

9110-9M-P

**DEPARTMENT OF HOMELAND SECURITY**

**[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<sup>1</sup> that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the **Federal Register**. That notice must be renewed each year. This notice announces that the Secretary of Homeland Security, in consultation with the Secretary of State, is identifying 84 countries whose nationals are eligible to participate in the H-2A program and 81 countries whose nationals are eligible to participate in the H-2B program for the coming year.

**DATES:** This designations in this notice are effective from January 19, 2019, and shall be without effect after January 18, 2020.

**FOR FURTHER INFORMATION CONTACT:** Eric B. Johnson, Office of Strategy, Policy, and Plans, Department of Homeland Security, Washington, DC 20528, (202) 282-8652.

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

## **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. Such designation must be published as a notice in the **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 factors serving the U.S. interest that could result in the exclusion of a country or the removal of a country from the list include, but are not limited to: fraud, abuse, denial rates, overstay rates, human trafficking concerns, and other forms of non-compliance with the terms and conditions of the H-2 visa programs by nationals of that country.

USCIS, however, may allow 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 such 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).

#### *Countries with Continued Eligibility*

The Secretary of Homeland Security has determined, with the concurrence of the Secretary of State, that 81 countries previously designated in the January 18, 2018 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 79 countries previously designated in the January 18, 2018 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: Dominican Republic (H-2B only), Ethiopia, and the Philippines.

The Dominican Republic has a high H-2B visa overstay rate. In Fiscal Year (FY) 2017, DHS estimated that nearly 30 percent of H-2B visa holders from the Dominican Republic overstayed their period of authorized stay. DHS recognizes that some of these individuals may have ultimately returned to the Dominican Republic without incurring ineligibilities (e.g. accrual of unlawful presence). However, this high H-2B visa overstay rate demonstrates an unacceptable potential for abuse, fraud, or other harm to the integrity of the H-2B visa program and thus continued eligibility for H-2B visas does not serve the U.S. interest. By comparison, in FY 2017, DHS estimated that less than 10 percent of H-2A visa holders from the Dominican Republic overstayed their period of authorized stay. Given this lower H-2A visa overstay rate, and absent additional derogatory information indicating a potential for fraud or abuse, DHS and

DOS are not removing the Dominican Republic from the list of eligible countries for the H-2A program at this time.

Ethiopia has been designated as “At Risk of Non-Compliance” since 2016, according to the U.S. Immigration and Customs Enforcement (ICE) biannual 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. DHS appreciates and recognizes Ethiopian efforts to improve cooperation, to include accepting repatriation charter flights and conducting interviews for travel documents as necessary. As such, DHS and Ethiopia are still working to fully implement a dependable and repeatable case management process for removals. When Ethiopia is longer considered “At Risk of Non-Compliance,” DHS and DOS would consider restoring Ethiopia to the list of H-2A and H-2B eligible countries.

The Philippines has a high H-2B overstay rate. In FY 2017, DHS estimated that nearly 40 percent of H-2B visa holders from the Philippines overstayed their period of authorized stay. Additionally, among all U.S. posts throughout the world, U.S. Embassy Manila issues the greatest number of T-derivative visas (T-2, T-3, T-4, T-5, T-6), which are reserved for certain family members of principal T-1 nonimmigrants (certain victims of a severe form of trafficking in persons). U.S. Embassy Manila issued approximately 40 percent of the total T-derivative visas issued worldwide from FY 2014-2016. A recent review of certain T-1 status recipients, whose spouses were issued T-2 visas during this same period, shows that approximately 60 percent were determined to have been trafficked to the United States on H-2B visas. DHS and DOS are concerned about the high volume of trafficking victims from the Philippines who were originally issued H-2B visas and the potential that continued H-2B visa issuance may encourage or serve as an avenue for future human trafficking from the Philippines. DHS and DOS also

believe that these overstay and human trafficking concerns are severe enough to warrant removal from the H-2A visa program as well. This concern is informed by a four-fold increase in H-2A visa applications from nationals of the Philippines between FY 2015-2018. The Philippines' continued inclusion creates the potential for abuse, fraud, and other harm to the integrity of the H-2A or H-2B visa programs.

Accordingly, DHS has removed these three countries from the H-2A and/or H-2B eligibility lists for 2019, though their nationals 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). For example, USCIS may favorably consider a beneficiary of an H-2B petition who is not a national of a country included on the H-2B eligibility list as serving the national interest, depending on the totality of the circumstances, if the petition qualifies under section 1045 of the National Defense Authorization Act (NDAA) for FY 2019, Public Law 115-232. Other facts USCIS may consider include, among other things, whether a beneficiary has previously been admitted to the United States in H-2B status and complied with the terms of the program. However, a determination 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 following three countries should be designated as eligible H-2A and/or H-2B countries because they are now meeting the standards set out in the regulation: Mozambique, Paraguay (H-2A only), and Samoa.

Mozambique does not present significant overstay or fraud concerns as evidenced by validation studies confirming a less than one percent overstay rate for travelers for business or tourism in the United States. Additionally, Mozambique has demonstrated that inclusion in the H-2A and H-2B visa programs serves the U.S. interest. Specifically, construction of necessary facilities in one of the largest untapped liquefied natural gas deposits in the world, located in the Rovuma basin in Northern Mozambique, will require an estimated 60,000 employees, including Mozambique nationals, some of whom will benefit from relevant work experience in the United States with American businesses seeking to construct some of these facilities. Establishing and maintaining a U.S. presence in the Rovuma basin is a foreign policy priority.

Paraguay has a low visa overstay rate and cooperates with the United States regarding the return of their nationals with final orders of removal. Additionally, Paraguay's Ministry of Agriculture has recently indicated its intent to manage a special program targeting young Paraguayans with agriculture-related education to obtain agricultural work experience in the United States and use this experience to improve their family farms upon their return to Paraguay. As evidence of its commitment, the Ministry of Agriculture has negotiated with a local bank to provide each H-2A recipient with a loan up to \$10,000 for agricultural investment in their own farms. DHS anticipates that the incentives offered by the Ministry will help sustain the traditionally low overstay rates for Paraguayans and that adding Paraguay to the H-2A countries list in turn will serve the U.S. interest.

Samoa is no longer considered "At Risk of Non-Compliance" according to ICE's 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. Since being removed from the H-2 list last year due to its previous "At Risk of Non-

Compliance” designation, and as a direct result of its removal from the H-2A and H-2B programs, Samoa has demonstrated increased cooperation with the United States regarding the return of their nationals with final orders of removal. Samoa is now considered “Cooperative” by ICE. The Government of Samoa has assured the United States it will continue to cooperate. Samoa’s improved cooperation with regard to removals is sufficient enough to no longer be considered “At Risk of Non-Compliance” and its continued cooperation with regard to removals serves the U.S. interest. Therefore, Samoa is being adding back onto the list of H-2A and H-2B eligible countries.

**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. Macedonia
42. Madagascar
43. Malta
44. Mexico
45. Moldova
46. Monaco
47. Mongolia
48. Montenegro
49. Mozambique
50. Nauru
51. The Netherlands
52. New Zealand
53. Nicaragua
54. Norway

55. Panama
56. Papua New Guinea
57. Paraguay
58. Peru
59. Poland
60. Portugal
61. Romania
62. Samoa
63. San Marino
64. Serbia
65. Singapore
66. Slovakia
67. Slovenia
68. Solomon Islands
69. South Africa
70. South Korea
71. Spain
72. St. Vincent and the Grenadines
73. Sweden
74. Switzerland
75. Taiwan
76. Thailand
77. Timor-Leste

78. Tonga
79. Turkey
80. Tuvalu
81. Ukraine
82. United Kingdom
83. Uruguay
84. 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. Lichtenstein
38. Lithuania
39. Luxembourg
40. Macedonia
41. Madagascar
42. Malta
43. Mexico
44. Monaco
45. Mongolia
46. Montenegro
47. Mozambique
48. Nauru
49. The Netherlands
50. New Zealand
51. Nicaragua
52. Norway
53. Panama
54. Papua New Guinea
55. Peru
56. Poland
57. Portugal

58. Romania
59. Samoa
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. Tonga
76. Turkey
77. Tuvalu
78. Ukraine
79. United Kingdom
80. Uruguay

81. Vanuatu

This notice does not affect the status of aliens who currently hold valid H-2A or H-2B nonimmigrant status. Persons 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. Similarly, persons 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 her 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.

**Kirstjen M. Nielsen,**  
*Secretary.*

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