

Mar 7, 2016

**SUBJECT: Updates to 9 FAM 402.10-4(E) - Guidance on Implementing the H-2B
Returning Worker Program**

1. **SUMMARY.** On December 22, 2015, Congress included in the Consolidated Appropriations Act for Fiscal Year 2016 the reinstatement of the H-2B Returning Worker exemption from the annual numerical cap for H-2B workers. Under this exemption, any H-2B worker who is certified to have been counted toward the annual H-2B cap for FY 2013, 2014, or 2015 is exempt from being counted toward the annual 66,000 H-2B cap for FY 2016. This ALDAC contains guidance to H-2B processing posts on the actions required to adjudicate these cases. The Department updated [9 FAM 402.10-4\(E\)](#) to reflect these changes. **END SUMMARY.**

Requirements for H-2B Returning Workers

2. The H-2B classification applies to aliens who are visiting the United States to perform nonagricultural services or labor of a temporary or seasonal nature, if qualified persons capable of performing this work cannot be found in the United States. This classification requires a temporary labor certification from the Department of Labor (DOL) and an approved I-129 petition from U.S. Citizenship and Immigration Services (USCIS).

3. To qualify as an H-2B returning worker, the petitioner requesting a returning worker must certify to USCIS in the petition filing that the worker named on the company's I-129 was previously counted toward the numerical limit in one of the previous three fiscal years (FY 2013, FY 2014, or FY 2015). In order to be certified as a returning worker by USCIS, a worker must appear as a named beneficiary of an approved I-129 petition. Consular officers overseas must certify that the worker was issued an H-2B visa during one of these three fiscal years.

Action for Consular Officers Overseas

4. During the petition approval process, USCIS will identify which workers the agency certifies as returning workers and submit an electronic notification to the Department of such a certification. The Kentucky Consular Center (KCC), in its processing of approved I-129 petitions, will mark in the Petition Information Management System (PIMS) record whether the worker is classifiable as a returning worker.

5. Consular staff must verify whether the H-2B worker is eligible for returning worker status prior to adjudication by viewing the PIMS report in the Consular Consolidated Database (CCD). If the applicant is identified as a returning worker in PIMS, consular staff also must verify that the applicant was issued a visa in one of the previous three fiscal years (FY 2013, FY 2014, or FY 2015).

6. If the worker is otherwise eligible for the visa, the consular officer should issue the H-2B visa following normal adjudication procedures. This worker's visa will then be counted toward the annual numerical limit. No further action is required of the consular officer.

7. These procedures will remain in place until the H-2B numerical limit for FY 2016 is reached. Posts should adjudicate all H-2B applications under the assumption that the numerical limit for H-2B workers is open unless instructed otherwise by VO/F. Regulations on the H-2B program can be found at [9 FAM 402.10-4\(E\)](#).

Updated 9 FAM 402.10-4(E)(f)

8. The updated 9 FAM 402.10-4(E)(f) follows:

Returning Workers: The Consolidated Appropriations Act for Fiscal Year 2016 was passed on December 22, 2015. Under this Act, certain returning H-2B workers are exempt from the annual H-2B numerical limitation. Aliens who were counted toward the fiscal year numerical limitation during FY 2013, FY 2014, or FY 2015 (i.e. issued an H-2B visa), shall not again be counted toward such limitation during FY 2016. Such an alien shall be considered a returning worker. USCIS will provide the Department with electronic notification of those H-2B workers seeking classification as returning workers. This notification will be entered into PIMS at KCC. Before issuing an H-2B visa to an applicant identified by USCIS as a returning worker, you should verify whether the applicant was in fact issued an H-2B visa in fiscal years 2013, 2014, or 2015. If you are unable to confirm that a visa was issued to an applicant identified by USCIS as a returning worker, you should make a notation of this in the case file. Until notified by CA/VO/F that the H-2B cap for the current fiscal year has been reached, you still should issue an H-2B visa if the applicant otherwise qualifies. For workers who qualify under the returning worker program, the interviewing officer must enter the case note: "Returning worker case." into the CCD. Qualifying returning workers will be issued H-2B visas under normal adjudication procedures.

9. Minimize considered.