9 FAM 41.53 Notes

9 FAM 41.53 N1 Introduction

(TL:VISA-64; 8-7-92)

a. The Immigration and Nationality Act of 1952 (Pub. L. 82-414 of June 27, 1952) created the H nonimmigrant visa classification at section 101(a)(15)(H) for temporary workers and trainees. Section 101(a)(15)(H) has been amended numerous times, most recently and significantly by the Immigration Act of 1990 (Pub. L. 101-649 of November 29, 1990), with further modification by the Miscellaneous and Technical Immigration and Naturalization Amendments Act of 1991 (Pub. L. 102-232 of December 12, 1991).

b. The Immigration Act of 1990 (IMMACT 90), as amended, made the following major changes to the H nonimmigrant visa classification:

(1) In the H-1B category, replaced the previous standard of “exceptional merit and ability” with “specialty occupation”, included “fashion models of distinguished merit and ability”, imposed a requirement on prospective employers of most H-1B aliens to file a labor condition application with the Department of Labor, and redefined the requirements for “graduates of medical schools”;

(2) Provided for the admission of nonimmigrants for cooperative research, development and co-production projects (H-1B aliens), and special education exchange visitor programs (H-3 aliens);

(3) Removed the presumption of immigrant intent to applicants for H-1 (and L-1) visas, and imposed a maximum length of stay for H-1 nonimmigrants of six years;

(4) Imposed a numerical limitation for H-1B and H-2B nonimmigrants; and

(5) Specified that training programs for H-3 nonimmigrants not be designed primarily to provide productive employment.

9 FAM 41.53 N2 Significance of Approved Petition

9 FAM 41.53 N2.1 INS Responsible for Adjudicating H Petitions

(TL:VISA-64; 8-7-92)

By mandating a preliminary petition process, Congress placed responsibility and authority with INS to determine whether the requirements of INA 101(a)(15)(H) are fulfilled. The INS regulations governing adjudication of H petitions are complex, and consular officers shall normally rely on INS expertise in this area.

9 FAM 41.53 N2.2 Approved Petition Is Prima Facie Evidence of Entitlement to H Classification

(TL:VISA-64; 8-7-92)

a. An approved Form I-129, Petition for Nonimmigrant Worker, or evidence that the H petition has been approved (an acceptable Form I-797, Notice of Action [see N8.1 below], or telegraphic or telephonic notification from INS or the Department) is, in itself, to be considered by consular officers as prima facie evidence that the requirements for H classification which are examined in the petition process have been met. Consular officers do not have the authority to question the approval of H petitions without specific evidence, unavailable to INS at the time of petition approval, that the beneficiary may not be entitled to status. The large majority of approved H petitions are valid, and involve bona fide establishments, relationships, and individual qualifications which conform to the INS regulations in effect at the time the H petition was filed.

b. On the other hand, the approval of a petition by INS does not relieve the alien of the burden of establishing visa eligibility. If the consular officer has reason to believe, based upon information developed during the visa interview or other evidence which was not available to INS, that the beneficiary may not be entitled to status, the consular officer may request any additional evidence which bears a reasonable relationship to this issue. Disagreement with INS interpretation of the law or the facts, however, is not sufficient reason to ask INS to reconsider its approval of the petition.

9 FAM 41.53 N2.3 Referring Approved H Petition to INS for Reconsideration

(TL:VISA-64; 8-7-92)

Posts shall consider all approved H petitions in light of these Notes, process with dispatch those cases which appear legitimate, and identify those which require local investigation or referral to the approving INS office for reconsideration. Posts should refer cases to INS for reconsideration sparingly, to avoid inconveniencing bona fide petitioners and beneficiaries and causing duplication of effort by INS. Consular officers must have specific evidence of either misrepresentation in the petition process or of previously unknown facts, which might alter INS's finding, before requesting review of a Form I-129 approval.

When seeking reconsideration, the consular officer shall forward the petition, all pertinent documentation, and a written memorandum of the evidence supporting the request for reconsideration to the approving INS office. A copy of all material must be retained at post.

9 FAM 41.53 N3 Issue of Temporariness of Stay

9 FAM 41.53 N3.1 H-1A and H-1B Nonimmigrants

(TL:VISA-64; 8-7-92)

H-1A and H-1B aliens are specifically excluded from the intending immigrant presumption of section 214(b) of the INA and are furthermore not required to have a residence abroad which they have no intention of abandoning. In addition, INA 214(h) provides that the fact that an alien has sought permanent residence in the United States does not preclude him or her from obtaining an H-1A or H-1B nonimmigrant visa or otherwise obtaining or maintaining that status. The alien may legitimately come to the United States as a nonimmigrant under the H-1A or H-1B classification and depart voluntarily at the end of his or her authorized stay, and, at the same time, lawfully seek to become a permanent resident of the United States. Consequently, the consular officer's evaluation of an applicant's eligibility for an H-1A or H-1B visa shall not focus on the issue of temporariness of stay or immigrant intent.

9 FAM 41.53 N3.2 H-2A, H-2B, and H-3 Nonimmigrants

(TL:VISA-64; 8-7-92)

An applicant classifiable as an H-2A, H-2B, or H-3 alien must have a residence abroad and no intent to abandon that residence.

9 FAM 41.53 N4 Description of H Classifications and Prerequisites for Filing H Petitions

9 FAM 41.53 N4.1 General Licensure Requirement for H Nonimmigrants

(TL:VISA-64; 8-7-92)

If the position to be occupied in the United States requires a state or local license for an individual to fully perform its duties, an alien seeking H classification to fill that position, other than a registered nurse [see 9 FAM 41.53 N19.1 below], must have that license before a petition can be approved on his or her behalf to confer H nonimmigrant status.

9 FAM 41.53 N4.2 H-1A Nonimmigrants

(TL:VISA-64; 8-7-92)

a. The H-1A classification applies to an alien who is coming to the United States to perform services as a registered nurse and whose qualifications meet the requirements of INA 212(m)(1). For the licensing and examination requirements for H-1A nurses, see 9 FAM 41.53 N18.1 below.

b. The Department of Labor must certify to INS that it has on file a valid attestation to the effect that the facility (or facilities) at which the registered nurse will be working meets the requirements of INA 212(m)(2).

9 FAM 41.53 N4.3 H-1B Nonimmigrants

(TL:VISA-64; 8-7-92)

The H-1B classification applies to an alien who is coming temporarily to the United States to perform services in one of the categories described below.

9 FAM 41.53 N4.3-1 Aliens in Specialty Occupations

(TL:VISA-64; 8-7-92)

a. Aliens in a specialty occupation who are qualified to perform services in the specialty occupation as described in INA 214(i)(1) and (2) (other than registered nurses, agricultural workers, or aliens qualifying under INA 101(a)(15)(O) or (P)) are classifiable as H-1B nonimmigrants. A specialty occupation requires the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) for entry into the occupation. An alien seeking to work in a specialty occupation must have completed such a degree or have experience in the specialty equivalent to the completion of the degree (as determined by INS) and expertise in the specialty through progressively responsible positions relating to the specialty.

b. The criteria for qualifying as an H-1B physician are found at 9 FAM 41.53 N18 below.

c. Prior to filing a petition with the INS on behalf of an alien in a specialty occupation, the prospective employer must have filed a labor condition application [see 9 FAM 41.53 N6 below] with the Department of Labor as specified in INA 212(n)(1). The filing of a labor condition application does not constitute a determination that the occupation in question is a specialty occupation. INS is responsible for determining whether the application involves a specialty occupation and whether the particular alien for whom H-1B status is sought qualifies to perform services in that occupation.

9 FAM 41.53 N4.3-2 Certain Fashion Models

(TL:VISA-64; 8-7-92)

a. H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. "Distinguished merit and ability" is defined by INS as prominence, i. e., the attainment of a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading or well-known in the field. Such an alien must also be coming to the United States to perform services which require a fashion model of prominence.

b. The prospective employer of a fashion model of distinguished merit and ability must file a labor condition application [see 9 FAM 41.53 N6 below] with the Department of Labor prior to filing a petition for the alien.

9 FAM 41.53 N4.3-3 Aliens in Department of Defense Cooperative Research and Development or co-production Projects

(TL:VISA-64; 8-7-92)

a. Aliens coming to the United States, pursuant to section 222 of the Immigration Act of 1990, to participate in a cooperative research and development project or a co-production project under a government-to-government agreement administered by the Department of Defense are classifiable as H-1B nonimmigrants. Such aliens must perform services of an exceptional nature requiring exceptional merit and ability. For purposes of this classification, services of an exceptional nature shall be those which require a baccalaureate or higher degree (or its equivalent, as determined by INS) to perform the duties.

b. The requirement for filing a labor condition application with the Department of Labor does not apply to petitions involving DoD cooperative research and development or co-production projects.

9 FAM 41.53 N4.4 H-2A Nonimmigrants

(TL:VISA-64; 8-7-92)

a. The H-2A classification applies to aliens who are coming temporarily to the United States to perform agricultural work of a temporary or seasonal nature.

b. The prospective employer must file a temporary agricultural labor certification with the Department of Labor prior to filing a petition with INS to classify an alien as an H-2A nonimmigrant.

9 FAM 41.53 N4.5 H-2B Nonimmigrants

(TL:VISA-64; 8-7-92)

a. The H-2B classification applies to aliens who are coming temporarily to the United States to perform nonagricultural service or labor of a temporary or seasonal nature, other than graduates of medical schools coming to provide medical services, if unemployed persons capable of performing such work cannot be found in the United States.

b. This classification requires a temporary labor certification issued by the Department of Labor or the Government of Guam, or a notice from one of these agencies that such a certification cannot be made, prior to the filing of a petition with INS to confer H-2B status.

9 FAM 41.53 N4.6 H-3 Nonimmigrants

(TL:VISA-64; 8-7-92)

The H-3 classification applies to an alien who is coming temporarily to the United States for one of the purposes described below.

9 FAM 41.53 N4.6-1 Alien Trainees

(TL:VISA-64; 8-7-92)

An alien who seeks to enter the United States to receive training in any field of endeavor, other than to receive training provided primarily at or by an academic or vocational institution or graduate medical education or training, is classifiable as an H-3 nonimmigrant. [For H-3 nurses and medical students, see 9 FAM 41.53 N19 and 9 FAM 41.53 N20, respectively, below.]

9 FAM 41.53 N4.6-2 Alien Participants in Special Education Exchange Visitor Program

(TL:VISA-64; 8-7-92)

a. A participant in a special education exchange visitor program, described in section 223 of the Immigration Act of 1990, is entitled to H-3 status. The alien must be coming to the United States to participate in a structured program with a professionally trained staff which provides practical training and hands-on experience in the education of children with physical, mental, or emotional disabilities.

b. Certain restrictions imposed by INS on the approval of petitions filed on behalf of H-3 trainees do not apply to petitions for H-3 participants in a special education exchange visitor program.

9 FAM 41.53 N5 Nature of Position or Training for H Nonimmigrants

9 FAM 41.53 N5.1 H-1A and H-1B Nonimmigrants

(TL:VISA-64; 8-7-92)

An alien may be classified H-1A or H-1B whether the position to be temporarily occupied is permanent or temporary in nature. For example, a foreign professor coming to fill a position on the faculty of a U.S. university could be classified H-1B.

9 FAM 41.53 N5.2 H-2A and H-2B Nonimmigrants

(TL:VISA-4; 8-7-92)

An H-2A or H-2B nonimmigrant must be coming to fill a position which is temporary in nature. He or she may not be classified H-2A or H-2B for the purpose of occupying a permanent or indefinite position, except in the case of sheepherders [see 9 FAM 41.53 N22 below].

9 FAM 41.53 N5.3 H-3 Nonimmigrants

(TL:VISA-64; 8-7-92)

An alien may not be classified H-3 if his or her training program is primarily designed to provide productive employment, except in the case of a participant in a special education exchange visitor program which is described in section 223 of the Immigration Act of 1990.

9 FAM 41.53 N5.4 Using B-1 in Lieu of H Classification

(TL:VISA-64; 8-7-92)

For a discussion of whether or not a B-1 in lieu of H classification may be used, see section 9 FAM 41.31 N8.

9 FAM 41.53 N6 Labor Condition Application for H-1B Nonimmigrants

(TL:VISA-64; 8-7-92)

Prior to filing a Form I-129 petition with INS for an H-1B nonimmigrant (other than an alien in a Department of Defense research and development or co-production project), the employer must file a labor condition application with the Department of Labor. The labor condition application must state that:

(1) The employer is offering and will pay the alien the greater of the actual or prevailing wage paid to all other workers with similar experience and qualifications for the specified employment in the area of employment;

(2) The employer will provide working conditions for the alien that will not adversely affect the working conditions of workers similarly employed; and

(3) There is no current strike or lockout as a result of a labor dispute in the occupational classification at the place of employment.

9 FAM 41.53 N7 Petition Procedures

9 FAM 41.53 N7.1 Using Form I-129 to File Petition

(TL:VISA-64; 8-7-92)

a. An employer must file a Form I-129 petition with INS to accord status as a temporary worker or trainee. Form I-129 is also used to request extensions of petition validity and extensions of stay in H status. The form must be filed with the INS Service Center which has jurisdiction over the area where the alien will perform services or receive training.

b. More than one beneficiary may be included in an H-2A, H-2B, or H-3 petition if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time and in the same location.

9 FAM 41.53 N7.2 Notifying Petitioner of Petition Approval

(TL:VISA-64; 8-7-92)

INS uses Form I-797, Notice of Action, to notify the petitioner that the H petition filed by the petitioner has been approved or that the extension of stay in H status for the employee has been granted. The petitioner may furnish Form I-797 to the employee for the purpose of applying for his or her H visa, or to facilitate the employee's entry into the United States in H status, either initially or after a temporary absence abroad during the employee's stay in H status [also see 9 FAM 41.53 N8.1 below].

9 FAM 41.53 N7.3 "FTA Professional" (TC) Status in Lieu of H-1B Petition for Canadian Citizens

(TL:VISA-64; 8-7-92)

No visa, prior petition, labor certification, or prior approval is required for a Canadian citizen who is a business person seeking to enter the United States temporarily to engage at a professional level in one of the professional activities listed in Schedule 2 to Annex 1502.1 of the U.S.-

Canada Free Trade Agreement. Engaging in a professional activity listed in Schedule 2 would not necessarily result in qualification for H-1B status. The criteria used to develop Schedule 2 differ from the statutory requirements for determining H-1B classification. To qualify for "TC" status, the alien must present supporting documentation to an immigration officer at the port of entry demonstrating that he or she seeks entry to engage in a listed profession at a professional level and meets the criteria to perform at that level. [See 9 FAM PART IV Appendix D, Exhibit II Services for INS, U.S.-Canada Free Trade Agreement].

9 FAM 41.53 N7.4 Filing H Petitions for Visa-Exempt Aliens

(TL:VISA-64; 8-7-92)

Except with regard to Schedule 2 professionals described in 9 FAM 41.53 N7.3 above, the petitioner must file a petition in advance with INS, and the visa-exempt beneficiary must present a copy of Form I-797 at a port of entry.

9 FAM 41.53 N8 Issuing H Visas

9 FAM 41.53 N8.1 Evidence Forming Basis for H Visa Issuance

(TL:VISA-64; 8-7-92)

The appropriate evidence forming the basis for H visa issuance consists of an approved Form I-129 petition, telegraphic or telephonic notification from INS or the Department of the approval of such a petition, or a Form I-797, Notice of Action, presented by the visa applicant, which shows that the petition on his or her behalf has been approved or that his or her authorized stay in H status has been extended. This Form I-797, printed on blue paper, must include the date of the Notice, the name of the petitioner, the name of the beneficiary, the petition/receipt number, the expiration date of the petition, and the name, address, and telephone number of the approving INS office. It is a computer-generated form and is not signed. The only Form I-797 which is valid for visa issuance is one which, at a minimum, contains the above information. If a post has any question regarding the bona fides of a particular Form I-797, it should query the originating INS office directly.

9 FAM 41.53 N8.2 Validity of H Visas

(TL:VISA-64; 8-7-92)

The validity of an H visa may not exceed the period of validity of a petition approved to accord H status or the period for which the alien's authorized stay in H status was extended. If the period of reciprocity shown in 9 FAM PART IV Appendix C is less than the validity period of the approved petition or extension of stay, it shall prevail.

9 FAM 41.53 N8.3 Limiting Validity of H Visas

(TL:VISA-64; 8-7-92)

a. Consular officers may restrict visa validity in some cases to less than the period of validity of the approved petition or authorized period of stay (for example, on the basis of reciprocity or the terms of an order waiving a ground of ineligibility). In any such case, in addition to the other notations required on the H visa, posts shall insert the following:

"PETITION VALID/STAY AUTHORIZED (whichever is applicable) TO (date)"

b. See section 9 FAM 41.113 PN8.7, for the required notations on H visas. MRV posts should use appropriate operating instructions for annotating visas.

9 FAM 41.53 N8.4 Reissuance of Limited H Visas

(TL:VISA-64; 8-7-92)

When an H visa has been issued with a validity of less than the validity of the petition or authorized period of stay, consular officers may reissue the visa any number of times within the period allowable. If a fee is prescribed in 9 FAM PART IV Appendix C, posts must collect the fee for each reissuance of the H visa.

9 FAM 41.53 N8.5 Issuing Single H Visa Based on More Than One Petition

(TL:VISA-64; 8-7-92)

If an alien is the beneficiary of two or more H petitions and does not plan to depart from the United States between engagements, *consular officers may issue a single H visa valid until the expiration date of the last expiring petition, reciprocity permitting. In such a case, the required notations from all petitions should be placed below the visa. [See section 9 FAM 41.113 PN8.7]

9 FAM 41.53 N9 Validity of Approved Petitions

9 FAM 41.53 N9.1 Initial Period of Approval

(TL:VISA-64; 8-7-92)

The initial approval period of an H petition adjudicated by INS shall conform to the following limits:

(1) An approved H-1A petition shall be valid for a period of one year in the case of an alien who has temporary authorization to practice as a registered nurse in the state of intended employment [see 9 FAM 41.53 N19.1 below], or up to three years for a registered nurse who has a full and unrestricted license in the state where he or she will be practicing;

(2) An approved H-1B petition for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application;

(3) An approved H-1B petition for a fashion model of distinguished merit and ability shall be valid for a period of up to three years;

(4) An approved H-1B petition involving a participant in a DoD research and development or co-production project shall be valid for a period of up to five years;

(5) An approved H-2A petition is valid through the expiration of the relating labor certification;

(6) An approved H-2B petition shall be valid for a period of up to one year;

(7) An approved H-3 petition for an alien trainee shall be valid for a period of up to two years; and

(8) An approved H-3 petition for an alien participating in a special education exchange visitor program shall be valid for a period of up to 18 months.

9 FAM 41.53 N9.2 Petition Extension

(TL:VISA-64; 8-7-92)

The petitioner must file a request for a petition extension on Form I-129 to extend the validity of an H petition. Supporting evidence is not required unless requested by INS. A request for a petition extension may be filed only if the validity of the original petition has not expired.

9 FAM 41.53 N10 Length of Stay

(TL:VISA-64; 8-7-92)

A beneficiary shall be admitted to the United States for the validity period of the petition, plus a period of up to ten days before the validity period of the petition begins (except for H-2A aliens, who may enter up to one week before the beginning of the approved period) and ten days after it ends. The beneficiary may not work except during the validity period of the petition.

9 FAM 41.53 N11 Extension of Stay Procedures

(TL:VISA-64; 8-7-92)

The petitioner shall request the extension of an alien's stay in the United States on the same Form I-129 used to file for the extension of the alien's petition. The effective dates of the petition extension and of the beneficiary's extension of stay shall be the same. The beneficiary must be physically present in the United States at the time the extension of stay petition is filed. If the alien is required to leave the United States for business or personal reasons while the extension requests are pending, the petitioner may ask INS to cable notification of the petition extension to the consular office abroad where the alien will apply for a visa. When the maximum allowable period of stay in an H classification has been reached [see 9 FAM 41.53 N12 below], no further extensions may be granted.

9 FAM 41.53 N12 Extension Periods and Maximum Total Periods of Stay

(TL:VISA-64; 8-7-92)

The petitioner may apply for the extension of an alien's stay in the United States up to the maximum total period of stay for each H category described below.

9 FAM 41.53 N12.1 H-1A Nonimmigrants

(TL:VISA-64; 8-7-92)

An extension of stay may be authorized for a period of up to two years for the beneficiary of an H-1A petition. The alien's total period of stay may normally not exceed five years. Beyond five years, an extension of stay not to exceed one additional year may be granted in extraordinary circumstances; i.e., when the INS finds that termination of the alien's services will impose extreme hardship on the petitioner's business operation or that the alien's services are required in the national welfare, safety, or security interests of the United States.

9 FAM 41.53 N12.2 H-1B Nonimmigrants

(TL:VISA-64; 8-7-92)

a. For an alien in a specialty occupation, or for a fashion model of distinguished merit and ability, an extension of stay may be authorized for a period of up to three years. The alien's total period of stay may not exceed six years.

b. For an alien participating in a DoD research and development or co-production project, an extension of stay may be authorized for a period of up to five years. The total period of stay may not exceed ten years.

9 FAM 41.53 N12.3 H-2A and H-2B Nonimmigrants

(TL:VISA-64; 8-7-92)

An extension of stay for the beneficiary of an H-2A or H-2B petition may be authorized for the validity of the labor certification or for a period of up to one year. The alien's total period of stay may not exceed three years, except that in the Virgin Islands, the alien's total period of stay may not exceed 45 days.

9 FAM 41.53 N12.4 H-3 Nonimmigrants

(TL:VISA-64; 8-7-92)

An extension of stay may be authorized for the length of the training program for a total period of stay not to exceed two years for an H-3 trainee, or for a total period of stay not to exceed 18 months for an H-3 participant in a special education exchange visitor program.

9 FAM 41.53 N13 Readmission after the Maximum Total Period of Stay Has Been Reached

(TL:VISA-64; 8-7-92)

When a nonimmigrant has spent the maximum allowable period of stay in the United States in H and/or L status, the alien may not be issued a visa or be readmitted to the United States under the H or L visa classification, nor may a new petition, extension, or change of status be approved for that alien under INA 101(a)(15)(H) or (L), unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H category. Brief trips to the United States for business or pleasure are not interruptive, but do not count toward fulfillment of the required time abroad. Periods when the alien fails to maintain status shall be counted towards the applicable limit; an alien may not circumvent the limit by violating his or her status. The required periods of residence abroad prior to readmission for H nonimmigrants who have reached their maximum period of stay are as follow.

9 FAM 41.53 N13.1 H-1A and H-1B Nonimmigrants

(TL:VISA-64; 8-7-92)

An H-1A or H-1B alien must have resided and been physically present outside the United States for the immediate prior year.

9 FAM 41.53 N13.2 H-2A, H-2B, and H-3 Nonimmigrants

(TL:VISA-64; 8-7-92)

An H-2A, H-2B, or H-3 alien must have resided and been physically present outside the United States for the immediate prior six months.

9 FAM 41.53 N14 Exceptions to Limitation on Readmission

(TL:VISA-64; 8-7-92)

The limitations described in N13 above shall not apply to H-1A, H-1B, H-2B, and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent, or was for an aggregate of six months or less per year, nor to aliens who resided abroad and regularly commuted to the United States to engage in part-time employment. These exceptions will not apply if the principal alien's dependents have been living continuously in the United States in H-4 status. The alien must provide clear and convincing proof (e.g., evidence such as arrival and departure records, copies of tax returns, records of employment abroad) that he or she qualifies for these exceptions.

9 FAM 41.53 N15 Return Transportation if H-1B or H-2B Alien's Employment Terminated Involuntarily

(TL:VISA-64; 8-7-92)

If an H-1B or H-2B nonimmigrant is dismissed from employment before the end of his or her authorized admission by the employer who sought the alien's H-1B or H-2B status, the employer is responsible for providing the reasonable cost of transportation to the alien's last place of residence. This requirement does not apply if the alien voluntarily terminates his or her employment.

9 FAM 41.53 N16 Spouse and Children of H Aliens

9 FAM 41.53 N16.1 Derivative Classification

(TL:VISA-64; 8-7-92)

a. The spouse and children of a principal alien classified H-1A, H-1B, H-2A, H-2B, or H-3, who are accompanying or following to join the beneficiary in the United States, are entitled to H-4 classification and are subject to the same visa validity, period of admission, and limitation of stay as the

principal alien. It is not required that the spouse and children of H-1A and H-1B nonimmigrants demonstrate that they have a residence abroad to which they intend to return. H-4 dependents of H-2A, H-2B, and H-3 aliens are subject to the residence abroad requirement. For a general discussion of the classification of the spouse and children of a nonimmigrant, see section 9 FAM 41.11 N4 and 9 FAM 41.11 N5.

b. For guidelines regarding classification of the spouse and children accompanying or following to join a Canadian citizen admitted under TC status in lieu of H-1B status, see 9 FAM PART IV, Services for INS, U.S.-Canadian Free Trade Agreement.

c. If an H-1A, H-1B, H-2B, or H-3 alien has maintained his or her family in the United States in H-4 status, he or she cannot qualify for one of the exceptions to the maximum allowable periods of stay described in 9 FAM 41.53 N14 above.

9 FAM 41.53 N16.2 Verifying Principal Alien is Maintaining Status

(TL:VISA-64; 8-7-92)

When an alien applies for an H-4 visa to follow to join a principal alien already in the United States, the consular officer must be satisfied that the principal alien is maintaining H status before issuing the visa. If the consular officer has any doubt about the principal alien's status and if there are no other readily available means of verification, the consular officer may suggest to the applicant that the principal alien in the United States obtain Form I-797 from INS and forward it to the applicant for presentation to the consular office.

9 FAM 41.53 N16.3 Employment in United States by H-4 Dependent Aliens Prohibited

(TL:VISA-64; 8-7-92)

Aliens in H-4 status are not authorized to accept employment. The spouse and children of H nonimmigrants may not accept employment unless they qualify independently for a classification in which employment is, or can be, authorized. The consular officer shall take this into account in evaluating whether family members have furnished adequate evidence of their support while in the United States. H-4 aliens are permitted to study during their stay in the United States.

9 FAM 41.53 N16.4 Using B-2 instead of H-4 Classification

(TL:VISA-64; 8-7-92)

Although the H-4 classification is provided specifically for the spouse and children of H nonimmigrants, such aliens could also accompany or follow to join the principal alien as temporary visitors. If the spouse or child already has a valid B-2 visa and it would be inconvenient or impossible for him or her to apply for an H-4 visa, the consular officer need not require the latter visa.

9 FAM 41.53 N17 Servants of H Nonimmigrants

(TL:VISA-64; 8-7-92)

Personal or domestic servants seeking to accompany or follow to join H nonimmigrant employers may be issued B-1 visas, provided they meet the requirements of section 9 FAM 41.31 N6.3-3.

9 FAM 41.53 N18 Physicians

9 FAM 41.53 N18.1 Graduates of Foreign Medical Schools

(TL:VISA-64; 8-7-92)

An alien graduate of a medical school, as defined in INA 101(a)(41), may enter the United States as an H-1B nonimmigrant to perform services as a member of the medical profession if he or she has a full and unrestricted license to practice medicine in a foreign state, or has graduated from a medical school in a foreign state, and meets the requirements of 9 FAM 41.53 N18.1-1 or 9 FAM 41.53 N18.1-2 below.

9 FAM 41.53 N18.1-1 Coming to Teach or Conduct Research

(TL:VISA-64; 8-7-92)

An alien physician may be classified H-1B if he or she is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency. Such an alien may only engage in direct patient care which is incidental to his or her teaching and/or research.

9 FAM 41.53 N18.1-2 Coming to Perform Direct Patient Care

(TL:VISA-64; 8-7-92)

An alien physician may engage in direct patient care in the United States as an H-1B nonimmigrant if he or she:

(1) Has a license or other authorization from the state of his or her intended employment, if the state requires a license or authorization;

(2) Has passed the Federation Licensing Examination (FLEX), administered by the Federation of State Medical Boards of the United States, or an equivalent examination as determined by the Secretary of Health and Human Services; and

(3) Has competency in oral and written English which is demonstrated by:

(a) Having passed the English language proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG); or

(b) Having graduated from a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education, whether or not the school is located in the United States.

9 FAM 41.53 N18.2 Alien Graduates of United States Medical Schools

(TL:VISA-64; 8-7-92)

An alien graduate of a medical school in the United States may perform any medical service as an H-1B nonimmigrant, including services primarily involving direct patient care, provided that he or she is licensed or otherwise authorized to practice in the state of intended employment.

9 FAM 41.53 N18.3 Alien Physicians Not Eligible for H-2B or H-3 Classification

(TL:VISA-64; 8-7-92)

Alien physicians who are coming to the United States to perform medical services or receive graduate medical training are statutorily ineligible to receive H-2B or H-3 status. Such aliens must qualify for H-1B, J-1, or immigrant visas.

9 FAM 41.53 N19 Nurses

9 FAM 41.53 N19.1 Licensing and Examination Requirements for H-1A Nurses

(TL:VISA-64; 8-7-92)

In order to qualify for H-1A classification, a nonimmigrant registered nurse must:

(1) Pass the screening examination administered by the Council on Graduates of Foreign Nursing Schools (CGFNS); or

(2) Have a full and unrestricted license to practice as a registered nurse in the state of intended employment; or

(3) Have a full and unrestricted license in any state or territory of the United States and receive temporary or interim authorization to practice as a registered nurse in the state of intended employment. The temporary or interim authorization may be obtained immediately after the alien nurse enters the United States and has registered to take the first available examination for permanent licensure.

9 FAM 41.53 N19.2 Certain Nurses Eligible for H-3 Classification

(TL:VISA-64; 8-7-92)

A petitioner may seek H-3 status for a nurse if it can be established that there is a genuine need for the nurse to receive a brief period of training that is unavailable in the alien's native country, and that such training is designed to benefit the nurse and the foreign employer upon the nurse's return to his or her country of origin. For a nurse to qualify for H-3 classification, certain criteria established by INS must be met.

9 FAM 41.53 N20 Medical Students Qualifying as H-3 Externs

(TL:VISA-64; 8-7-92)

A hospital approved by the American Medical Association or the American Osteopathic Association for either an internship or residency program may petition to classify a student attending a medical school abroad as an H-3 trainee, if the alien will engage in employment as an extern during his or her medical school vacation.

9 FAM 41.53 N21 Alien Coming to Train Others and/or Organize Business

(TL:VISA-64; 8-7-92)

An alien seeking to enter the United States to train others or to organize a business operation may be considered to be coming to a temporary position and is classifiable H-2B if otherwise qualified. For example, a cook coming to train other cooks or organize a kitchen may be classified H-2B, but a cook coming to assume a job of a permanent nature may not be accorded H-2B or any other nonimmigrant status and would have to *qualify* for an immigrant visa.

9 FAM 41.53 N22 Classification of Sheepherders

(TL:VISA-64; 8-7-92)

Based upon a recommendation from Congress, alien sheepherders may be admitted to the United States as H-2B nonimmigrants. Consular officers may process applications for visas received from sheepherders who are the beneficiaries of H-2B petitions even if they are coming to occupy positions which are permanent or continuing in nature.

9 FAM 41.53 N23 Aliens Employed by U. S. Exhibitors at International Fairs or Expositions

(TL:VISA-64; 8-7-92)

Alien employees of U. S. exhibitors or employers at international fairs or expositions held in the United States are classifiable as H-1B or H-2B temporary workers.

9 FAM 41.53 N24 Numerical Limitations on Certain H Nonimmigrants

(TL:VISA-64; 8-7-92)

a. The total number of aliens who can be accorded H nonimmigrant visa classification in the categories indicated below is limited as follows:

(1) Aliens classified as H-1B nonimmigrants, excluding those participating in DoD research and development or co-production projects, may not exceed 65,000 in any fiscal year;

(2) Aliens classified as H-1B nonimmigrants to work in DOD research and development or co-production projects may not exceed 100 at any time;

(3) Aliens classified as H-2B nonimmigrants may not exceed 66,000 during any fiscal year; and

(4) Aliens classified as H-3 participants in special education exchange visitor programs may not exceed 50 in any given fiscal year.

b. These numerical limitations are controlled by INS which allocates a number to each alien included in a new petition when the petition is filed. Petitioners are required to notify the appropriate INS Service Center Director when numbers are not used, so that they may be reassigned.

Consequently, consular officers need not concern themselves about the availability of visa numbers for beneficiaries of approved petitions, nor need they inform INS when H visa applications in affected categories are abandoned or denied. The dependents of principal aliens in these categories shall not be counted against the numerical limitations.

9 FAM 41.53 N25 Former Exchange Visitors Subject to Two-Year Foreign Residence Requirement

(TL:VISA-64; 8-7-92)

For instructions regarding requests for waivers of the two-year foreign residence requirement by H visa applicants who are former exchange visitors and subject to the two-year residence abroad requirement of INA 212(e), see section 9 FAM 40.102 and 40.102 Notes thereto.