

Temporary USCIS Rules for H-2A

On April 20, 2020, in response to the COVID-19 pandemic, the Department of Homeland Security published a temporary final rule to make change certain H-2A requirements to assist U.S. agricultural employers. The temporary final rule (“TFR”) expires on August 18, 2020 unless DHS decides to extend it beyond that date. Here are the changes that the TFR has put into effect, as well as instructions for employers completing the Form I-9 for H-2A employees covered by the TFR.

The TFR applies to H-2A employers with an approved labor certification where USCIS received the employer’s extension of stay H-2A petition on or after March 1, 2020 and it was still pending on April 20, or where USCIS received the employer’s H-2A petition between April 20 and August 18, 2020.

Once USCIS receives the transfer request on the Form I-129, the H-2A worker can begin working on that new labor certification immediately and for up to 45 days without waiting for USCIS to decide the petition. If USCIS approves the request, the work can continue; if USCIS denies the request or the employer withdraws the petition, the worker’s work authorization ends 15 days later.

For purposes of completing the Form I-9 for such workers, the worker’s unexpired Form I-94 and foreign passport work together as a List A document. For Section 2 of the Form, the employer would enter:

- the unexpired foreign passport information;
- the unexpired Form I-94 information; and
- “45-Day Ext.” and the date the employer submitted the Form I-129 to USCIS under the “Additional Information” field.

The employer would need to re-verify the employee’s employment authorization in Section 3 of the Form I-9 by the end of the 45-day period after USCIS receives the Form I-129 (or once the employer receives a decision from USCIS, whichever comes first).

Where the H-2A worker is continuing employment with the same employer or that employer uses E-Verify, the usual I-9 process is followed under the M-274 Handbook for Employers.

The TFR also provides that H-2A workers may remain in the United States and working beyond their three-year limitation on stay, at least until the TFR expires in August.