



[Docket No. DHS-2011-0108]

RIN 1601-ZA11

## Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A and H-2B Nonimmigrant Worker Programs

**AGENCY:** Office of the Secretary, DHS.

**ACTION:** Notice.

**SUMMARY:** Under Department of Homeland Security (DHS) regulations, U.S. Citizenship and Immigration Services (USCIS) may generally only approve petitions for H-2A and H-2B nonimmigrant status for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the **Federal Register**. Each such notice shall be effective for one year after its date of publication. This notice announces that the Secretary of Homeland Security, in consultation with the Secretary of State, is identifying 87 countries whose nationals are eligible to participate in the H-2A program and 88 countries whose nationals are eligible to participate in the H-2B program for the coming year.

**DATES:** The designations in this notice are effective from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and shall be without effect on [INSERT DATE ONE YEAR AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Ihsan Gunduz, Office of Strategy, Policy, and Plans, Department of Homeland Security, Washington, DC 20528, (202) 282-9708.

### **SUPPLEMENTARY INFORMATION:**

#### **Background:**

Generally, USCIS may approve H-2A and H-2B petitions for nationals of only those countries that the Secretary of Homeland Security, with the concurrence of the Secretary of

State, has designated as participating countries.<sup>1</sup> Such designation must be published as a notice in the **Federal Register** and expires after one year. In designating countries to include on the lists, the Secretary of Homeland Security, with the concurrence of the Secretary of State, will take into account factors including, but not limited to: (1) 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; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1).<sup>2</sup> Examples of specific factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country include, but are not limited to: fraud (e.g., fraud in the H-2 petition or visa application process by nationals of the country, the country's level of cooperation with the U.S. government in addressing H-2 associated visa fraud, and the country's level of information sharing to combat immigration-related fraud), nonimmigrant visa overstay<sup>3</sup> rates for nationals of the country (including but not limited to H-2A and H-2B nonimmigrant visa overstay rates), and non-

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<sup>1</sup> With respect to all references to "country" or "countries" in this document, it should be noted that the Taiwan Relations Act of 1979, Pub. L. No. 96-8, Section 4(b)(1), provides that "[w]henver the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan." 22 U.S.C. § 3303(b)(1). Accordingly, all references to "country" or "countries" in the regulations governing whether nationals of a country are eligible for H-2 program participation, 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1), are read to include Taiwan. This is consistent with the United States' one-China policy, under which the United States has maintained unofficial relations with Taiwan since 1979.

<sup>2</sup> DHS has published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* in which it is proposing to eliminate the requirement to designate countries whose nationals are eligible to participate in the H-2A and H-2B programs from DHS regulations. The rule is in a proposal stage and does not impact the designation of eligible countries contained in this notice. The regulations requiring the designation of countries whose nationals are eligible to participate in the H-2 programs will remain in effect until such time as DHS publishes any final rule amending such regulations and such final rule goes into effect, if applicable. *See* 88 FR 65040.

<sup>3</sup> An overstay is a nonimmigrant lawfully admitted to the United States for an authorized period, but who remained in the United States beyond his or her authorized period of admission. U.S. Customs and Border Protection (CBP) identifies two types of overstays: 1) individuals for whom no departure was recorded (Suspected In-Country Overstays), and 2) individuals whose departure was recorded after their authorized period of admission expired (Out-of-Country Overstays). For purposes of this Federal Register Notice, DHS uses Fiscal Year 2022 CBP nonimmigrant overstay data for the H-2A and H-2B nonimmigrant visa categories and the Fiscal Year 2022 Entry/Exit Overstay Report for all other visa categories.

compliance with the terms and conditions of the H-2 visa programs by nationals of the country.

As previously indicated, *see* 86 FR 2689; 86 FR 62559, in evaluating the U.S. interest, the Secretary of Homeland Security, with the concurrence of the Secretary of State, will generally ascribe a negative weight to evidence that a country had a suspected in-country visa overstay rate of 10 percent or higher with a number of expected departures of 50 individuals or higher in either the H-2A or H-2B classification according to U.S. Customs and Border Protection overstay data, and generally, with the concurrence of the Secretary of State, will terminate designation of that country from the H-2A or H-2B nonimmigrant visa program, as appropriate, unless, after consideration of other relevant factors, it is determined not to be in the U.S. interest to do so.

Similarly, DHS recognizes that countries designated under long-standing practice by U.S. Immigration and Customs Enforcement (ICE) as “At Risk of Non-Compliance” or “Uncooperative” with removals based on ICE data put the integrity of the immigration system and the American people at risk. Therefore, unless other favorable factors in the U.S. interest outweigh such designations by ICE, the Secretary of Homeland Security, with the concurrence of the Secretary of State, generally will terminate designation of such countries from the H-2A and H-2B nonimmigrant visa programs. Because there are separate lists for the H-2A and H-2B categories, it is possible that, in applying the above-described regulatory criteria for listing countries, a country may appear on one list but not on the other.

Even where the Secretary of Homeland Security has determined to terminate or decided not to designate a country, DHS, through USCIS, may allow, on a case-by-case basis, a national from a country that is not on the list to be named as a beneficiary of an H-2A or H-2B petition based on a determination that it is in the U.S. interest, in the totality of the circumstances, for that individual noncitizen to be a beneficiary of an H-2 petition. Determination of such U.S. interest will take into account factors, including but not limited to: 1) 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 8 CFR 214.2(h)(5)(i)(F)(I)(i) (H-2A nonimmigrants) or 214.2(h)(6)(1)(E)(I) (H-2B nonimmigrants), as applicable; 2) evidence that the beneficiary has been admitted to the United States previously in H-2A or H-2B status; 3) the potential for abuse, fraud, or other harm to the integrity of the H-2A or H-2B visa program through the potential admission of a beneficiary from a country not currently on the list; and 4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(I)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2). An additional factor for beneficiaries of H-2B petitions, although not necessarily determinative, would be whether the H-2B petition qualifies under section 1049 of the National Defense Authorization Act (NDAA) for FY 2018, Pub. L. 115-91, section 1045 of the NDAA for FY 2019, Pub. L. 115-232, section 9502 of the NDAA for FY 2021, Pub. L. 116-283, or section 5901 of the NDAA for FY 2023, Pub. L. 117-263.

In December 2008, DHS published the first lists of eligible countries for the H-2A and H-2B Visa Programs in the **Federal Register**. These notices, “Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2A Visa Program,” and “Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H-2B Visa Program,” designated 28 countries whose nationals were eligible to participate in the H-2A and H-2B programs. *See* 73 FR 77043 (Dec. 18, 2008); 73 FR 77729 (Dec. 19, 2008). The notices ceased to have effect on January 17, 2009, and January 18, 2009, respectively. Since the publication of the first lists in 2008, with the concurrence of the Secretary of State, has published a series of notices on a regular basis. *See* 75 FR 2879 (Jan. 19, 2010) (adding 11 countries to both programs); 76 FR 2915 (Jan. 18, 2011) (removing one country from and adding 15 countries to both programs); 77 FR 2558 (Jan. 18, 2012) (adding five countries to both programs); 78 FR 4154 (Jan. 18, 2013) (adding one country to both programs); 79 FR 3214 (Jan. 17, 2014) (adding four countries to both programs); 79 FR 74735 (Dec. 16, 2014) (adding five countries to both programs); 80 FR 72079 (Nov. 18, 2015) (removing one country from the H-2B program and

adding 16 countries to both programs); 81 FR 74468 (Oct. 26, 2016) (adding one country to both programs); 83 FR 2646 (Jan. 18, 2018) (removing three countries from and adding one country to both programs); 84 FR 133 (Jan. 18, 2019) (removing two countries from and adding 2 countries to both programs, removing one country from only the H-2B program, and adding one country to only the H-2A program); 85 FR 3067 (January 17, 2020) (leaving the lists unchanged); 86 FR 2689 (Jan. 13, 2021) (removing two countries from both programs, removing one country from only the H-2A program, and adding one country to only the H-2B program); 86 FR 62559 (Nov. 10, 2021) (removing one country from only the H-2A program, adding one country to only the H-2B program, and separately adding five countries to both programs); and 87 FR 67930 (Nov. 10, 2022) (adding one country to both programs).

### **Determination of Countries with Continued Eligibility**

The Secretary of Homeland Security has determined, with the concurrence of the Secretary of State, that the 86 countries previously designated to participate in the H-2A program in the November 10, 2022 notice continue to meet the regulatory standards for eligible countries and therefore should remain designated as countries whose nationals are eligible to participate in the H-2A program. Additionally, the Secretary of Homeland Security has determined, with the concurrence of the Secretary of State, that the 87 countries previously designated to participate in the H-2B program in the November 10, 2022 notice continue to meet the regulatory standards for eligible countries and therefore should remain designated as countries whose nationals are eligible to participate in the H-2B program. These determinations take into account how the regulatory factors identified above apply to each of these countries.

Consistent with the previous notices, nationals of non-designated countries may still be beneficiaries of approved H-2A and H-2B petitions upon the request of the petitioner if USCIS determines, as a matter of discretion and on a case-by-case basis, that it is in the U.S. interest for the individual to be a beneficiary of such petition. *See* 8 CFR 214.2(h)(5)(i)(F)(I)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2). USCIS may favorably consider a beneficiary of an H-2A or H-2B petition

who is not a national of a country included on the H-2A or H-2B eligibility lists as serving the national interest, depending on the totality of the circumstances, as described above. An additional factor for beneficiaries of H-2B petitions, although not necessarily determinative, would be whether the H-2B petition qualifies under section 1049 of the National Defense Authorization Act (NDAA) for FY 2018, Pub. L. 115-91, section 1045 of the NDAA for FY 2019, Pub. L. 115-232, section 9502 of the NDAA for FY 2021, Pub. L. 116-283, or section 5901 of the NDAA for FY 2023, Pub. L. 117-263. However, any ultimate determination of eligibility will be made according to all the relevant factors and evidence in each individual circumstance.

### **Countries Now Designated as Eligible**

The Secretary of Homeland Security has also determined, with the concurrence of the Secretary of State, that Bolivia should be designated as an eligible country to participate in both the H-2A and H-2B nonimmigrant visa programs because its participation is in the U.S. interest consistent with the regulations governing these programs.

Bolivia consistently cooperates with accepting its nationals subject to a final order of removal. Furthermore, nationals of Bolivia do not present significant visa overstay concerns; their overstay rates are consistent with other countries currently listed as eligible to participate in the H-2A and H-2B programs. Bolivian nationals are generally compliant with the terms and conditions of all visa categories. For instance, DOS's recent validation study of B1/B2 visas found that under two percent of Bolivian nationals overstayed their B1/B2 visas. Due to the current economic situation in Bolivia, adding Bolivia to these programs would contribute to DOS's goals of promoting economic development and improving bilateral commercial relationships in Bolivia. Additionally, the H-2A and H-2B programs will provide an alternative, lawful, pathway to irregular migration for Bolivian nationals seeking an economic opportunity in the United States. Based on the foregoing reasons, adding Bolivia to both the H-2A and H-2B eligible countries lists serves the U.S. interest.

### **Designation of Countries Whose Nationals Are Eligible to Participate in the H-2A and H-**

## **2B Nonimmigrant Worker Programs**

Pursuant to the authority provided to the Secretary of Homeland Security under sections 214(a)(1) and 215(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1) and 1185(a)(1)), I am designating, with the concurrence of the Secretary of State, the following countries as those whose nationals are eligible to participate in the H-2A nonimmigrant worker program:

1. Andorra
2. Argentina
3. Australia
4. Austria
5. Barbados
6. Belgium
7. Bolivia
8. Bosnia and Herzegovina
9. Brazil
10. Brunei
11. Bulgaria
12. Canada
13. Chile
14. Colombia
15. Costa Rica
16. Croatia
17. Republic of Cyprus
18. Czech Republic
19. Denmark
20. Dominican Republic

21. Ecuador
22. El Salvador
23. Estonia
24. The Kingdom of Eswatini
25. Fiji
26. Finland
27. France
28. Germany
29. Greece
30. Grenada
31. Guatemala
32. Haiti
33. Honduras
34. Hungary
35. Iceland
36. Ireland
37. Israel
38. Italy
39. Jamaica
40. Japan
41. Kiribati
42. Latvia
43. Liechtenstein
44. Lithuania
45. Luxembourg
46. Madagascar



47. Malta
48. Mauritius
49. Mexico
50. Monaco
51. Montenegro
52. Mozambique
53. Nauru
54. The Netherlands
55. New Zealand
56. Nicaragua
57. North Macedonia (formerly Macedonia)
58. Norway
59. Panama
60. Papua New Guinea
61. Paraguay
62. Peru
63. Poland
64. Portugal
65. Romania
66. Saint Lucia
67. San Marino
68. Serbia
69. Singapore
70. Slovakia
71. Slovenia
72. Solomon Islands

73. South Africa
74. South Korea
75. Spain
76. St. Vincent and the Grenadines
77. Sweden
78. Switzerland
79. Taiwan
80. Thailand
81. Timor-Leste
82. Turkey
83. Tuvalu
84. Ukraine
85. United Kingdom
86. Uruguay
87. Vanuatu

Pursuant to the authority provided to the Secretary of Homeland Security under sections 214(a)(1) and 215(a)(1) of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1) and 1185(a)(1)), I am designating, with the concurrence of the Secretary of State, the following countries as those whose nationals are eligible to participate in the H-2B nonimmigrant worker program:

1. Andorra
2. Argentina
3. Australia
4. Austria
5. Barbados
6. Belgium

7. Bolivia
8. Bosnia and Herzegovina
9. Brazil
10. Brunei
11. Bulgaria
12. Canada
13. Chile
14. Colombia
15. Costa Rica
16. Croatia
17. Republic of Cyprus
18. Czech Republic
19. Denmark
20. Dominican Republic
21. Ecuador
22. El Salvador
23. Estonia
24. The Kingdom of Eswatini
25. Fiji
26. Finland
27. France
28. Germany
29. Greece
30. Grenada
31. Guatemala
32. Haiti

33. Honduras
34. Hungary
35. Iceland
36. Ireland
37. Israel
38. Italy
39. Jamaica
40. Japan
41. Kiribati
42. Latvia
43. Liechtenstein
44. Lithuania
45. Luxembourg
46. Madagascar
47. Malta
48. Mauritius
49. Mexico
50. Monaco
51. Mongolia
52. Montenegro
53. Mozambique
54. Nauru
55. The Netherlands
56. New Zealand
57. Nicaragua
58. North Macedonia (formerly Macedonia)

59. Norway
60. Panama
61. Papua New Guinea
62. Peru
63. The Philippines
64. Poland
65. Portugal
66. Romania
67. Saint Lucia
68. San Marino
69. Serbia
70. Singapore
71. Slovakia
72. Slovenia
73. Solomon Islands
74. South Africa
75. South Korea
76. Spain
77. St. Vincent and the Grenadines
78. Sweden
79. Switzerland
80. Taiwan
81. Thailand
82. Timor-Leste
83. Turkey
84. Tuvalu

85. Ukraine

86. United Kingdom

87. Uruguay

88. Vanuatu

This notice does not affect the current status of noncitizens who at the time of publication of this notice hold valid H-2A or H-2B nonimmigrant status. Noncitizens currently holding such status, however, will be affected by this notice should they seek an extension of stay in the H-2 classification, or a change of status from one H-2 status to another, for employment on or after the effective date of this notice. Similarly, noncitizens holding nonimmigrant status other than H-2 are not affected by this notice, but will be affected by this notice if they seek a change of status to H-2 on or after the effective date of this notice.

Nothing in this notice limits the authority of the Secretary of Homeland Security or his designee or any other federal agency to invoke against any foreign country or its nationals any other remedy, penalty, or enforcement action available by law.

**Alejandro N. Mayorkas,**

*Secretary of Homeland Security.*

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