

Issues Related to the Admission and Retention of H2B Workers

As the pandemic related to COVID-19 continues, new challenges are arising every day, impacting US businesses large and small. Those challenges are particularly acute for employers that rely on the H2B foreign worker visa program for a seasonal and surge workforce as decisions by both the United States government regarding travel, flights, entry to the country, etc., and by the worker's native countries regarding travel and reentry govern the employer's access to their workers.

We have been closely monitoring the situation at US Consulates abroad. Late Monday the US State Department issued the following notice on processing of H2 visa applications in Mexico

Notice to H-2 Petitioners: In response to the global pandemic COVID-19 the U.S. Embassy in Mexico City and all U.S. consulates in Mexico will cancel routine immigrant and nonimmigrant visa services starting March 18, 2020. This includes both visa interviews at the consulate as well as processing at the Centros de Atención a Solicitantes (CAS).

We intend to continue processing H2 cases but will need to modify our procedures in order to facilitate the social distancing recommended by health authorities. The U.S. Consulate General will prioritize the processing of returning H-2 workers who are eligible for an interview waiver. Because limited interview appointments will be available, we may cancel some first-time applicant appointments that have already been scheduled. If circumstances change, we will contact you with additional information.

As a reminder, returning H-2 workers are applicants whose H-2A or H-2B visas have expired in the last twelve months and are now applying for the same visa classification and did not require a waiver the last time they applied for a visa. Please do not make IW appointments for first-time applicants or applicants who require an interview every year due to law enforcement or immigration violations. First-time applications will not be processed if they are submitted as returning applicants.

At the same time, the Embassy and Consular Division in Jamaica completely closed for 15 days due to the discovery of an infected employee and today Guatemala suspended all flights coming and going from that country. Mexico has issued a travel advisory for travel to the United States, particularly to California, New York and Washington.

So what does this mean for the ability to obtain workers from abroad?

The good news is that H2B visa processing operations continue in Mexico for the time being. The sobering news is that the processing is limited. In person interviews are temporarily suspended. Workers who meet the existing criteria for interview waivers will continue to be processed but that will not cover every applicant. Detailed below are the eligibility criteria for the grant of an interview waiver.

Eligibility Criteria for Interview Waiver Program

To qualify for the IWP, the applicant typically must meet ALL of the following requirements:

- The applicant must be applying for the same type of visa that was previously issued.
- The prior visa in the same class must still be valid or must have expired within the last 12 months.
- The person must be applying at a consular post located in the country of the applicant's usual residence.
- The applicant must not have been previously refused a visa, unless such refusal was overcome or a waiver of ineligibility was obtained.
- If the applicant is applying to renew an F-1 or M-1 visa, the student must either be continuing to participate in the same major course of study, even if at a different institution; or the person must be attending the same institution, even if in a different major course of study.

We do not know when the consulates will resume in person interviews but can certainly expect a backlog in interview requests when they do, delaying the date of entry. And there may be additional travel restrictions imposed by other countries as the pandemic continues to spread.

What can be done?

We are recommending the following actions:

- 1) Where there are foreign workers who are currently here with expiring visas and/or entry documents and who are unable to return to their home country due to travel restrictions DHS should immediately extend their stay and deem them in continued lawful presence with work eligibility
- 2) Where workers are currently here to work in industries negatively impacted by the COVID-19 response actions the DOL and DHS should immediately implement flexible and generous worker transfer procedures to both relieve the financial liability of the impacted employer and to meet the workforce needs of a capped out employer still in need
- 3) Where workers are here to work in industries negatively impacted by the COVID-19 response and work will be significantly delayed, DHS should extend the current 30 day limitation on re-entry to allow the workers to immediately re-enter the moment the employer resumes business operations
- 4) Where workers are waiting visa processing abroad, all US consulates should deem all H2B visa applications as emergency requests and process accordingly, with expeditious in person interviews ongoing
- 5) Where workers are waiting visa processing abroad, consulates should immediately implement virtual interview capability
- 6) Where employers have not yet submitted petitions to CIS and CIS employees are required to telework, DHS should immediately provide for online, digital filing of petitions and uploading of required documentation rather than existing mail receipt

We will continue to refine and augment the list of recommendations as new challenges present themselves.