



# U.S. Citizenship and Immigration Services Modernizing H-2 Program Requirements, Oversight, and Worker Protections

## Small Entity Compliance Guide

### Introduction and Purpose

The U.S. Department of Homeland Security (DHS) has prepared this document as the small entity compliance guide required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. The guide summarizes and explains rules that DHS adopted, but it is not a substitute for any rule. Only the final rule can provide complete and definitive information regarding its requirements.

### Overview

On December 18, 2024, DHS issued a final rule at *89 FR 103202* that amends the United States Citizenship and Immigration Service's (USCIS) regulations affecting temporary agricultural (H-2A) and temporary nonagricultural (H-2B) nonimmigrant workers (H-2 programs) and their employers. The final rule modernizes and improves DHS regulations relating to H-2 programs, including a number of measures to strengthen program integrity, provide greater protections and flexibility for H-2 workers, and improve program efficiency.

The effective date of the final rule is January 17, 2025. This guidance restates some of the information in the final rule, particularly the information related to small entities. However, this guidance does not replace the final regulations; instead, it is a reference for small entities seeking information concerning the potential impact of the regulations on them as it relates to this rule specifically, DHS prepared a full Regulatory Impact Assessment (RIA) and Small Entity Analysis (SEA) to accompany the rule that are available in the final rule published on the federal register at <https://www.federalregister.gov/documents/2024/12/18/2024-29353/modernizing-h-2-program-requirements-oversight-and-worker-protections>.

### Summary of the Final Rule Provisions

The final rule adopts, with appropriate changes, the regulatory text in the proposed rule published in the Federal Register on September 20, 2023.<sup>1</sup> DHS made several changes in the final rule based on comments received regarding the proposed rule or as required by the effects of those changes. The major provisions of the final rule are as follows:

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<sup>1</sup> See U.S. Citizenship and Immigration Services Modernizing H-2 Program Requirements, Oversight, and Worker Protections; Proposed rule, 88 FR 65040.

## 1. Compliance Reviews and Inspections

DHS added stronger language requiring petitioners and employers to both consent to and fully comply with any USCIS audit, investigation, or other program integrity activity and clarified USCIS' authority to deny/revoke a petition if unable to verify information related to the petition, including due to lack of cooperation from the petitioner or employer during a site visit or other compliance review.

## 2. Whistleblower Protections

DHS provided H-2A and H-2B workers with "whistleblower protection" comparable to the protection currently offered to H-1B workers.

## 3. Prohibited Fees Provisions

DHS significantly revised the provisions relating to prohibited fees to strengthen the existing prohibition on, and consequences for, charging certain fees to H-2A and H-2B workers, including new bases for denial for some H-2 petitions.

## 4. Grounds for Denial of H-2 Petitions

DHS instituted certain mandatory and discretionary grounds for denial of an H-2A or H-2B petition filed by a petitioner who, among other things, has been found to have committed certain labor or other legal violations or misused the H-2 programs.

## 5. Elimination of Eligible Countries List

DHS removed the requirement that USCIS may generally only approve petitions for H-2 nonimmigrant status for nationals of countries designated as eligible to participate in the H-2 programs.

## 6. Establishment of 60-Day Grace Period

DHS changed the existing grace periods before and after petition validity such that they will be the same for both H-2A and H-2B Programs. DHS further created a 60-day grace period following any H-2A or H-2B revocation or cessation of employment during which the worker will not be considered to have failed to maintain nonimmigrant status and will not accrue any unlawful presence solely on the basis of the revocation or cessation so that workers have time to prepare for departure or seek new qualifying employment.

## 7. Clarification of Responsibility for Costs of Return Transportation

DHS clarified responsibility of H-2A employers for reasonable costs of return transportation for beneficiaries following a petition revocation.

## 8. Clarification of Steps Towards Lawful Permanent Resident Status

DHS clarified that H-2 workers may take certain steps toward becoming a lawful permanent resident of the United States while still maintaining lawful nonimmigrant status.

## 9. Elimination of Interrupted Stay Calculation

DHS eliminated the “interrupted stay” calculation and instead provided a uniform period of absence (at least 60 days) to reset an individual’s 3-year period of stay.

## 10. Make Portability Permanent

DHS made portability permanent for H-2B workers and removed the requirement that H-2A workers can only port to an E-Verify employer. Portability refers to the ability of eligible workers to immediately begin working upon the proper filing of an extension of stay petition, rather than only upon its approval. DHS further clarified that the beneficiary of such a petition is considered to have been in a period of authorized stay during the pendency of the petition and that the petitioner must still abide by all H-2 program requirements

## Entities Subject to the Rule

The U.S. Small Business Administration (SBA) Size Standards define “small entities” as comprising small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000.<sup>2</sup> Entities affected by the final rule are those that file and pay fees for certain immigration benefit requests on behalf of a foreign national. The petitions or applications filed by entities include the following:

- a. Petition for a Nonimmigrant Worker, Form I-129 – authorizes foreign workers for temporary employment, services, or to receive training in the United States.

DHS concluded that the small entities primarily impacted by this final rule are those that will incur additional direct costs to complete an H-2 petition. These costs are related to the additional time for a selected small entity to complete the updated Form I-129 H Classification Supplement to this rule.

### a. Form I-129 Small Entities

The increase in cost per petition to file the H classification supplement for Form I-129 on behalf of an H-2 worker is the additional time burden of 0.23 hours to complete the form.

Petitioning employers may incur costs they would not have otherwise incurred if they are selected to participate in compliance reviews or inspections that are necessary for the approval of a petition but fail or refuse to comply with such reviews or inspections.

This final rule does not impose any new or additional direct “reporting” or “recordkeeping” requirements on filers of H-2 petitions. The final rule does not require any new professional skills for reporting.

## Additional Resources

### Final Rule

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<sup>2</sup> A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act, 15 U.S.C. 632.

The final rule is published on the Office of the Federal Register web site at:

<https://www.federalregister.gov/documents/2024/12/18/2024-29353/modernizing-h-2-program-requirements-oversight-and-worker-protections>

### **Compliance Assistance**

Additional resources for small entities are available at the USCIS website for the Small Business Regulatory Enforcement Fairness Act (SBREFA): <https://www.uscis.gov/legal-resources/smallbusiness-regulatory-enforcement-fairness-act-sbrefa>. USCIS can help small entities with questions about the final rule. Please refer to the above website for additional information and resources for addressing inquiries and resources.