



October 1, 2018

PM-602-0164

## Policy Memorandum

**SUBJECT:** Implementing the National Defense Authorization Act for Fiscal Year 2019 and the Exemption to the Temporary Need Requirement for H-2B Workers on Guam and in the Commonwealth of the Northern Mariana Islands

### Purpose

This policy memorandum (PM) provides guidance regarding the filing and adjudication of H-2B nonimmigrant petitions that fall under section 1045 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 and supersedes the February 15, 2018 memorandum (PM-602-0156) that originally implemented section 1049 of the National Defense Authorization Act for FY 2018. This PM applies to certain H-2B petitions requesting start dates on or after August 13, 2018, and before December 31, 2023, for an otherwise qualified H-2B worker to perform certain service or labor on Guam or in the Commonwealth of the Northern Mariana Islands (CNMI) that is either (i) pursuant to any agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a contract or subcontract for construction, repairs, renovations, or facility services that is directly connected to, or associated with, the military realignment occurring on Guam and the CNMI or (ii) as a health care worker at a facility that jointly serves members of the Armed Forces, dependents, and civilians on Guam or in the CNMI. Under the NDAA, an employer's need for these specific types of service or labor is not required to be temporary in nature if the employment start date is on or before December 30, 2023.

### Scope

This PM applies to all U.S. Citizenship and Immigration Services (USCIS) employees. This guidance goes into effect the date it is published.

### Authorities

- National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, section 1045, Workforce Issues for Military Realignments in the Pacific.
- National Defense Authorization Act for Fiscal Year 2018, Pub. L. 115-91, section 1049, Workforce Issues for Military Realignments in the Pacific.
- Section 6 of Pub. L. 94-241, as amended, 48 U.S.C. 1806(b).
- Immigration and Nationality Act (INA) 101(a)(15)(H)(ii)(b); 8 U.S.C. 1101(a)(15)(H)(ii)(b).
- Title 8 Code of Federal Regulations (CFR) 214.2(h)(6).

### **Policy**

On August 13, 2018, the president signed the NDAA, which includes a provision addressing H-2B workers on Guam and in the CNMI. Section 1045 of the NDAA amends section 6(b) of Public Law 94-241, 48 U.S.C. 1806(b). It leaves intact current law that employers on Guam and in the CNMI are exempt from the national H-2B cap and other H caps until December 31, 2029.<sup>1</sup> It then amends the “H-2B Workers” provision that had been enacted in the National Defense Authorization Act for Fiscal Year 2018 to state the following:

In the case of an alien . . . who seeks admission under section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (8 U.S.C. 1110(a)(15)(II)(ii)(b)), the alien, if otherwise qualified, may, before December 31, 2023, be admitted under such section, notwithstanding the requirement of such section that the service or labor be temporary, for a period of up to 3 years—

(i) to perform service or labor on Guam or in the Commonwealth pursuant to any agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a cont[r]act or subcontract for construction, repairs, renovations, or facility services that is directly connected to, or associated with, the military realignment occurring on Guam and in the Commonwealth; or

(ii) to perform service or labor as a health care worker (such as a nurse, physician assistant, or allied health professional) at a facility that jointly serves members of the Armed Forces, dependents, and civilians on Guam or in the Commonwealth, subject to the education, training, licensing, and other requirements of section 212(a)(5)(C) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)(C)), as applicable, except that this clause shall not be construed to include graduates of medical schools coming to Guam or the Commonwealth to perform service or labor as members of the medical profession.

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<sup>1</sup> See Northern Mariana Islands U.S. Workforce Act of 2018, Pub. L. 115-218.

The NDAA also amends this provision by extending its effectiveness by close to three months and by eliminating the numerical limitation (or “cap”) that had previously been established for each fiscal year from 2018 through 2023, by which not more than 4,000 H-2B workers could be admitted annually to Guam or the CNMI pursuant to the exemption from the temporary need requirement that generally applies to H-2B nonimmigrants. Finally, the NDAA eliminates a prior delayed effective date for service or labor in the CNMI. For H-2B petitions for workers on Guam and in the CNMI, the amendment took immediate effect on August 13, 2018, the date of the enactment of the NDAA.

For H-2B petitions for employment on Guam and in the CNMI that do not qualify under the NDAA exemption, USCIS will adjudicate according to existing DHS regulations and policy concerning the H-2B classification.

H-2B Petition Eligibility Directly Connected to or Directly Associated With the Military Realignment on Guam or in the CNMI

With the exception of health care workers (discussed below), USCIS will require petitioners requesting the NDAA temporary need exemption to demonstrate that all services or labor to be performed by H-2B nonimmigrants on Guam or in the CNMI are:

- Pursuant to an agreement entered into by a prime contractor or subcontractor; and
- For services or labor required for performance of a contract or subcontract<sup>2</sup> that is:
  - For construction, repairs, renovations or facility services; and
  - Directly connected to, or associated with, the military realignment on Guam and in the CNMI.

Accordingly, any contract or subcontract for labor or services for construction, repairs, renovations, or facility services must be directly connected to, or directly associated with, the military realignment and cannot be only indirectly, incidentally, or tangentially connected to or associated with the realignment.

For example, the NDAA’s H-2B provision is unlikely to apply to H-2B workers performing services or labor under a contract or subcontract at hotels, restaurants, retailers, vendors, and other service-type establishments located near a U.S. military base, as any such services or labor would likely not be directly connected to or directly associated with the military realignment. Rather, any use of such services or labor by persons or entities directly engaged in the military realignment effort, would likely be characterized as, at most, merely incidental to the realignment. On the other hand, infrastructure improvements, such as to utility or transportation systems, are likely to qualify for employment of H-2B workers under the NDAA exemption if the petitioner can establish that the contract or subcontract for such labor or services directly

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<sup>2</sup> The “agreement,” depending on the circumstances, may be the “contract or subcontract.”

supports the military realignment on Guam or in the CNMI, even if the contract or subcontract for such improvements is not directly with the U.S. military.

To qualify for the NDAA exemption, the direct connection or direct association cannot be with just any military activity on Guam or in the CNMI; it must be with “the military realignment occurring on Guam and the [CNMI].” The term “military realignment” refers generally to the planned realignment of U.S. Marines from Okinawa, Japan to Guam. Guam has a long-established U.S. military presence (including U.S. Air Force and U.S. Navy bases) that predates this military realignment, including ongoing activities that are not necessarily related to the military realignment. While some military activity on Guam or in the CNMI that is not specifically related to the Marines may come under the term “the military realignment”, distinguishing U.S. military activity that is “the realignment” as compared to other military activity on Guam or in the CNMI is a particularly difficult task for USCIS adjudicators, as this is a military function determination, and the broader strategic goal supported by a particular contract or subcontract is unlikely to be evident from the contract documents themselves. For this reason, input from the Department of Defense (DoD) is particularly important, as further described in the “Submission of Evidence” section below.

#### H-2B Petition Eligibility for Health Care Workers

For health care workers, USCIS will require petitioners requesting the NDAA temporary need exemption to demonstrate that all services or labor to be performed by H-2B nonimmigrants on Guam or in the CNMI are:

- As a health care worker (such as a nurse, physician assistant, or allied health professional), but excluding graduates of medical schools coming to Guam or the CNMI to perform service or labor as a members of the medical profession; and
- At a facility that jointly serves members of the Armed Forces, dependents, and civilians on Guam or in the CNMI.

Eligibility for the temporary need exemption will not, per the prohibition in section 101(a)(15)(H)(ii)(b), extend to members of the medical profession, which under current agency interpretation includes physicians.

Recognizing the limitations imposed upon health care facilities by patient confidentiality restrictions, USCIS does not expect and will not generally request that a petitioner submit facility records that would support that it is jointly serving members of the Armed Forces, dependents, and civilians on Guam or in the CNMI. USCIS will instead accept a signed statement by a facility administrator on its company letterhead providing its TRICARE or other applicable provider number and attesting to the fact that it jointly serves members of the Armed Forces, dependents and civilians as sufficient evidence to establish the petitioner’s eligibility. The statement should, to the extent possible, also include the number of members of the Armed Forces, dependents, and civilians on Guam or in the CNMI that the petitioning facility has served

in the preceding 12 months. For further instruction, see the “Submission of Evidence” section below.

#### Submission of Evidence for Petitioners Requesting an NDAA Exemption

Petitioners that request their cases to be considered for eligibility under the NDAA H-2B temporary need exemption should submit with their Form I-129, Petition for Nonimmigrant Worker, the following:

- A cover sheet indicating “NDAA Eligible” in large, bold letters.
- If claiming eligibility directly connected to, or directly associated with, the military realignment, also submit:
  - A copy of any applicable agreement, contract or subcontract for services or labor for construction, repairs, renovations, or facility services that is directly connected to, or associated with, the military realignment occurring on Guam or in the CNMI, as well as other probative evidence that each requested H-2B position meets the requirement that the worker will perform services or labor on Guam or in the CNMI pursuant to any agreement entered into by a prime contractor or subcontractor calling for services or labor required for performance of a contract or subcontract for construction, repairs, renovations, or facility services that is directly connected to or directly associated with the military realignment occurring on Guam or in the CNMI.
  - A signed statement from an official within the DoD (including a branch of the armed forces). This statement should provide the DoD view regarding whether the applicable agreement, contract, or subcontract is directly connected to, or directly associated with, the military realignment. If this DoD statement is not provided, the petitioner should establish why it could not be obtained.
- If claiming eligibility for health care workers, also submit:
  - A signed statement on company letterhead from a corporate officer or facility administrator having the authority to speak on behalf of the company or facility attesting that the facility where the workers will perform service or labor jointly serves members of the Armed Forces, dependents, and civilians on Guam or in the CNMI. The statement should include evidence such as a TRICARE provider number to demonstrate the facility’s service to members of the Armed Forces and their dependents. The statement should also include, to the extent possible, the

number of members of the Armed Forces, dependents, and civilians on Guam or in the CNMI that the petitioning facility has served in the preceding 12 months.<sup>3</sup>

#### Adjudicating H-2B Petitions for Workers on Guam or in the CNMI Under the NDAA

USCIS officers will determine whether the petitioner has met its burden of demonstrating eligibility under the NDAA based on the totality of the evidence. When applicable, the signed statement from the DoD, although not determinative, should be given appropriate weight, particularly with respect to determining the relationship between the services or labor and the military realignment, as opposed to other U.S. military activity. If the USCIS officer determines that the case does not meet the NDAA exemption, then he or she should adjudicate the petition under existing H-2B policy and regulations, including the requirement that the petitioner establish temporary need. If a petition is denied it may be appealed to the USCIS Administrative Appeals Office.

For cases meeting the NDAA exemption regarding H-2B petitions for workers on Guam or in the CNMI, USCIS officers will not perform an analysis of whether the need for the H-2B position is temporary under otherwise applicable law and regulations. Officers will, however, continue routine case processing to include reviewing whether the petition includes an approved temporary labor certification (TLC) issued by Guam's Department of Labor or the U.S. Department of Labor, as appropriate. As provided by the Department of Homeland Security regulations, the Guam or U.S. Department of Labor may approve a TLC for a period of up to one year, with the possibility for extension, for H-2B employment in Guam or the CNMI, respectively.

#### Elimination of the Annual Cap

The NDAA removed the previous cap of 4,000 workers per fiscal year. Accordingly, USCIS will not limit the number of approvals for certain H-2B petitions requesting start dates on or after August 13, 2018, and before December 31, 2023, for an otherwise qualified H-2B worker to perform certain services or labor on Guam or in the CNMI as described in the NDAA.

#### Period of Admission

Before December 31, 2023,<sup>4</sup> an H-2B worker whose services or labor meets the NDAA exemption may be admitted for a consecutive period of up to 3 years, depending on the specific need stated in the H-2B petition.<sup>5</sup> Thereafter, he or she may again apply for admission under the

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<sup>3</sup> This information will be used by USCIS to evaluate the use of the NDAA provision.

<sup>4</sup> Because the NDAA refers to admission "before" December 31, 2023, the last eligible requested employment start date is December 30, 2023.

<sup>5</sup> Any single grant of a period of admission is limited to the validity period of the TLC, which may not exceed one year. If eligible, the worker may obtain extensions of stay for a total period of admission of up to three years.

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NDAA exemption or as an H-2B in general after residing and being physically present outside the United States for the immediately preceding 3 months as set forth in 8 CFR 214.2(h)(13)(iv). Because the provisions of the NDAA will sunset at the end of the day on December 30, 2023, petitions with employment start dates on or after December 31, 2023, will be subject to adjudication and admission under the law and regulations that apply to the H-2B program on that future date.

### **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 at 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.