-1B classification have experienced difficulty in providing complete and detailed itineraries due to the unique employment practices of such industries. For examp le, companies which are in the business of contracting out physical therapists or computer professionals often get requests from customers to fill a position with as little as 1 day advance notice. Clearly an H-1B petitioner in this situation could not know of all particular contract jobs at the time that it first files the H-1B petition with the Service. As a result, many such bona fide employment contractors do not know all of the locations where a contract worker will be employed at the time the Form I-1 29, Petition for a Nonimmigrant Worker, is initially filed.

Moreover, some employers who use the H-1B classification may have a legitimate, but unforeseeable, need to transfer their employees on short notice from one work site to another within the organization, such as from the employer's Los Angeles office to its New York office. Under the current regulation, however, such an employer is required to submit with its petition a complete itinerary listing all of the locations where the contract workers will be employed. The regulation as now written, therefore, does not fully reflect current legitimate business practices.

In response to these problems, the Service now proposes to amend its regulations at 8 CFR 214.2(h)(2)(i)(B) and at 8 CFR 214.2(h)(2)(i)(F) to allow certain petitioners to submit a general statement describing the locations where the alien is to be employed, thereby eliminating the necessity of submitting a complete itinerary. A complete itinerary must be submitted only in those instances where the employer is aware of the actual itinerary or where the petitioner is an agent that does not actually employ the beneficiary but merely represents the alien and the alien's employer.

In those instances where the employer does not yet know the alien's complete itinerary at the time the petition is filed, the employer must submit, in lieu of a complete itinerary, a list of the places where it knows the beneficiary will definitely be employed, together with a description of the alien's job duties at those locations. In addition, the employer must submit, to the extent possible, a list describing the alien's possible places of employment and the duties which the alien would perform at such locations. The employer may also be asked to submit a letter with the petition describing its past hiring practices, including a list of past places where it has employed similarly situated persons. The letter must describe the employer's tentative plans to use the beneficiary in an H-1B capacity in the future. However, the absence of a past hiring practice is not a bar to the approval of the petition. Petitions filed without any itinerary may not be approved since this type of petition involves purely spec ulative employment. Of course, the petitioner must also submit all other documentary evidence required by the regulation for H-1B classification.

It is important to note that this proposed rule affects only those entities which are the actual employer of the alien, such as employment contractors and direct employers. In this regard, an employment contractor is one which employs the alien but assigns the alien to work at a different location than the contractor's place of business, based on the terms of a contract with a person or entity seeking the employer's services. A direct employer is one which hires the alien and assigns the alien to work at th e employer's place of business. In both instances, the petitioner is the employer of the alien and retains the ability to hire and fire the alien.

An agent who represents both the alien and the alien's employer is not the alien's employer and is required under this proposed rule to submit a complete itinerary. A typical example of this type of agency is the sports agent who has a contract with a sports star and who solicits potential employers in order to obtain the best deal for the alien. Recruitment agencies and entities which merely locate an alien for employers are not the actual employer of the alien and do not fit the Service's definition of an agent. As a result they may not file an H-1B petition.

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonim migrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor's degree. See section 214(i) of the

Immigration and Nationality Act (the "Act"). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

To ensure that petitioners will not use the H-1B classification for speculative employment, this proposed regulation would require petitioners to establish that they, in fact, have employment in a specialty occupation available for the alien at the time that the petition is initially filed. Under this proposed rule, the petitioner would be required to establish, both through the submission of evidence relating to its past employment practices and through the submission of evidence relating to its employment plans for the beneficiary, that the alien will, in fact, commence work in a speciality occupation immediately upon admission in H classification. The petitioner must be able to demonstrate its need for the alien's services within the specialty occupation described in the petition when the petition is filed. It should be noted that this 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 w ork site necessitates the filing of a new labor condition application or when the beneficiary is required to obtain a new state license in order to commence employment at the new location. In light of the existing statutory requirements for H-1B classification and the Department of Labor's regulations regarding labor condition applications, the Service is confident that the proposed regulation would ensure that U.S. workers continue to receive protection from employers who might attempt to abuse the H-1B no nimmigrant classification.

Finally, as previously indicated, the regulatory requirement relating to the submission of a complete itinerary was geared primarily for the entertainment industry, which, in light of changes under the Immigration Act of 1990, generally no longer uses the H-1B nonimmigrant classification. While it is preferable that all H-1B petitions be accompanied by complete itineraries listing the dates and places of the alien's employment, the Service recognizes such an across-the-board requirement is no longer practic al in today's business environment.

It should be noted that a petition filed by an agent who is not the actual employer of the alien, as described in 8 CFR 214.2(h)(2)(i)(F)(1), must be accompanied by an itinerary. The Service wishes to retain strict control over petitions filed under these circumstances since, as noted above, this type of agent, unlike an employment contractor, is not the actual employer of the alien. In such a case, unless the agent submits a complete itinerary, the Service cannot be assured that the alien will be employed continuously as a specialty worker following admission to this country. Moreover, in such a situation, the Service cannot approve the H cla ssification since there would not exist a valid labor condition application for each location where the alien will be employed.

The Service recognizes that implementation of this rule would remove some of the controls which it currently has over prospective H-1B employers at the time they initially file their petitions. To ensure that employers have complied with the terms of the initial petition and supporting labor condition application, the Service proposes to amend its regulations at 8 CFR 214.2(h)(15)(ii)(B)(1) relating to extensions of H-1B petitions to include clear language providing Service directors with the authority to require petitioners to submit evidence regarding the alien beneficiary's employment activities under the initial or prior approved petition or petitions.

The Service also proposes to revise 8 CFR 214.2(h)(2)(i)(E) to provide concrete examples of certain common situations where an amended H-1B petition need or need not be filed. While the examples are by no means intended to be exhaustive, the Service believes that such clarification is in the public interest. It

should be noted that the Service has previously provided guidance to the public on this issue through a policy memorandum dated October 22, 1992, signed by James J. Hogan, Executive Associate Commiss ioner, Operations. Hence, the examples described in the proposed regulation merely codify longstanding Service policy and practice.

The proposed rule addresses the following situations. First, where an employer is required, under relevant Department of Labor regulations, to file a new labor condition application, such as following certain temporary or permanent transfers, the employer will also be required to file an amended petition. On the other hand, when an H-1B nonimmigrant is transferred by an employer to another work site within the area covered by the supporting labor condition application, and there are no other changes in the nature or terms of the H-1B nonimmigrant's employment, the employer need not file an amended petition. Second, an employer will be required to file an amended petition where the alien's duties change from one specialty occupation to another. An employer need not file an amended petition, however, where there is a mere change in the petitioner's name, without a change in the underlying nature or terms of the H-1B employment. In such a situation, the petitioner may simply notify the Service of its name chang e when and if it files an application to extend the alien's nonimmigrant stay. The Service is amenable to considering additional suggestions from the public for streamlining the amended petition process.

The Service proposes to amend 8 CFR 214.2(h)(11) (i), (ii), and (iii) to indicate that a petition for an H nonimmigrant alien will be automatically revoked if the petitioner notifies the Service that the beneficiary is no longer employed by the petitioning entity. Under the current regulation, when the petitioner notifies the Service that the beneficiary is no longer employed by it in the capacity specified in the petition, the Service is required to send the petitioner a notice of intent to revoke the peti tion. (See 8 CFR 214.2(h)(11)(iii)(A)(1).) This process requires the petitioner to respond to the notice of intent, and then for the Service to take action based on the petitioner's subsequent response. Since the petitioner is the entity which supplied the Service with the information concerning the alien's employment, the current procedure creates unnecessary burdens on both the petitioner and the Service and, therefore, appears to be inappropriate. Moreover, this proposed change will bring the H regulation into conformity with the O and P regu lations in this regard.

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