



[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 81 countries whose nationals are eligible to participate in the H-2A program and 80 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 January 19, 2021, and shall be without effect after January 18, 2022.

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.¹ Such designation must be published as a notice in the

¹ With respect to all references to “country” or “countries” in this document, it should be noted that the Taiwan

Federal Register and expires after one year. In designating countries to include on the list, 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). 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 (including but not limited to 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 overstay² rates for nationals of the country (including but not limited to H-2 nonimmigrants), non-compliance with the terms and conditions of the H-2 visa programs by nationals of the country, and the country's level of compliance with U.S. immigration policies.

In evaluating the U.S. interest, the Secretary of Homeland Security, with the concurrence of the Secretary of State, further considers visa overstay rates of 10 percent or higher to pose an unreasonably high risk to the integrity of our immigration system. The Department believes that

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.

² 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 FY 2019 U.S. Customs and Border Protection H-2A and H-2B nonimmigrant overstay data.

a failure of one out of every 10 nationals of a country to comply with his or her nonimmigrant status through timely departure is indicative of significant underlying problems relating to the country's designation for H-2A or H-2B program participation. Naturally, with greater numbers of participants from any country comes more significant risk when the overstay rate of a country's nationals is unreasonably high. DHS believes that countries with more than 50 expected departures in a given fiscal year whose nationals overstay at rate of more than 10 percent (i.e., at least 5 overstays) present an appreciable and considerable degree of risk to the integrity of these nonimmigrant programs.

Accordingly, the Secretary of Homeland Security, with the concurrence of the Secretary of State, will ascribe significant 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 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. Overstay rates greater than 10 percent and/or involving more expected than 50 departures will bear increasingly negative weight. Overstay rates that are lower than 10 percent or which involve less than 50 expected departures may also be weighed negatively, but less so as the numbers decrease.

Similarly, the Department of Homeland Security 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, will terminate designation of such countries from the H-2A and H-2B nonimmigrant visa programs in recognition that the U.S. typically cannot continue to admit individuals from countries that do not consistently cooperate

with the removal of their citizens and nationals. Note that, as 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 terminated designation of a country as not being in the U.S. interest, however, 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 the individual alien's participation is in the U.S. interest. 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)(1)(i) (H-2A nonimmigrants) or 214.2(h)(6)(1)(E)(1) (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)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2).

In December 2008, DHS published in the **Federal Register** two 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," which 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, 2010, and January 18, 2010, respectively. *See* 8 CFR 214.2(h)(5)(i)(F)(2) and 8 CFR 214.2(h)(6)(i)(E)(3). In implementing these regulatory provisions, the Secretary of Homeland Security, 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); 76 FR 2915 (Jan. 18, 2011) (removing 1 country and adding 15 countries); 77 FR

2558 (Jan. 18, 2012) (adding 5 countries); 78 FR 4154 (Jan. 18, 2013) (adding 1 country); 79 FR 3214 (Jan.17, 2014) (adding 4 countries); 79 FR 74735 (Dec. 16, 2014) (adding 5 countries); 80 FR 72079 (Nov. 18, 2015) (removing 1 country from the H-2B program and adding 16 countries); 81 FR 74468 (Oct. 26, 2016) (adding 1 country); 83 FR 2646 (Jan. 18, 2018) (removing 3 countries and adding 1 country); 84 FR 133 (Jan. 18, 2019) (removing 2 countries from both the H-2A program and the H-2B program, removing 1 country from only the H-2B program, and adding 2 countries to both programs and 1 country to only the H-2A program); 85 FR 3067 (January 17, 2020) (remained unchanged).

Determination of Countries with Continued Eligibility

The Secretary of Homeland Security has determined, with the concurrence of the Secretary of State, that 81 countries previously designated to participate in the H-2A program in the January 17, 2020 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 80 countries previously designated to participate in the H-2B program in the January 17, 2020 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.

Countries No Longer Designated as Eligible

The Secretary of Homeland Security has now determined, with the concurrence of the Secretary of State, that the following countries should no longer be designated as eligible countries because they no longer meet the regulatory standards identified above: Mongolia (H-2A only), the Independent State of Samoa (“Samoa”), and Tonga.

Mongolia has a high H-2A visa overstay rate. In FY 2019, DHS estimated that 67 H-2A visa holders from Mongolia were expected to depart the United States. However, DHS estimated

that 40.3% of those H-2A visa holders from Mongolia overstayed their period of authorized stay. This high H-2A visa overstay rate demonstrates an unacceptable level of harm to the integrity of the H-2A visa program; continued eligibility of Mongolian nationals for the H-2A visa program thus does not serve the U.S. interest. Therefore, the Secretary of Homeland Security, with the concurrence of the Secretary of State, is removing Mongolia from the list of eligible countries for the H-2A program. By contrast, in FY 2019, DHS estimated that none of the H-2B visa holders from Mongolia overstayed their period of authorized stay. Given this compliance with H-2B program, and absent additional derogatory information indicating an unacceptable potential for fraud or program abuse, DHS and DOS are not removing Mongolia from the list of eligible countries for the H-2B program at this time.

Samoa has been designated as “At Risk of Non-Compliance” according to ICE’s FY 2020 mid-year assessment of 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. Samoa was removed from the H-2 list in 2018 due to its designation as “At Risk of Non-Compliance.” 83 FR 2646, 2647. When Samoa demonstrated increased cooperation with the United States regarding the return of its nationals with final orders of removal, DHS and DOS added Samoa back to the list of H-2 eligible countries in 2019. 84 FR 133, 135. However, Samoa reverted back to being “At Risk of Non-Compliance” in ICE’s FY 2019 mid-year assessment and has continued to be “At Risk of Non-Compliance” since then. Samoa’s inconsistent cooperation with the United States regarding the return of its nationals and citizens with final orders of removal does not serve the U.S. interest. Therefore, the Secretary of Homeland Security, with the concurrence of the Secretary of State, is removing Samoa from the list of H-2A and H-2B eligible countries.

Tonga has been designated as “At Risk of Non-Compliance” according to ICE’s FY 2020 mid-year assessment of the country’s cooperation with respect to the refusal to accept ICE charter flights for the repatriation of its nationals that have been ordered removed from the

United States. Tonga's inconsistent cooperation with the United States regarding the return of its nationals and citizens with final orders of removal does not serve the U.S. interest. Therefore, the Secretary of Homeland Security, with the concurrence of the Secretary of State, is removing Tonga from the list of H-2A and H-2B eligible countries.

On the basis of the foregoing analysis, DHS has removed three countries from the H-2A and/or H-2B country eligibility lists for 2021. Nonetheless, 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)(1)(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 list as serving the national interest, depending on the totality of the circumstances. Factors USCIS may consider include, among other things, whether a beneficiary has previously been admitted to the United States in H-2A or H-2B status and complied with the terms of the program. An additional factor for beneficiaries of H-2B petitions, although not necessarily determinative standing alone, would be whether the H-2B petition qualifies under section 1049 of the National Defense Authorization Act (NDAA) for FY 2018, Public Law 115-91 or section 1045 of the NDAA for FY 2019, Pub.L.115-232. However, any ultimate determination of eligibility will be made according to all of 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 the Philippines should be designated as eligible to participate in the H-2B non-immigrant visa program because the participation of the Philippines is in the U.S. interest consistent with the regulations governing this program.

The U.S. military realignment away from Japan and subsequent military construction on

Guam requires a sizeable workforce that cannot be sustained by the local workforce in Guam. According to the U.S. Department of Defense, the need for more labor to work in military construction is likely to grow significantly in the next five years. Additionally, the influx of military personnel and activity on Guam will cause a surge in demand in the civilian construction sector (i.e. homes, expansion of hospitals, commercial projects, etc.). The U.S. Department of Interior continues to register the significant dependence that Guam and the Commonwealth of the Northern Mariana Islands (CNMI) has on foreign workers from the Philippines to supplement necessary and essential components of their workforce. As such, to ensure the labor needs of the U.S. military realignment projects in Guam and the labor shortages experienced in the CNMI are met properly, adding the Philippines to the H-2B eligible countries list 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), 215(a)(1), and 241 of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1), 1185(a)(1), and 1231), I am designating, with the concurrence of the Secretary of State, nationals from the following countries to be eligible to participate in the H-2A nonimmigrant worker program:

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

8. Brunei
9. Bulgaria
10. Canada
11. Chile
12. Colombia
13. Costa Rica
14. Croatia
15. Czech Republic
16. Denmark
17. Dominican Republic
18. Ecuador
19. El Salvador
20. Estonia
21. Fiji
22. Finland
23. France
24. Germany
25. Greece
26. Grenada
27. Guatemala
28. Honduras
29. Hungary
30. Iceland
31. Ireland
32. Israel
33. Italy

34. Jamaica
35. Japan
36. Kiribati
37. Latvia
38. Liechtenstein
39. Lithuania
40. Luxembourg
41. Madagascar
42. Malta
43. Mexico
44. Moldova
45. Monaco
46. Montenegro
47. Mozambique
48. Nauru
49. The Netherlands
50. New Zealand
51. Nicaragua
52. North Macedonia (formerly Macedonia)
53. Norway
54. Panama
55. Papua New Guinea
56. Paraguay
57. Peru
58. Poland
59. Portugal

60. Romania
61. San Marino
62. Serbia
63. Singapore
64. Slovakia
65. Slovenia
66. Solomon Islands
67. South Africa
68. South Korea
69. Spain
70. St. Vincent and the Grenadines
71. Sweden
72. Switzerland
73. Taiwan
74. Thailand
75. Timor-Leste
76. Turkey
77. Tuvalu
78. Ukraine
79. United Kingdom
80. Uruguay
81. Vanuatu

Pursuant to the authority provided to the Secretary of Homeland Security under sections 214(a)(1), 215(a)(1), and 241 of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1), 1185(a)(1), and 1231), I am designating, with the concurrence of the Secretary of State, nationals

from the following countries to be eligible to participate in the H-2B nonimmigrant worker program:

1. Andorra
2. Argentina
3. Australia
4. Austria
5. Barbados
6. Belgium
7. Brazil
8. Brunei
9. Bulgaria
10. Canada
11. Chile
12. Colombia
13. Costa Rica
14. Croatia
15. Czech Republic
16. Denmark
17. Ecuador
18. El Salvador
19. Estonia
20. Fiji
21. Finland
22. France
23. Germany

24. Greece
25. Grenada
26. Guatemala
27. Honduras
28. Hungary
29. Iceland
30. Ireland
31. Israel
32. Italy
33. Jamaica
34. Japan
35. Kiribati
36. Latvia
37. Liechtenstein
38. Lithuania
39. Luxembourg
40. Madagascar
41. Malta
42. Mexico
43. Monaco
44. Mongolia
45. Montenegro
46. Mozambique
47. Nauru
48. The Netherlands
49. New Zealand

50. Nicaragua
51. North Macedonia (formerly Macedonia)
52. Norway
53. Panama
54. Papua New Guinea
55. Peru
56. Philipinnes
57. Poland
58. Portugal
59. Romania
60. San Marino
61. Serbia
62. Singapore
63. Slovakia
64. Slovenia
65. Solomon Islands
66. South Africa
67. South Korea
68. Spain
69. St. Vincent and the Grenadines
70. Sweden
71. Switzerland
72. Taiwan
73. Thailand
74. Timor-Leste
75. Turkey

- 76. Tuvalu
- 77. Ukraine
- 78. United Kingdom
- 79. Uruguay
- 80. Vanuatu

This notice does not affect the current status of aliens who at the time of publication of this notice hold valid H-2A or H-2B nonimmigrant status. Aliens currently holding such status, however, will be affected by this notice should they seek an extension of stay in 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, aliens holding nonimmigrant status other than H-2 status are not affected by this notice unless they seek a change of status to H-2 status.

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.

The Senior Official Performing the Duties of the Deputy Secretary, Kenneth T. Cuccinelli II, having reviewed and approved this document, is delegating the authority to electronically sign this document to Ian J. Brekke, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

Ian J. Brekke
Senior Official Performing the Duties of the
General Counsel