

On August 12, 2020, the Department of State released guidance regarding the “National Interest Exceptions” to the Presidential Proclamations suspending entry of nonimmigrants into the U.S.

The State Department guidance can be viewed at:

<https://travel.state.gov/content/travel/en/News/visas-news/exceptions-to-p-p-10014-10052-suspending-entry-of-immigrants-non-immigrants-presenting-risk-to-us-labor-market-during-economic-recovery.html>

H-2B visa applicants whose travel is in the national interest are eligible for an exception to Presidential Proclamations. There are two general categories for an exception – one based on a request from a U.S. government agency and one based on facilitating the economic recovery of the U.S. Most H-2B applicants will fall into the latter category.

Most H-2B employers will need to convince a Consular Officer that its prospective H-2B employees (H-2B visa applicants) qualify for the “Facilitating Economic Recovery” exception category by demonstrating that two of the three factors listed in the guidance are satisfied with regard to the visa applicant.

As this time, no formal submission process exists for an employer to provide information to the State Department demonstrating that a visa applicant should qualify for an exception. Thus, in the absence of further guidance from the Administration, it seems this information could be transmitted to the State Department most effectively by emailing the Consulate where the visa application will be processed.

The employer needs to demonstrate that the visa applicant meets at least two of the three following factors --

Factor # 1: The Visa applicant was previously employed by the employer under two or more H-2B (named or unnamed) petitions.

- This should be relatively simple to demonstrate by providing in a cover letter the prior petition approval numbers applicable to each visa applicant’s name. If possible, the employer may also want to provide a copy of the prior approved petitions.

Factor #2. The Visa applicant is traveling based on a temporary labor certification that reflects continued need.

- This should be relatively simple to satisfy, provided the labor certification was issued by DOL after July 2020. Any visa applicant seeking employment that begins on or after October 1st would presumably be associated with an employer’s Petition that includes a labor certification issued after July 2020.
- Based on the State Department guidance, it appears unlikely that an applicant would meet this factor if the employer’s labor certification was issued before July 2020.

Factor #3. Denial of the visa based on the Presidential Proclamation will cause financial hardship to the employer.

- This will require the most work by an employer but should not be too difficult to satisfy. The State Department guidance provides examples of the type of the information that may illustrate a financial hardship for an employer if the applicant’s visa is denied:
 - Inability to meet financial or contractual obligations
 - Inability to continue the business
 - Delay or impediment to the employer’s ability to return its pre-COVID-19 level of operations.
- If the denial of visas will result in an inability to meet financial or contractual obligations, the employer should specify/quantify the extent of that impact, including if U.S. employees could lose their jobs.
- If the denial of visas would threaten the existence of the business, the employer should explain that impact. In addition, you should describe the downstream impact on your community, including the supplies and services you will not purchase from local merchants and taxes the city/county/state/feds won’t collect.
- If the denial of visas will delay or impede your ability to return your business to pre-COVID-19 levels, you should specify that impact, including the economic factors above.

You could provide all of this information in the body of an email, but it may also be helpful if you provide a letter attached to your email that contains all of this information. You want to make your presentation to the Consular Officer as simple and as clear as possible, so that it is easy for the official reviewing the file to see that you meet the exception criteria. Remember, they are busy and overworked – you don’t want them to have to hunt for the information. Present the information in a clear an organized manner.

Your letter (*example included on page 3*) should include the following information:

- Employer name – make sure it is the same as what is listed on the Petition
- Petition number
- Temporary Labor Certification Number and validity dates (indicating it was approved after July 2020)
- List of each of the H-2B workers you expect to hire for the positions on that Petition. List the Petition numbers of the two Prior petitions on which they were employed. If different workers were employed on different petitions, you may want to enclose a spreadsheet/table listing each worker’s name and the petition numbers that correspond to the worker.
- A statement explaining how you meet Factor #3 (discussed above).

SAMPLE Consular Official Letter Requesting Approval of H-2B Forestry Guestworkers

Delete Highlighted Sections when finalizing your letter

Dear (Name of Consular Official):

Thank you for your consideration of my company's (company name) petition for H-2B guestworkers to conduct reforestation and other forestry-related projects. My petition number is _____ and my temporary labor certification number is _____, the latter of which was approved after July 2020.

I wish to retain the following workers for the positions listed on my petition. They are:

-
-
-

Their petition numbers on the two prior petitions on which they were employed are:

[if the workers were not all employed on the same prior petitions – then group the workers with the corresponding prior petition numbers]

It is our opinion that these H-2B visa applicants meet the criteria established by August 12, 2020 guidance associated with “National Interest Exceptions” to the Presidential Proclamations suspending entry of nonimmigrants into the U.S. These applicants have been previously employed by (employer name) on two prior petitions and the current petition is accompanied by a labor certification that was issued by DOL after July 2020 and therefore reflects our continued need for the workers. Most importantly, these applicants are necessary to continue our business and the denial of their visas will result in a significant financial hardship to the company threatening our ability to remain in business. My company relies heavily on H-2B guest workers to perform forestry-related work, including [list specific work you perform] (hand planting tree seedlings following timber harvest operations, natural disturbances like fire or insect infestations, or as part of reclamation and erosion control projects, brush clearing and herbicide application to control invasive species). The work is demanding and often conducted in extreme weather and terrain. Moreover, the labor is itinerant and necessitates that workers move from region to region. For these reasons, domestic workers have shown little interest in these jobs which makes reliance on H-2B guestworkers a necessity, as demonstrated by our DOL labor certification.

For the upcoming season, we already have contractual obligations to perform work valued at XX. Without our H-2B employees we will be unable to perform this work and will default on our contracts and jeopardize the longstanding relationships we have with our clients. In addition, without the revenue from our contracts we will be unable to meet our financial obligations to the local businesses in the rural communities where we purchase our supplies and equipment, which will cause those companies financial harm. The work performed by our H-2B employees also supports the employment of XX full time U.S. employees who perform management, sales, administrative jobs for the company. Without our H-2B employees, our entire business will be threatened and we will also have to lay off our U.S. employees.

Thank you for your consideration of this matter. Please let me know if you require additional information.

Sincerely,