



November 14, 2019

PM-602-0176

Policy Memorandum

SUBJECT: Temporary or Seasonal Need for H-2A Petitions Seeking Workers for Range Sheep and/or Goat Herding or Production

Purpose

This policy memorandum (PM) provides guidance regarding the determination of temporary or seasonal need for H-2A petitions seeking workers for range sheep or goat herding or production (hereinafter referred to as “H-2A sheep/goatherder petitions”). It is not intended to alter current policy for the adjudication of H-2A petitions, but to ensure that U.S. Citizenship and Immigration Services (USCIS) adjudicates all H-2A sheep/goatherder petitions on a case-by-case basis, considering the totality of the facts presented, and in the same manner as all other H-2A petitions, consistent with the Immigration and Nationality Act (INA) and existing regulations. USCIS is issuing this PM to better ensure that those aliens admitted into the United States as H-2A nonimmigrant herders fill temporary and seasonal positions, and petitioners filing petitions for permanent sheep/goatherders comply with the requirements applicable to permanent positions.¹

Effective Date

This PM applies to all USCIS employees. This new guidance will take effect on June 1, 2020, in order to provide the regulated public with the opportunity to comment and make any necessary changes to existing business practices. USCIS welcomes comments on the guidance, the proposed effective date, potential cost savings or increases, impacts on filing practices, and other topics that are the focus of this guidance. USCIS will review and consider all comments received during the 30-day comment period from November 14, 2019 to December 14, 2019, and may subsequently publish a revised PM, as needed. The guidance contained in the PM will be controlling and will supersede any prior guidance regarding the determination of temporary or seasonal need for H-2A sheep/goatherder petitions.

Authorities

- INA 101(a)(15)(H)(ii)(a); 8 U.S.C. 1101(a)(15)(H)(ii)(a).
- Title 8 Code of Federal Regulations (CFR) 214.2(h).

¹ See, e.g., 8 U.S.C. 1153(b)(3).

Background

In relation to a challenge brought by worker advocates, the U.S. Court of Appeals for the D.C. Circuit, on August 17, 2018, remanded claims challenging the Department of Labor's (DOL) regulation at 20 CFR 655.215(b)(2), which allows for 364-day temporary labor certifications (TLC) for sheep/goatherders, and opined that the Department of Homeland Security's (DHS's) corresponding practice of approving H-2A petitions for sheep/goatherders on a consecutive, that is, back-to-back, basis, for 364-day periods of need did not conform with the INA, as amended. *Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 386 (D.C. Cir. 2018) (finding that the Plaintiff has "plausibly shown that [DHS's] *de facto* policy of authorizing long-term visas is arbitrary, capricious, and contrary to law, in violation of the [Administrative Procedure Act] and the Immigration and Nationality Act, . . . because it authorizes the creation of permanent herder jobs that are not temporary or seasonal.") (internal marks and reference to Second Amended Complaint omitted).² DHS/USCIS interprets the D.C. Circuit Court's opinion as stating that an agency history of consecutive, back-to-back 364-day approvals of H-2A sheep/goatherder petitions would violate the INA and DHS regulations (*see* 8 CFR 214.2(h)(5)(iv)(A) (requiring H-2A employment to be "temporary or seasonal") and (h)(1)(ii)(C) (same)) and that such a practice would be inconsistent with the H-2A statutory and regulatory requirements that the H-2A employer's need be temporary or seasonal.

The D.C. Circuit found that statutory language supports the conclusion that H-2A petitioners seeking sheep/goatherders are subject to the same temporary or seasonal need requirement as other H-2A petitioners, and that a practice that exempts these petitioners from this H-2A requirement goes against H-2A statutory and regulatory authorities. First, the INA does not exempt H-2A sheep/goatherder petitions from the temporary or seasonal need requirement. Similarly, the plain language of DHS regulations does not distinguish or exempt H-2A sheep/goatherder petitions from the temporary or seasonal need requirement.

Further, as DHS explained in its final rule, "Changes to Requirements Affecting H-2A Nonimmigrants," 73 FR 76891, 76906-7 (Dec. 18, 2008), Congress permitted the special laws enacted during the early 1950s for foreign workers skilled in sheepherding to expire after the issuance of "Spanish Shepherders, Report of Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives," a report by the House Judiciary Committee on February 14, 1957.³ In short, it was the Committee's opinion that sheepherders should not benefit from some "preferential or privileged" treatment. USCIS agrees that sheep/goatherder positions should be treated the same as all other H-2A positions with respect to temporary or seasonal need and therefore will assess temporariness and seasonality of positions described in petitions for such workers just as it does for other occupations.

² The D.C. Circuit stated that based on the Plaintiffs evidence of DHS's actual practice, it assumed, as of the date of its opinion, that H-2A sheep/goatherders and their employers have an expectation that herders work in the United States just shy of three years, return home for a brief period of time, and "then [return] for another nearly three-year stint." *Hispanic Affairs Project*, 901 F.3d at 386.

³ These special laws enacted by Congress permitted foreign workers with sheepherding skills to be admitted for permanent employment. *See generally* 73 FR 76891, 76906 (Dec. 18, 2008).

Therefore, in light of the D.C. Circuit Court’s decision, and interpretation of the existing statutory and regulatory framework above, USCIS has determined that, other than in extraordinary circumstances (noted at 8 CFR 214.2(h)(5)(iv)(A)), it will not grant consecutive, back-to-back 364-day approvals (or similarly lengthy consecutive periods for the same job duties for a sheep/goatherder position) of H-2A sheep/goatherder petitions, notwithstanding issuance of a TLC for such periods. *See* 8 CFR 214.2(h)(5)(iv)(B). Moving forward, H-2A sheep/goatherder petitions will be subject to the same temporary or seasonal need analysis that applies to all other H-2A petitions. USCIS’ publication of this PM will ensure consistent application of DHS H-2A regulations addressing temporariness and seasonality to the adjudications of H-2A sheep/goatherder petitions, and will ensure that the wages and working conditions of similarly situated U.S. workers are not depressed by the employment of H-2A temporary workers.

USCIS believes that this PM, which ensures that H-2A sheep/goatherder petitions are treated similarly as all other H-2A petitions, will further assist in safeguarding the integrity of the H-2A program, which was intended for agricultural labor or services that are temporary or seasonal in nature. Aligning adjudication of temporariness and seasonality in the context of H-2A sheep/goatherder petitions with the adjudication of temporariness and seasonality of other H-2A petitions will also support efficient and fair adjudication of H-2A nonimmigrant benefit requests while protecting the interests of U.S. workers (for example, their wages and job opportunities).

Effective June 1, 2020, USCIS will adjudicate Form I-129, Petition for Nonimmigrant Worker, filed by petitioners seeking H-2A sheep/goatherder workers in line with this PM.

Policy

Temporary or Seasonal Need Analysis:

1. Legal Authorities on Temporary or Seasonal Need

All H-2A petitions, including H-2A sheep/goatherder petitions, are subject to the same statutory standards and DHS regulatory standards requiring that the H-2A employer establish temporary or seasonal need. Specifically, INA 101(a)(15)(h)(ii)(a) states, in relevant part, that an alien seeking to come to the United States as an H-2A nonimmigrant must be “coming temporarily to the United States to perform agricultural labor or services...*of a temporary or seasonal nature*” (italics added).

As noted in the statute, not only must the alien be coming “temporarily” to the United States, but the agricultural labor or services that the alien is performing must also be “temporary or seasonal.”

DHS regulations state that, “[a]n H-2A *petitioner* must establish that the employment proposed in the certification is of a temporary or seasonal nature.” 8 CFR 214.2(h)(5)(iv)(A) (emphasis added).

The regulations further define an employer's temporary or seasonal needs as follows:

- **Temporary.** Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.
- **Seasonal.** Employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations.

Id. (emphasis added).

As emphasized in the prior paragraph, the temporary or seasonal nature of an agricultural position is not determined by the occupation or the job itself, and whether it is characterized as temporary or seasonal, but rather the employer's need for the duties to be performed. *See Matter of Artee*, 18 I. & N. Dec. 366 (BIA 1982).⁴

As articulated by the Department of Justice's Office of Legal Counsel:

[I]n order to determine whether a particular job is "temporary" within the meaning of [8 U.S.C. §] 1101(a)(15)(H)(ii)(a), [DHS] and the Department of Labor must focus upon the employer's need. If an employer makes a bona fide application showing that he needs to fill a job on a temporary basis, the work is "of a temporary or seasonal nature." It is irrelevant whether the job is for three weeks to harvest a crop or for six months to replace a sick worker or for a year to help handle an unusually large lumber contract. What is relevant is the employer's assessment -- evaluated, as required by statute, by the Department of Labor and [DHS] -- of his [sic] need for a short-term (as opposed to a permanent) employee. The issue to be decided is whether the employer has demonstrated a temporary need for a worker in some area of agriculture. The nature of the job itself is irrelevant. What is relevant is whether the employer's need is truly temporary.

Temp. Workers Under S 301 of the Immigration Reform & Control Act, 11 U.S. Op. Off. Legal Counsel 39, 41-42 (1987).

2. The Role of Department of Labor's Temporary Labor Certification and USCIS Adjudicating Temporary or Seasonal Need on a Case-by-Case Basis

Each H-2A petition must be submitted with a single, valid TLC. *See* INA 218(a); *see also* 8 CFR 214.2(h)(5)(i)(A). DOL's finding that employment qualifies as temporary or seasonal is "normally sufficient" for the purpose of an H-2A petition. 8 CFR 214.2(h)(5)(iv)(B). An H-2A petitioner must establish that the employment proposed in the certification is of a temporary or

⁴ The Board of Immigration Appeals' interpretation of temporary need in *Matter of Artee* applies to the H-classification. That 1982 decision preceded enactment of the Immigration Reform and Control Act of 1986 (IRCA), which moved agricultural employment from the pre-IRCA H-2 classification into a separate H-2A classification. *See also Temporary Workers Under Section 301 of the Immigration Reform and Control Act*, 11 U.S. Op. Off. Legal Counsel 39 (Apr. 23, 1987) (applying *Matter of Artee* standard to the H-2A classification); *Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the United States*, 52 FR 20496, 20498 (June 1, 1987) (DOL interim final rule) (citing favorably to *Matter of Artee* for the proposition that the relevant test in determining whether employer has temporary need in the H-2A context is "whether the employer's need is truly temporary").

seasonal nature. 8 CFR 214.2(h)(5)(iv). However, eligibility will not be found, notwithstanding the issuance of a TLC, where there is “substantial evidence” that the employment is not temporary or seasonal. 8 CFR 214.2(h)(5)(iv)(B). Otherwise stated, if the record on the whole reflects that the need is not temporary or seasonal, the petitioner will not have met their burden to establish eligibility for a nonimmigrant H-2A position. *See id.* Accordingly, USCIS’ review of an H-2A petition is structured in such a way that DOL’s certification generally would be accepted. The exception is when there is substantial evidence in the record that the employer does not have a temporary or seasonal need. In such instances, USCIS, as the final adjudicator of temporary or seasonal need, would reach a different conclusion based on substantial evidence that the employment does not qualify for an H-2A because of the petitioner’s lack of temporary or seasonal need. *See generally* INA 214(c). USCIS, for instance, may have information regarding an employer’s petition filing history that DOL did not have at the time it adjudicated the TLC application, indicating that the employer’s purported need is, in fact, an ongoing permanent need and therefore, not temporary or seasonal in nature. Consequently, even if the H-2A petition is submitted to USCIS with an approved TLC issued by DOL, “eligibility will not be found,” and USCIS will deny a petition if there is “substantial evidence” that the employment is not temporary or seasonal. 8 CFR 214.2(h)(5)(iv)(B). What constitutes a temporary or seasonal need is inherently fact driven, and can only be determined on a case-by-case basis; the petitioner, for an H-2A sheep/goatherder position, as in other H-2A petitions, bears the burden of establishing the temporary or seasonal need.

3. Adjudicating Consecutive, Back-to-Back H-2A Sheep/Goatherder Petitions

Absent a showing of extraordinary circumstances demonstrating a one-time need, a petitioner requesting H-2A workers to perform the same sheep/goatherder position and job duties, for a consecutive, back-to-back 364-day period (or similarly lengthy consecutive periods), without a meaningful break in employment, so as to indicate an ongoing permanent need would, generally, constitute substantial evidence supporting the denial of the H-2A petition, notwithstanding the existence of DOL TLCs for such periods. See 8 CFR 214.2(h)(5)(iv). However, the mere fact that a petitioner employing H-2A sheep/goatherders has, prior to the effective date of this PM, sought workers for the same or a similar position does not by itself mean that USCIS will find that there is no temporary or seasonal need.

The herding petitioner’s filing history, with regard to a given position or alien, is a relevant consideration with respect to determining whether the petitioner can meet its burden of establishing that its current need to fill a position is in fact temporary or seasonal, but the weight USCIS will afford such filing history will necessarily depend on the totality of the employer’s circumstances.

Along those lines, a prior revocation or denial based on a determination that the preponderance of the evidence established that an H-2A herder petitioner’s need is permanent does not preclude approval of subsequent petitions by the same petitioner, so long as the facts in a subsequent petition show that the petitioner has a temporary or seasonal need for the duties of the position. Conversely, prior approvals of H-2A sheep/goatherder petitions do not alone preclude a denial or

revocation based on a petitioner's lack of temporary or seasonal need for the same or a similar position; in all cases, the determination of temporary or seasonal need would be based on the facts presented at the time any later petition is filed.⁵

a. Considerations

USCIS has interpreted H-2A statutory and regulatory authorities as allowing H-2A petitioners to file consecutive, back-to-back petitions, seeking the same or different workers, if they can establish that an employer's needs for the job duties are demonstrably different or that each consecutive petition is tied to a specific event or pattern. In accordance with 8 CFR 214.2(h)(5)(iv)(A) and (h)(15)(ii)(C) (recognizing that H-2A employees typically may be granted extensions of stay for "a period of up to one year"), USCIS evaluates all H-2A petitions based on the facts presented in the petition as well as the past filings of the petitioner, as appropriate. For example, USCIS may, depending on the totality of the circumstances, consider the need in consecutively filed petitions to be temporary or seasonal, so long as the jobs in each petition entail different duties or, in the case of a claimed seasonal need, can each be tied to a certain time of year by an event or pattern.⁶ In all cases, whether the claim is of a temporary or seasonal need, the petitioner must establish that its need is temporary or seasonal in nature. 8 CFR 214.2(h)(5)(iv)(A).

A non-exhaustive list of examples of relevant inquiries, depending on the specific facts presented, in determining whether the employer's need is "temporary" or "seasonal" includes the following:

- Whether two or more Form I-129 H-2A petitions reflect the employer's need for different job duties to be performed, or if they in fact reflect the same need.

This can be determined by examining the tools used and individual tasks performed by the workers. If the job duties being performed are the same, or are of a sufficiently similar nature so as to call into question whether the petitioner's need for such worker is in fact permanent rather than temporary or seasonal in nature, USCIS may reasonably inquire whether the total period of time reflected on two or more approved TLCs supporting Form I-129 H-2A petitions reflects a permanent, year-round need. In this regard, it is worth reiterating, the burden is on the petitioner to establish the requisite need.

- Whether the separate Form I-129 H-2A petitions cover separate temporary work.

Supplementary evidence may include, among other things, work contracts, invoices, client documents, or employees' work schedules, and similar documents showing:

- The work recurs on the same cycle each year;

⁵ See, e.g., *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988) (USCIS not required to approve petitions where eligibility has not been demonstrated merely because of prior approvals which may have been erroneous); *Sussex Eng'g. Ltd. V. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987) (neither USCIS nor any other agency must treat acknowledged errors as binding precedent).

⁶ See 8 CFR 214.2(h)(5)(iv)(A) and 20 CFR 655.103(d).

- The work will be performed in certain months each year only; and/or
 - There are more than token gaps each year when services are not needed.
- Whether the petitioner is employing different beneficiaries for each distinct period of need.

Different beneficiaries required for work on separate petitions may, but do not, standing alone, indicate that the employer's need is for distinct services or labor, including duties and skills, rather than a continuation of the same types of work. Supplementary evidence may include payroll records, staffing/workload data, or employment contracts showing that the petitioner has different workers and that the positions in question are materially different from each other and require distinctly separate skills.

It is possible for a petitioner to meet its burden of demonstrating that its need is “more likely than not” temporary or seasonal by satisfactorily addressing any one (or more) of the inquiries described above or any other relevant inquiry raised by the facts presented in a given case. Conversely, in certain circumstances, a petitioner may be able to present evidence in response to several of the factors above, yet still be unable to show that its need is “more likely than not” temporary or seasonal.

b. Examples Using the Above-Mentioned Considerations.

If the job duties being performed, as described on consecutive petitions, are the same, or the petitioner is unable to establish a specific, seasonal event or pattern that is tied to an employer's need for the services or labor as reflected on the consecutive petitions, then USCIS adjudicators will consider whether the need identified on the consecutive, back-to-back H-2A petitions, taken together, shows a permanent, non-seasonal need. When evaluating a petition, USCIS would generally consider the examples described below as substantial evidence to overcome DOL's temporary or seasonal need determination, unless there is additional evidence in the record that outweighs these examples and supports DOL's determination that the petitioner's need is temporary or seasonal. The following are examples of when USCIS may request additional evidence to establish the employer's need is temporary or seasonal, or in the absence of such evidence, deny a petition for failure to establish temporary or seasonal:⁷

- A petitioner files consecutive Form I-129 H-2A petitions for the same type of position, including job duties covering a continuous period of time that, in the totality, lasts more than a year without detailing extraordinary circumstances that may apply; or
- A petitioner files consecutive Form I-129 H-2A petitions for workers performing the same job duties that cover a continuous period of time lasting more than a year, without detailing

⁷ These examples are non-exhaustive, and there may be circumstances not outlined in these examples when USCIS will need the petitioner to provide additional evidence to establish employer's temporary or seasonal need. In light of the historical treatment of these kinds of petitions, the mere fact that an employer previously obtained one or more H-2A petitions claiming a temporary period of need would not by itself demonstrate a temporary or seasonal need in future petitions.

how the length of time requested constitutes a distinct period of temporary need, or is seasonal in that it is tied to a certain time each year by a predictable event or pattern.

Conversely, applying the temporary or seasonal need considerations mentioned above, it is plausible that consecutive Form I-129 H-2A sheep/goatherder petitions may still be approvable where an H-2A petitioner establishes that its need for H-2A sheep/goatherders truly is temporary or seasonal. Examples of such instances might include circumstances such as:⁸

- Addressing a temporary need while the sheep/goatherding operation grows in size; or
- Filling a need lasting for more than a year, albeit not indefinitely, after establishing, by a preponderance of the evidence, that extraordinary circumstances exist.

In sum, in light of *Hispanic Affairs Project*, 901 F.3d 378 (D.C. Cir. 2018), and the statutory and regulatory requirements that an H-2A employer's need be temporary or seasonal, filing consecutive, back-to-back H-2A petitions for substantially the same type of position, with no material break between such filings, and claiming a 364-day period of need (or similarly lengthy consecutive periods for the same job duties for a sheep/goatherder position) will be reviewed to determine whether, as a factual matter, the petitioner's need is temporary or seasonal in nature. On the other hand, since each case must be adjudicated based on all the facts presented, the filing of consecutive H-2A sheep/goatherder petitions would not in every case necessarily result in a denial based on the lack of temporary or seasonal need, if the petitioner can show that, more likely than not, it in fact has the requisite temporary or seasonal need. Consistent with this memorandum, such petitions should be reviewed to evaluate whether substantial evidence exists that the need is neither temporary nor seasonal.

Implementation and Reliance

USCIS recognizes that this PM may have an impact on the long-standing business practices of petitioners submitting H-2A sheep/goatherder petitions. Despite this potential impact, however, and consistent with the decision of the U.S. Court of Appeals for the D.C. Circuit, USCIS believes that the interpretation in this PM better complies with pertinent provisions of the INA and applicable implementing regulations. This guidance helps ensure that petitioners filing H-2A petitions on behalf of sheep/goatherders are held to the same legal standard with respect to temporariness and seasonality as all other H-2A petitioners while protecting the interests of similarly situated U.S. workers (for example, their wages and working conditions).

Given the potential impact of this policy on those submitting H-2A sheep/goatherder petitions, the PM has an effective date of June 1, 2020, a period of 6.5 months after initial publication. USCIS believes the future effective date allows the regulated public a reasonable time to amend their practices, as necessary, while also establishing a date certain for USCIS to implement the policy within Fiscal Year 2020. H-2A sheep/goatherder petitions that are filed on or after June 1, 2020 will be adjudicated in accordance with the PM. USCIS encourages public comment during the 30-day comment period and will review input to determine if further revision of the PM is

⁸ These examples are also non-exhaustive, and employers filing other H-2A sheep/goatherder petitions that do not fall within these examples may be able to establish temporary or seasonal need. These examples presume compliance with DOL regulations.

required. See <https://www.uscis.gov/outreach/feedback-opportunities/policy-memoranda-comment>.

Use

This PM is intended solely for the training and guidance of USCIS personnel in performing their duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable by law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

If USCIS officers have questions or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.