

(c) The Manager, FCIC, shall be the debarring and suspending official for all debarment or suspension proceedings undertaken by FCIC under the provisions of 7 CFR part 3017.

■ 8. Amend § 400.457 by adding a new paragraph (d) to read as follows:

**§ 400.457 Program Fraud Civil Remedies Act.**

\* \* \* \* \*

(d) Civil penalties and assessments imposed pursuant to this section are in addition to any other remedies that may be prescribed by law or imposed under this subpart.

**§ 400.458 [Amended]**

■ 9. Amend § 400.458 by removing paragraph (b)(2), adding an “or” at the end of paragraph (b)(1) and redesignating paragraph (b)(3) as paragraph (b)(2).

**§ 400.459 [Removed]**

■ 10. Remove § 400.459.

**PART 407—GROUP RISK PLAN OF INSURANCE REGULATIONS**

■ 11. The authority citation for 7 CFR part 407 continues to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

■ 12. Amend § 407.9, Group Risk Plan Common Policy, by adding a new section 22 at the end to read as follows:

**§ 407.9 Group risk plan common policy.**

\* \* \* \* \*

**22. Remedial Sanctions**

If you willfully and intentionally provide false or inaccurate information to us or FCIC or you fail to comply with a requirement of FCIC, in accordance with 7 CFR part 400, subpart R, FCIC may impose on you:

(a) A civil fine for each violation in an amount not to exceed the greater of:

(1) The amount of the pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of this title; or

(2) \$10,000; and

(b) A disqualification for a period of up to 5 years from receiving any monetary or non-monetary benefit provided under each of the following:

(1) Any crop insurance policy offered under the Act;

(2) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*);

(3) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*);

(4) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*);

(5) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*);

(6) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*);

(7) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*); and

(8) Any federal law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

**PART 457—COMMON CROP INSURANCE REGULATIONS**

■ 13. The authority citation for 7 CFR part 457 is revised to read as follows:

Authority: 7 U.S.C. 1506(l), 1506(o).

■ 14. Amend § 457.8, Common Crop Insurance Policy Basic Provisions, by adding a new paragraph (e) at the end of section 27 to read as follows:

**§ 457.8 The application and policy.**

\* \* \* \* \*

27. Concealment, Misrepresentation or Fraud.

\* \* \* \* \*

(e) If you willfully and intentionally provide false or inaccurate information to us or FCIC or you fail to comply with a requirement of FCIC, in accordance with 7 CFR part 400, subpart R, FCIC may impose on you:

(1) A civil fine for each violation in an amount not to exceed the greater of:

(i) The amount of the pecuniary gain obtained as a result of the false or inaccurate information provided or the noncompliance with a requirement of this title; or

(ii) \$10,000; and

(2) A disqualification for a period of up to 5 years from receiving any monetary or non-monetary benefit provided under each of the following:

(i) Any crop insurance policy offered under the Act;

(ii) The Farm Security and Rural Investment Act of 2002 (7 U.S.C. 7333 *et seq.*);

(iii) The Agricultural Act of 1949 (7 U.S.C. 1421 *et seq.*);

(iv) The Commodity Credit Corporation Charter Act (15 U.S.C. 714 *et seq.*);

(v) The Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 *et seq.*);

(vi) Title XII of the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*);

(vii) The Consolidated Farm and Rural Development Act (7 U.S.C. 1921 *et seq.*); and

(viii) Any federal law that provides assistance to a producer of an agricultural commodity affected by a crop loss or a decline in the prices of agricultural commodities.

\* \* \* \* \*

Signed in Washington, DC on December 12, 2008.

**Eldon Gould,**

Manager, Federal Crop Insurance Corporation.

[FR Doc. E8–30073 Filed 12–17–08; 8:45 am]

BILLING CODE 3410–08–P

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 214, 215 and 274a**

[Docket No. USCIS–2007–0055; CIS No. 2428–07]

RIN 1615–AB65

**Changes to Requirements Affecting H–2A Nonimmigrants**

**AGENCY:** U.S. Citizenship and Immigration Services, U.S. Customs and Border Protection, DHS.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security regulations regarding temporary and seasonal agricultural workers, and their U.S. employers, within the H–2A nonimmigrant classification. The final rule removes certain limitations on H–2A employers and adopts streamlining measures in order to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. The final rule also addresses concerns regarding the integrity of the H–2A program and sets forth several conditions to prevent fraud and to protect laborers’ rights. The purpose of the final rule is to provide agricultural employers with an orderly and timely flow of legal workers, thereby decreasing their reliance on unauthorized workers, while protecting the rights of laborers.

The rule revises the current limitations on agricultural workers’ length of stay including lengthening the amount of time an agricultural worker may remain in the United States after his or her employment has ended and shortening the time period that an agricultural worker whose H–2A nonimmigrant status has expired must wait before he or she is eligible to obtain H–2A nonimmigrant status again. This rule also provides for temporary employment authorization to agricultural workers seeking an extension of their H–2A nonimmigrant status through a different U.S. employer, provided that the employer is a registered user in good standing with the E-Verify employment eligibility verification program. In addition, DHS modifies the current notification and

payment requirements for employers when an alien fails to show up at the start of the employment period, an H-2A employee's employment is terminated, or an H-2A employee absconds from the worksite. To better ensure the integrity of the H-2A program, this rule also requires certain employer attestations and precludes the imposition of fees by employers or recruiters on prospective beneficiaries. Under this final rule, DHS also will revoke an H-2A petition if the Department of Labor revokes the petitioner's underlying labor certification. Also, this rule provides that DHS will publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H-2A program. These changes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers.

Finally, this rule establishes criteria for a pilot program under which aliens admitted on certain temporary worker visas at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographical information upon departure. U.S. Customs and Border Protection (CBP) will publish a Notice in the **Federal Register** designating which temporary workers must participate in the program, which ports of entry are participating in the program, and the types of information that CBP will collect from the departing workers.

**DATES:** This rule is effective January 17, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529, telephone (202) 272-8410.

**SUPPLEMENTARY INFORMATION:** This supplementary information section is organized as follows:

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### I. Background

#### A. Proposed Rule

The H-2A nonimmigrant classification applies to aliens seeking to perform agricultural labor or services of a temporary or seasonal nature in the United States. Immigration and Nationality Act (Act or INA) section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see* 8 CFR 214.1(a)(2) (designation for H-2A classification). Despite the availability of the H-2A nonimmigrant classification, a high percentage of the agricultural workforce is comprised of aliens who have no immigration status and are unauthorized to work. In response to members of the public citing what they consider to be unnecessarily burdensome regulatory restrictions placed on the H-2A nonimmigrant classification and resulting limits on the utility of this nonimmigrant category to U.S. agricultural employers, the Department of Homeland Security (DHS) published a notice of proposed rulemaking on February 13, 2008, proposing to amend its regulations regarding the H-2A nonimmigrant classification. 73 FR 8230. On the same date, the Department of Labor (DOL) published a notice of proposed rulemaking to amend its regulations regarding the certification of H-2A employment and the enforcement of the contractual obligations applicable to H-2A employers. 73 FR 8538.

DHS, among other changes, proposed to:

- Relax the limitations on naming beneficiaries on the H-2A petition who are outside of the United States.
- Permit H-2A employers to file only one petition when petitioning for multiple H-2A beneficiaries from multiple countries.
- Deny or revoke any H-2A petition if the alien-beneficiary paid or agreed to pay any prohibited fee or other form of compensation to the petitioner, or, with the petitioner's knowledge, to a facilitator, recruiter, or similar employment service, in connection with the H-2A employment.
- Require H-2A petitioners: (a) To attest that they will not materially change the information provided on the Form I-129 and the temporary labor certification; (b) to attest that they have not received and do not intend to receive, any fee, compensation, or other form of remuneration from prospective H-2A workers; and (c) to identify any facilitator, recruiter, or similar

employment service that they used to locate foreign workers.

- Require H-2A petitioners to provide written notification to DHS, or be subject to an imposition of \$500 in liquidated damages, within forty-eight hours if: (a) An H-2A worker fails to report to work within five days of the date of the employment start date; (b) the employment terminates more than five days early; or (c) the H-2A worker has not reported for work for a period of five days without the consent of the employer.

- Clarify that DHS will not accord H-2A status to any alien who has violated any condition of H-2A nonimmigrant status within the previous five years.

- Immediately and automatically revoke an H-2A petition upon the revocation of the underlying labor certification by DOL.

- Refuse to approve H-2A petitions filed on behalf of beneficiaries from or to grant admission to aliens from countries determined by DHS to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal.

- Extend the H-2A admission period following the expiration of the H-2A petition from not more than 10 days to 30 days.

- Reduce from 3 months to 45 days the minimum period spent outside the United States that would interrupt the accrual of time toward the 3-year maximum period of stay where the accumulated stay is 18 months or less, and to reduce such minimum period from 1/6 of the period of accumulated stay to 2 months if the accumulated stay is longer than 18 months.

- Reduce from 6 months to 3 months the period that an individual who has held H-2A status for a total of 3 years must remain outside of the United States before he or she may be granted H-2A nonimmigrant status again.

- Extend H-2A workers' employment authorization for up to 120 days while they are awaiting an extension of H-2A status based on a petition filed by a new employer, provided that the new employer is a registered user in good standing in DHS's E-Verify program.

- Impose on sheepherders the departure requirement applicable to all H-2A workers.

- Establish a temporary worker exit program on a pilot basis that would require certain H-2A workers to register at the time of departure from the United States.

DHS initially provided a 45-day comment period in the proposed rule, which ended on March 31, 2008. DHS provided an additional 15-day comment

period from April 1, 2008 through April 14, 2008. During this 60-day comment period, DHS received 163 comments. DHS received comments from a broad spectrum of individuals and organizations, including various agricultural producers, agricultural trade associations, farm workers' labor unions, civil and human rights advocacy organizations, agricultural producers' financial cooperatives, farm management services companies, voluntary public policy organizations, private attorneys, state government agencies, a Member of Congress, and other interested organizations and individuals. During the public comment period, DHS officials, together with those from DOL, also met with stakeholders to discuss the proposed rule. Meeting participants were encouraged to submit written comments on the rule.

DHS considered the comments received and all other materials contained in the docket in preparing this final rule. The final rule does not address comments seeking changes in United States statutes, changes in regulations or petitions outside the scope of the proposed rule, or changes to the procedures of other DHS components or agencies.

All comments and other docket materials may be viewed at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2007-0055.

#### B. Discussion of the Final Rule

The final rule adopts many of the regulatory amendments set forth in the proposed rule. The rationale for the proposed rule and the reasoning provided in the preamble to the proposed rule remain valid with respect to these regulatory amendments, and DHS adopts such reasoning in support of the promulgation of this final rule. Based on the public comments received in response to the proposed rule, however, DHS has modified some of the proposed changes for the final rule as follows.

##### 1. Notification and Liquidated Damages Requirements

The final rule requires petitioners to notify DHS, within two workdays, beginning on a date and in a manner specified in a notice published in the **Federal Register**, of the following circumstances: (a) An H-2A worker's failure to report to work within five workdays of the employment start date on the H-2A petition or within five workdays of the start date established by his or her employer, whichever is later; (b) an H-2A worker's completion of

agricultural labor or services 30 days or more before the date specified by the petitioner in its H-2A petition; or (c) an H-2A worker's absconding from the worksite or termination prior to the completion of the agricultural labor or services for which he or she was hired. New 8 CFR 214.2(h)(5)(vi)(B)(1). By "workday," DHS means the period between the time on any particular day when such employee commences his or her principal activity and the time on that day at which he or she ceases such principal activity or activities.

##### a. Liquidated Damages

DHS has revisited the proposed increase in liquidated damages from \$10 to \$500 for an employer's failure to comply with the notification requirement. For the time being, DHS will retain the liquidated damages provision under 8 CFR 214.2(h)(5)(vi)(B)(3), and require an employer who fails to comply with the notification requirements, as revised under this final rule, to pay liquidated damages in the amount of \$10.

##### b. Timeframes Triggering Notification Requirement

To minimize the impacts on petitioners, the final rule relaxes the notification requirement in response to commenters' concerns that the proposed timeframes were not workable within current business realities. The final rule allows an employer, in certain circumstances, to use a start date newly established by the employer as the notification trigger date. The final rule also clarifies that the H-2A worker must report to work within five "workdays" of the employment start date, rather than the proposed five days. If the H-2A worker does not timely report to the worksite, the H-2A employer must report this violation to DHS within two workdays, rather than the proposed 48 hours. The final rule adopts the term "workdays" to ensure that H-2A employers are clear on the reporting deadlines. The final rule also requires DHS notification where the work is completed 30 days early rather than the proposed five days. The rule relieves the employer of its obligation to notify DHS when the worker's employment terminates upon completion of the work (unless the work is completed more than 30 days early). The final rule also provides that, if the petitioner demonstrates in the notification itself that good cause exists for an untimely notification to DHS, then DHS, in its discretion, may waive the liquidated damages amount.

##### c. Remedy for Petitioners

While the notification provision furthers DHS's enforcement goals of locating aliens who have not met the terms of their nonimmigrant status, DHS recognizes that the current regulations do not provide a sufficient remedy to petitioners that "lose" H-2A workers before the completion of work in the instances covered in the notification provision. Under the current regulations, petitioners may replace H-2A workers whose employment was terminated before the work has been completed. 8 CFR 214.2(h)(5)(ix). Such petitioners must file a new H-2A petition using a copy of the previously approved temporary labor certification to request replacement workers. However, the current regulations do not cover situations where H-2A workers fail to show up at the worksite or abscond.

To minimize the adverse impact on petitioners who lose workers for these reasons, DHS has determined that petitioners should be permitted to seek substitute H-2A workers in these instances, as well, provided that petitioners comply with the notification requirements in 8 CFR 214.2(h)(5)(vi). Thus, the final rule allows a petitioner to file an H-2A petition using a copy of the previously-approved temporary labor certification to replace an H-2A worker where: (a) An H-2A worker's employment was terminated early (i.e., before the completion of work); (b) a prospective H-2A worker fails to report to work within five workdays of the employment start date on the previous H-2A petition or within five workdays of the date established by his or her employer, whichever is later; or (c) an H-2A worker absconds from the worksite. New 8 CFR 214.2(h)(5)(ix). These three instances parallel the instances that trigger the notification requirement in new 8 CFR 214.2(h)(5)(vi)(B)(1) (except where the work for which the petitioner needed H-2A workers has been completed).

##### d. Retention of Evidence of a Change in Employment Start Date

The final rule also adds to the provision requiring the petitioner to retain evidence of its notification to DHS a requirement that the petitioner also retain evidence of a different employment start date for one year if the start date has changed from that stated on the H-2A petition. New 8 CFR 214.2(h)(5)(vi)(B)(2). Since the notification provision allows for the petitioner to use a new start date that the petitioner has established rather than the start date stated in the H-2A

petition, DHS believes that it must require the employer to retain evidence of the change in the start date to protect against misrepresentations by the petitioner regarding the employment start date.

#### e. Response Period Upon Receipt of a Notice of Noncompliance With the Notification Requirement

The final rule extends from 10 days to 30 days the time period within which a petitioner must reply to a DHS notice of noncompliance with the notification requirement. New 8 CFR 214.2(h)(5)(vi)(C). Based upon comments received, DHS recognizes that small businesses may have difficulty in responding to a DHS notice within 10 days. Many do not have a human resources department to handle administrative tasks and may find it difficult to respond to a notice within 10 days, especially if the notice arrives during the petitioner's busiest season. DHS believes that a 30-day time period for responding to a notice is reasonable.

#### 2. Payment of Fees by Aliens To Obtain H-2A Employment

To address some commenters' concerns about the proposed provisions addressing job placement-related fees paid by beneficiaries to obtain H-2A employment, the final rule makes several clarifications and changes.

First, the final rule specifies that the fees prohibited by the rule do not include the lower of the fair market value or the actual costs of transportation to the United States and any payment of government-specified fees required of persons seeking to travel to the United States (e.g., fees required by a foreign government for issuance of passports, fees imposed by the U.S. Department of State for issuance of visas, inspection fees), except where the passing of such costs to the worker is prohibited by statute or the Department of Labor's regulations. See 20 CFR 655.104(h). Prospective H-2A workers may be required to pay such costs, unless the prospective employer has agreed with the alien to pay such fees and/or transportation costs. New 8 CFR 214.2(h)(5)(xi)(A). DHS determined that payment of these costs by the H-2A worker should not be prohibited since they are personal costs related to the alien's travel to the United States, rather than fees charged by a recruiter or employer for finding employment.

Second, to clarify the standard for the petitioner's knowledge of fees being paid by the alien, the final rule modifies the standard to include both knowledge by the petitioner and circumstances in which the petitioner should reasonably

know that that worker has paid or has entered an agreement to pay the prohibited fees.

Third, the final rule offers petitioners a means by which to avoid denial or revocation (following notice to the petitioner) of the H-2A petition in cases where USCIS determines that the petitioner knows or reasonably should know that the worker has agreed to pay the prohibited fees as a condition of obtaining H-2A employment. In cases where prohibited fees were collected prior to petition filing, and in cases where prohibited fees were collected by the labor recruiter or agent after petition filing, USCIS will not deny or revoke the petition if the petitioner demonstrates that the beneficiary has been reimbursed in full for fees paid or, if the fees have not yet been paid, that the agreement to pay such fees has been terminated. Additionally, as an alternative to reimbursement in the case where the prohibition is violated by the recruiter or agent after the filing of the petition, the petitioner may avoid denial or revocation of the petition by notifying DHS of the improper payments, or agreement to make such payments, within two workdays of finding out about such payments or agreements. If the H-2A petition is denied or revoked on these grounds, then, as a condition of approval of future H-2A petitions filed within one year of the denial or revocation, the petitioner must demonstrate that the beneficiary has been reimbursed or that the beneficiary cannot be located despite the petitioner's reasonable efforts. New 8 CFR 214.2(h)(5)(xi)(C).

Fourth, the final rule does not include the requirement that the petitioner submit a separate document attesting to: The scope of the H-2A employment and the use of recruiters to locate H-2A workers, and the absence of any payment of prohibited recruitment fees by the beneficiary. Although petitioners will be required to attest to these factors, DHS is instead amending the Form I-129 to include those attestation provisions rather than requiring petitioners to submit a separate attestation document. DHS has determined that a separate attestation would increase petitioners' administrative burdens as well as duplicate much of the same information that petitioner must provide on the H-2A petition to establish eligibility.

#### 3. Revocation of Labor Certification

The final rule addresses the effect of the revocation of temporary labor certifications by DOL on H-2A petitioners and their beneficiaries. This rule provides for the immediate and

automatic revocation of the H-2A petition if the underlying temporary labor certification is revoked by DOL. New 8 CFR 214.2(h)(5)(xii). DHS believes that immediate and automatic revocation of the petition is a necessary consequence of a revocation of the temporary labor certification. The temporary labor certification is the basis for the petition, and DHS does not have the expertise to second-guess DOL's decision to revoke the temporary labor certification.

Because the denial or revocation of a petition based on the revocation of temporary labor certification will have a direct effect on an H-2A worker's status, DHS will authorize the alien beneficiary's period of stay for an additional 30-day period for the purpose of departure or extension of stay based upon a new offer of employment. *Id.* During this 30-day period, such alien will not be deemed to be unlawfully present in the United States. *Id.*; see also INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B) (description of unlawful presence). Although DHS also proposed to require a petitioner to pay for the alien's reasonable transportation costs of return to his or her last place of foreign residence abroad after DHS revokes a petition for improper payment of fees, DHS has removed that requirement from this final rule.

#### 4. Violations of H-2A Status

The final rule clarifies that DHS will deny H-2A nonimmigrant status based on a finding that the alien violated any condition of H-2A status within the past 5 years, unless the violation occurred through no fault of the alien. DHS has added this clarification to ensure that this provision will not adversely affect the aliens whose previous violations of status were caused by illegal or inappropriate conduct by their employers. New 8 CFR 214.2(h)(5)(viii)(A).

#### 5. Permitting H-2A Petitions for Nationals of Participating Countries

The final rule modifies the proposal that would have precluded DHS from approving an H-2A petition filed on behalf of aliens from countries that consistently deny or unreasonable delay the prompt return of their citizens, subjects, nationals or residents who are subject to a final order of removal from the United States. DHS will now publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H-2A program. In designating countries to

allow the participation of their nationals in the H-2A program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the 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. Initially, the list will be composed of countries that are important for the operation of the H-2A program and are cooperative in the repatriation of their nationals. The countries included on the list are the countries whose nationals contributed the vast majority of the total beneficiaries of the H-2A program during the last three fiscal years. Additional details on how this list will be administered are included in the discussion in response to comments received on this proposed provision below.

#### 6. Conforming Amendments and Non-Substantive Changes

The final rule makes conforming amendments to 8 CFR 214.2(h)(2)(B) and (C) by providing that the form instructions will contain information regarding appropriate filing locations for the H-1B, H-2A, H-2B, and H-3 classifications. The final rule also makes conforming amendments to 8 CFR 214.2(h)(5)(v)(B) and 8 CFR 214.2(h)(5)(v)(C) to clarify job qualification documentation requirements and the timing for such documents to be filed for named and unnamed beneficiaries. Finally, the final rule includes non-substantive structure or wording changes from the proposed rule for purposes of clarity and readability.

## II. Public Comments on the Proposed Rule

### A. Summary of Comments

Out of the 163 comments USCIS received on the proposed rule, several comments supported the proposals in the rule as a whole and welcomed DHS's recognition of the need for H-2A workers and for modifications to the current H-2A regulations. Agricultural employers submitted 115 of the total comments received.

Most commenters generally supported the streamlining measures in the

proposed rule, such as: Removing the requirement to name the sole beneficiary and beneficiaries who are outside of the United States if the beneficiaries are named in the labor certification; permitting an employer to file only one petition for multiple beneficiaries from multiple countries; extending the admission period to 30 days after the conclusion of the H-2A employment; and reducing the required time abroad once an H-2A worker has reached the maximum period of stay before being able to seek H-2A nonimmigrant status again. However, many commenters were opposed to several changes that they believe will impose additional burdens and costs on farm businesses. They suggested that some of the proposed changes could lead to a decrease in usage of the H-2A program, such as the following proposals: Precluding the current practice of approving H-2A petitions that are filed with denied temporary labor certifications; authorizing USCIS to deny or revoke upon notice any H-2A petition if it determines that the beneficiary paid a fee in connection with or as a condition of obtaining the H-2A employment; modifying the current notification and liquidated damages requirements; providing for the immediate and automatic revocation of the petition upon the revocation of the labor certification; and imposing on shepherders the same departure requirement applicable to all H-2A workers. Many commenters also were concerned about the proposals to authorize employment of H-2A workers while they are changing employers (if the new employer is a participant in good standing in E-Verify) and to institute a land-border exit system for certain H-2A workers on a pilot basis.

The concerns of the commenters summarized above and additional, more specific comments are organized by subject area and addressed below.

### B. General Comments

#### 1. Comments From the Dairy Industry

*Comment:* Several commenters expressed disappointment about what was described as the continued exclusion of the dairy industry from the H-2A program.

*Response:* DHS notes that most dairy farmer's needs are year-round and, therefore, may not be able to meet the requirements of the H-2A program. Dairy farmers that can demonstrate a temporary need for H-2A workers, however, are able to utilize the program. The applicable statute precludes DHS from extending the program to work that is considered permanent. *See* INA

section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a).

#### 2. U.S. and Foreign Worker Protections

*Comment:* DHS received some comments that urged the withdrawal of the proposed rule entirely on the basis that the rule fails to reflect the critical balance between the nonimmigrant labor force and the U.S. workforce and undermines critical labor protections that serve as the foundation of the H-2A program. Some commenters also opined that the proposed rule would result in the exploitation of temporary foreign workers and the undermining of wages and working conditions of U.S. workers.

*Response:* DHS is aware of its responsibility to help maintain the careful balance between preserving jobs for U.S. workers and administering nonimmigrant programs designed to invite foreign workers to the United States. The final rule contains two major revisions to the regulations designed to protect U.S. workers: (1) Removal of DHS's authority to approve H-2A petitions filed with temporary labor certifications that have been denied by DOL (revised 8 CFR 214.2(h)(5)(i)(A)); and (2) the addition of a provision to provide for the immediate and automatic revocation of an H-2A petition upon the revocation of the temporary labor certification by DOL (new 8 CFR 214.2(h)(5)(xii)). DHS believes that a temporary labor certification process is required to protect U.S. workers.

In order to protect foreign workers from exploitation, the final rule requires petitioners to return any recruiter or finders' fees paid by alien beneficiaries as a condition of the H-2A employment if paid with the knowledge of the petitioner (or if the petitioner reasonably should have known about the payment). *See* new 8 CFR 214.2(h)(5)(xi)(A). Failure to return the prohibited fees to the beneficiaries will result in the denial or revocation of the H-2A petition.

#### 3. Lack of Enforcement Against the Employment of Unauthorized Aliens

*Comment:* A few commenters criticized the lack of a sound method for strong enforcement against employers that obtain and maintain a workforce of unauthorized aliens while the rule proposed to impose stiffer fines, revocations, and increase in costs to those employers who are trying to obtain and maintain a legal workforce through the H-2A program.

*Response:* U.S. Immigration and Customs Enforcement (ICE) is charged with enforcing the laws against the

employment of unauthorized aliens, including the applicable provisions at section 274A of the INA, 8 U.S.C. 1324a. Enforcement of these provisions is outside the scope of this rulemaking. The purpose of this rule is to strengthen the integrity of the H-2A program so that employers will be encouraged to obtain workers through the H-2A program rather than through unlawful means. The added authority to deny or revoke petitions, and any increase in costs to employers included in this rule reflect necessary anti-fraud and worker protection measures. Employers that follow the rules of the program will not be unreasonably affected by these measures.

### C. Specific Comments

#### 1. Consideration of Denied Temporary Agricultural Labor Certifications

*Comment:* Seventeen out of 24 commenters who discussed this issue objected to the removal of regulatory language permitting, in limited circumstances, the approval of H-2A petitions filed with temporary labor certifications that have been denied by DOL.

*Response:* After considering the commenters' objections, DHS nevertheless retains this proposal in this final rule as discussed in the comments and responses below. See new 8 CFR 214.2(h)(5)(i)(A).

*Comment:* Some commenters among those who objected to this proposal suggested that the INA vests the authority for making decisions on the H-2A workers' admission solely with DHS, not DOL.

*Response:* DHS's statutory authority is to determine whether or not to approve a petition for H-2A workers after consultation with DOL. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). By no longer permitting the approval of H-2A petitions in instances where DOL has denied the temporary labor certification, DHS does not believe that it is abrogating its statutory responsibility in adjudicating H-2A petitions. Rather, DHS is recognizing that it does not have the expertise in evaluating the current U.S. labor market to make a determination independent from DOL's determination on the temporary labor certification. It is therefore in the best interests of U.S. workers and the public in general that DHS relinquish its ability to approve H-2A petitions in the absence of the grant of such labor certification by DOL.

*Comment:* A few commenters pointed out that the language of the INA requires an employer only to apply for, not obtain, a temporary labor certification

from the Secretary of Labor. See INA section 218(a)(1), 8 U.S.C. 1188(a)(1).

*Response:* DHS disagrees with the commenters' interpretation of the statute. While the statutory language only refers to a petitioner's application for a temporary labor certification, DHS believes that its interpretation of this language requiring petitioners also to obtain a temporary labor certification as a condition of H-2A employment is reasonable. A temporary labor certification certifies that there are insufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and that the employment of the alien in such labor or services will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. INA section 218(a)(1), 8 U.S.C. 1188(a)(1). The statute includes the temporary labor certification requirement as a means to protect U.S. workers from losing jobs to foreign laborers. INA section 218(c)(3)(A), 8 U.S.C. 1188(c)(3)(A). Without requiring that the temporary labor certification actually be obtained by the petitioner, the temporary labor certification requirement would fail to offer such protection. Moreover, it is clear that the determinations as to the availability of U.S. workers and the effect on their wages and working conditions are within the expertise of DOL, not DHS. Without certification by the Secretary of Labor, DHS would not be well equipped to make a determination on the petition for an employer to import foreign workers. Additionally, section 214(a)(1) of the INA grants the Secretary of Homeland Security authority to establish by regulation the conditions for nonimmigrant admissions. 8 U.S.C. 1184(a)(1). This rule is establishing a requirement that employers obtain a temporary labor certification as a condition for an alien to be admitted as an H-2A nonimmigrant.

*Comment:* Many commenters who objected to this proposal suggested that this proposal and the lack of an expeditious process to make a new determination on the denied temporary labor certification will leave employers without recourse if U.S. workers do not report to work on the date of their need. They asserted that filing a petition without a temporary labor certification should be allowed in any circumstance where DOL denies certification or fails to act in a timely manner.

*Response:* In its final H-2A rule, DOL establishes a process for an employer to request re-determination of need if U.S. workers fail to report on the date of

need. DHS believes that this DOL provision addresses these commenters' concerns. Therefore, under this final rule, DHS abrogates the process for approving H-2A petitions, in limited circumstances, that are filed with denied temporary labor certifications.

#### 2. Unnamed Beneficiaries in the Petition

*Comment:* Ten commenters addressed and supported the proposal to allow H-2A petitions to include unnamed beneficiaries for those who are outside the United States regardless of the number of beneficiaries on the petition or whether the temporary labor certification named beneficiaries. They agreed that it would provide agricultural employers with more flexibility to recruit foreign workers months ahead of the actual date of stated need.

*Response:* Based on the support from the commenters, the final rule adopts this proposal with minor changes. The changes discussed below concern beneficiaries from countries that have not been designated as participating countries under the H-2A program as well as minor, nonsubstantive changes to improve the clarity of the text. The final rule revises 8 CFR 214.2(h)(2)(iii) and removes 8 CFR 214.2(h)(5)(i)(C). Also, as noted earlier, the final rule makes conforming amendments to 8 CFR 214.2(h)(5)(v)(B) and 8 CFR 214.2(h)(5)(v)(C) to clarify job qualification documentation requirements and the timing for such documents for named and unnamed beneficiaries. The final rule also maintains the requirement that the petition include the names of those beneficiaries who are present in the United States. It should be noted that, in the case of an alien who is already in the United States, an H-2A petition encompasses both an employer's request to classify its worker as H-2A nonimmigrant and the alien worker's request to change from a different nonimmigrant status to H-2A or to extend his or her H-2A status. If eligible, the approval of the H-2A petition and the related request for extension of stay or change of status will serve either to confer a new immigration status or to extend the status of a particular alien immediately upon approval. Since such an approval, unlike a nonimmigrant admission from outside the country, does not afford the U.S. Government the opportunity to first inspect and/or interview the H-2A beneficiary at a consular office abroad or at a U.S. port of entry, it is essential that DHS have the names of beneficiaries in the country.

### 3. Multiple Beneficiaries

*Comment:* Eleven out of 12 commenters supported the proposal to permit petitioners to file only one petition with DHS when petitioning for multiple H-2A beneficiaries from multiple countries. They stated that this change to the regulations would benefit the employer not only in terms of convenience but also financially.

*Response:* Based on the positive responses from commenters, the final rule retains the proposal. New 8 CFR 214.2(h)(5)(i)(B).

*Comment:* One commenter suggested that this change would unnecessarily complicate the visa issuance process.

*Response:* DHS disagrees with this commenter's concern. DHS proposed the change as a result of the implementation of the Petition Information Management System (PIMS) by the Department of State in 2007. PIMS effectively tracks visa issuance for specific petitions approved for multiple beneficiaries in real time regardless of the consulate location where a beneficiary may apply for a visa. Therefore, DHS does not believe that this proposed change would complicate the visa issuance process. A consular officer would have full and timely access to information regarding the exact number of beneficiaries who have been issued visas based on the approved H-2A petition at the time an alien applies for his or her H-2A visa based on that petition. The Department of State website provides more information about PIMS at [http://travel.state.gov/visa/laws/telegrams/telegrams\\_4201.html](http://travel.state.gov/visa/laws/telegrams/telegrams_4201.html).

*Comment:* The same commenter also stated that the proposal would result in an employer recruiting and hiring workers from different geographical regions of a country and/or from different nations. The commenter further suggested that such hiring process would increase the likelihood of problems for workers who feel isolated, decreasing the workers' ability to unite and communicate among themselves.

*Response:* DHS does not intend to change employers' recruiting processes as a result of this proposal. Under the current regulations, an employer may bring in H-2A workers from many different countries rather than from a single country or from one region within a country. The change made by this final rule merely would permit petitioners to file only one petition with DHS when petitioning for multiple H-2A beneficiaries from multiple countries instead of requiring multiple petitions.

### 4. Payment of Fees by Beneficiaries To Obtain H-2A Employment

#### a. Grounds for Denial or Revocation on Notice.

*Comment:* Eleven out of 83 commenters supported the proposal to authorize the denial or revocation of an H-2A petition if DHS determines that the alien beneficiary has paid or has agreed to pay any fee or other form of compensation, whether directly or indirectly, to the petitioner or that the petitioner is aware or reasonably should be aware that such payment was made to the petitioner's agent, or to any facilitator, recruiter, or similar employment service, in connection with or as a condition of obtaining the H-2A employment. Seventy-one commenters responded negatively to this proposal and one comment was neutral.

*Response:* After carefully considering the commenters' support and objections, for the reasons stated in the paragraphs below, the final rule provides DHS with the authority to deny or to revoke (following notice and an opportunity to respond) an H-2A petition if DHS determines that the petitioner has collected, or entered into an agreement to collect a fee or compensation as a condition of obtaining the H-2A employment, or that the petitioner knows or reasonably should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service as a condition of H-2A employment. See new 8 CFR 214(h)(5)(xi)(A). DHS has determined that a prohibition on any payment made by a foreign worker in connection with the H-2A employment is more restrictive than necessary to address the problem of worker exploitation by unscrupulous employers, recruiters, or facilitators imposing costs on workers as a condition of selection for H-2A employment. Accordingly, DHS has not included in the final rule the prohibition on payments made in connection with the H-2A employment, but retains the prohibition on payments made to an employer, recruiter, facilitator, or other employment service by the foreign worker that are a condition of obtaining the H-2A employment.

DHS will not deny or revoke the petition if the petitioner demonstrates that (1) prior to the filing of the petition, the alien beneficiary has been reimbursed for the prohibited fees paid; (2) where the prohibited fees have not yet been paid, that the agreement to pay has been terminated; or (3) where the prohibition on collecting or agreeing to collect a fee is violated by a recruiter or agent after the filing of the petition, the

petitioner notifies DHS about the prohibited payments, or agreement to make such payments, within 2 workdays of finding out about such payments or agreements.

*Comment:* The commenters who supported this proposal welcomed this addition to the regulations as a positive change to recognize worker abuses, such as human trafficking and effective indenture. They suggested that DHS should take further measures to deter future violations by implementing procedures to debar a violator from the program.

*Response:* DHS does not have the statutory authority to implement procedures to debar petitioners from the H-2A program. The statute provides DHS with the authority to deny petitions filed with respect to an offending employer under section 204 or 214(c)(1) of the INA (8 U.S.C. 1154 or 1184(c)(1)) for 1 to 5 years if it finds a significant failure to meet any of the conditions of an H-2B petition or a willful misrepresentation of a material fact in an H-2B petition. INA section 214(c)(14)(A)(ii), 8 U.S.C. 1184(c)(14)(A)(ii). However, there is no similar provision applicable to the H-2A nonimmigrant classification that provides such authority.

*Comment:* Most of the commenters supporting worker protections also suggested that DHS should take further measures to provide appropriate remedies to help the foreign workers receive the funds to which they were entitled.

*Response:* DHS agrees that the proposed rule, while offering some safeguards against the indenture of H-2A workers by providing a direct disincentive to employers and/or their recruiters to collect recruiting and similar fees from prospective and current H-2A workers, does not address fully the basic problem such workers face: They remain "indentured" until such time as they are relieved of this debt burden. While the proposed rule addresses this concern by providing an alien worker who has incurred such debt in connection with obtaining H-2A employment with the opportunity to change employers or return to his or her home country, it does not relieve the alien of his or her improperly imposed H-2A placement-related debt burden. DHS agrees with the commenters' concern in this regard and believes that it is in the interests of both the alien and legitimate H-2A employers to ensure the fair and even-handed administration of the H-2A program by providing a means to make such alien workers whole. Consistent with the expressed intent of the proposed rule to afford

adequate protections for alien agricultural workers seeking H-2A nonimmigrant classification and to remove unnecessary administrative burdens on legitimate employers seeking to hire such workers, the final rule, therefore, provides that an H-2A petitioner can avoid denial or revocation of the H-2A petition if the petitioner demonstrates that the petitioner or the employment service reimbursed the alien worker in full for the prohibited fees paid or that any agreement for future payment is terminated. New 8 CFR 214.2(h)(5)(xi)(A)(1), (2), and (4). However, the remedy of reimbursement would not apply if the petitioner collected the fees after the filing of the petition. New 8 CFR 214.2(h)(5)(xi)(A)(3). For a petitioner who discovers after the filing of the petition that the alien worker paid or agreed to pay an employment service the prohibited fees, the petitioner can avoid denial or revocation by notifying DHS within 2 workdays of obtaining this knowledge instead of reimbursing the worker or effecting termination of the agreement. New 8 CFR 214.2(h)(5)(xi)(A)(4). DHS will publish a notice in the **Federal Register** to describe the manner in which the notification must be provided.

DHS does not believe it appropriate to impose on petitioners who discover a post-filing violation by a labor recruiter the same adverse consequence—denial or revocation of the petition—that is imposed on more culpable petitioners who themselves violate the prohibition on collection of fees from H-2A workers after petition filing, nor should petitioners discovering such post-filing violations by a labor recruiter be put in a situation where the only way to avert denial or revocation of the petition might be for the petitioner to pay for the recruiter's violation by reimbursing the alien itself. Petitioners should be encouraged to come forward with information about post-filing wrongdoing by labor recruiters, even if reimbursement is not possible. In this way, DHS can help provide further protections to H-2A workers against unscrupulous recruiter practices.

Further, where the petitioner does not reimburse the beneficiary and USCIS denies or revokes the H-2A petition, the final rule provides that a condition of approval of subsequent H-2A petitions filed within one year of the denial or revocation is reimbursement of the beneficiary of the denied or revoked petition or a demonstration that the petitioner could not locate the beneficiary. New 8 CFR 214.2(h)(5)(xi)(C)(1). This requirement is

intended to balance the commenters' concerns that an H-2A alien worker not be required to pay fees as a condition of obtaining his or her H-2A employment with the legitimate concern that petitioners who run afoul of 8 CFR 214.2(h)(5)(xi)(A) but who have reimbursed the alien worker in full or who, despite their reasonable efforts, are unable to locate such workers, continue to have access to participation in the H-2A program. Whether the petitioner will be able to demonstrate to the satisfaction of DHS that it has exercised reasonable efforts to locate the alien worker will depend on the specific facts and circumstances presented. In this regard, DHS would take into consideration the amount of time and effort the petitioner expended in attempting to locate the beneficiary, and would require, at a minimum, that the petitioner has attempted to locate the worker at every known address(es). The final rule also clarifies that the 1-year condition on petition approval will apply anew each time an H-2A petition is denied or revoked on the basis of new 8 CFR 214.2(h)(5)(xi)(A)(1)–(4). New 8 CFR 214.2(h)(5)(xi)(C)(2).

*Comment:* Many commenters further suggested that employers should be obligated to pay for aliens' subsistence costs while the workers are not permitted to work.

*Response:* DHS agrees that the revocation of a petition based on the payment of prohibited fees should not penalize H-2A workers. Accordingly, to minimize the adverse impact on workers, DHS will authorize the alien beneficiary's period of stay for an additional 30-day period for the purpose of departure or extension of stay based upon a new offer of employment. *Id.* During this 30-day period, such alien will not be deemed to be unlawfully present in the United States. *Id.*; see also INA section 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B) (description of unlawful presence).

DHS, however, will not be requiring employers to provide financial assistance to aliens adversely affected by the revocation of a petition. While we understand that certain H-2A workers will be adversely affected when DHS revoked H-2A petitions due to actions by the employer, we do not believe that DHS can require employers to cover expenses for workers without further notice and comment. This determination, however, does not impact any other legal remedy or claim that an affected worker may have against his or her employer.

Further, although DHS proposed to also require a petitioner to pay for the alien's reasonable transportation costs of

return to his or her last place of foreign residence abroad after DHS revokes a petition for improper payment of fees, DHS has removed that requirement from this final rule. While section 214(c)(5)(A) of the INA (8 U.S.C. 1184(c)(5)(A)), requires petitioners to pay the workers' reasonable transportation expenses to return to their last place of foreign residence following revocation of a petition, that provision pertains solely to H-1B and H-2B nonimmigrant workers. 8 U.S.C. 1184(c)(5)(A). As there is no similar statutory requirement for employers of H-2A temporary workers to cover expenses for beneficiaries even when the petitioner's actions result in the revocation of the petition and thus require the alien to leave the United States, DHS does not believe that it may impose such costs onto the H-2A employer.

*Comment:* Several commenters suggested that employers should be required to ensure that workers' passports are not confiscated.

*Response:* Existing laws satisfactorily meet these commenters' concerns and they are not addressed by this final rule. For example, it is unlawful to conceal, remove or confiscate an immigration document in furtherance of peonage or involuntary servitude. See 18 U.S.C. 1592.

*Comment:* Some commenters suggested that the U.S. government should require H-2A employers to comply with Article 28 of Mexico's Federal Labor Law, which requires that employers recruiting Mexican citizens in Mexico for employment abroad comply with such requirements as registering with the applicable Board of Conciliation and Arbitration, submitting the employment contract to the Board, and posting a bond to ensure a fund to compensate workers for illegal employment practices. They further stated that the North American Agreement on Labor Cooperation (NAALC), which requires each signatory nation to cooperate to ensure compliance with all labor laws and improve conditions for workers, is a treaty that binds the United States.

*Response:* DHS does not enforce the labor law of a foreign country. As it is DOL's function to administer the U.S. government's responsibilities under the NAALC and to enforce federal labor laws, DHS is not in a position to reply to these comments and no changes were made to the final rule to respond to them.

*Comment:* One commenter suggested that the proposed rule contains no plan for dealing with unscrupulous, fraudulent recruiters in foreign

countries and that this change may result in DHS penalizing the victims rather than the perpetrators as workers lose jobs and employers lose workers. Some commenters made a variety of recommendations to enforce the methods to protect H-2A workers from abuses, such as requiring an H-2A employer to reach written agreements with labor contractors, recruiters, or facilitators to prohibit the imposition of job placement-related fees on prospective workers or limiting the use of recruiters and facilitators for H-2A purposes to those that maintain an office in the United States and are duly licensed to do business in the United States according to Federal and State laws.

*Response:* While DHS agrees that these precautions would further protect H-2A workers from abuses, including such precautions in this final rule would be outside DHS' authority. DHS cannot specifically regulate the business practices of recruiters in foreign countries or the agreements between private entities under existing authorities.

*Comment:* Some commenters who objected to this proposal suggested that this proposal would lead to a decrease in the usage of the H-2A program as it will make the program more costly.

*Response:* While DHS understands that this rule has the effect of requiring employers rather than H-2A workers to bear these costs, the H-2A program was never intended to encourage the importation of indebted workers. The intention of the final rule is to ensure that the actual wages paid to H-2A workers reflect those set forth in the labor certification; passing recruitment-related costs on to the alien worker would have the effect of reducing the alien worker's actual wages. Further, DHS does not believe that this rule would have a chilling effect on the recruitment of H-2A workers; demand for such workers is based on a prospective employer's need for workers. So too, the choice whether to use recruiters and/or facilitators is that of the employer and is presumably based on a determination that it makes economic sense to use such persons to assist in finding alien workers. Assuming that making the employer bear such recruitment costs would make the program more cost prohibitive, the solution is not to pass those costs on to economically disadvantaged alien workers but to leave to the free market the amount an employer is willing to agree to pay the recruiter, facilitator, or employment service.

*Comment:* A number of commenters who objected to this proposal asserted

that there is no statutory authority in the INA for DHS to prohibit prospective workers from paying a recruiter or a facilitator for the services they receive in order to secure employment in the United States. They stated that it is a longstanding practice that foreign agents collect fees from those who wish to find work in the United States and need assistance with their visa applications and/or the admission process and, in fact, such services have become essential with constant changes in the visa application procedure at U.S. consulates abroad.

*Response:* DHS believes that these comments misinterpret the proposed change. The proposal would neither prohibit the use of such recruiters or facilitators during the recruitment or visa application process nor the collection of fees itself. Instead, the proposal would prohibit imposition of fees on prospective workers as a condition of selection for such employment. It would not preclude the payment of any finder's or similar fee by the prospective employer to a recruiter or similar service, provided that such payment is not assessed directly or indirectly against the alien worker. Under section 214(a) of the INA, 8 U.S.C. 1184(a), DHS has plenary authority to determine the conditions of admission of all nonimmigrants to the United States, including H-2A workers. It is within the authority of DHS to bar the payment by prospective workers of recruitment-related fees as a condition of an alien worker's admission to this country in H-2A classification.

DHS notes that this final rule is consistent with the Department of Labor's bar on the employer passing to prospective alien agricultural workers fees the employer incurs in recruiting U.S. workers in conjunction with obtaining a temporary agricultural worker labor certification. *See* new 20 CFR 655.105(o).

*Comment:* Many commenters asked DHS to specify what types of fees are prohibited by the rule. Several commenters argued that obtaining a passport and a visa for arriving H-2A workers should not be the employer's responsibility.

*Response:* DHS agrees that passport and visa fees should not be included in the types of fees prohibited by the rule, except where the passing of such costs to the worker is prohibited by statute or the Department of Labor's regulations. Generally, the types of fees that would be prohibited include recruitment fees, attorneys' fees, and fees for preparation of visa applications. So that the prohibition against impermissible fees remains general, covering any money

paid by the beneficiary to a third party as a condition of the H-2A employment, the final rule does not provide a list of prohibited fees. However, as discussed earlier, the final rule provides that prohibited fees do not include the lesser of the fair market value or actual costs of transportation to the United States, or payment of any government-specified fees required of persons seeking to travel to the United States, such as, fees required by a foreign government for issuance of passports and by the U.S. Department of State for issuance of visas. As these costs would have to be assumed by any alien intending to travel to the United States, DHS believes that each alien should be responsible for them. New 8 CFR 214.2(h)(5)(i)(C)(5) and (h)(5)(xi)(A) and (C).

*Comment:* Many commenters expressed concerns about petition revocation based on an employer's knowledge of the payment of job placement-related fees by prospective workers. Many commenters requested that DHS clarify the standard by which an employer will be deemed to lack knowledge of the prohibited payment by the prospective worker.

*Response:* The final rule clarifies that an H-2A petition will be subject to denial or revocation only if DHS determines that the H-2A petitioner knew, or reasonably should have known, that the H-2A worker paid or agreed to pay a prohibited fee. New 8 CFR 214.2(h)(5)(xi)(A). For example, if a recruiter advertises to prospective H-2A petitioners that it can place temporary alien workers with such employers at no or minimal cost to the employers, it is reasonable for prospective petitioners to view these claims as suspect and question whether the recruiter has passed its recruitment costs to the prospective H-2A workers. A determination by DHS that the petitioner failed to make reasonable inquiries to ensure that prospective H-2A workers did not pay the recruiter any fees will subject the petition to denial or revocation. Similarly, if an H-2A petitioner learns, directly or indirectly, that a prospective H-2A worker has been asked to pay a fee or other thing of value as a condition of his or her employment with the U.S. employer, the H-2A petitioner will be deemed to be on notice that the prospective worker has paid a prohibited fee and reasonably can be expected to ascertain whether this is in fact true before petitioning for the worker.

*Comment:* Another comment stated that this proposal would make petitioners subject to liability by opening additional avenues for lawsuits

against the petitioners who may be held responsible for a third party's action.

*Response:* This provision is not intended to provide any party with the authority to engage in legal proceedings based on this decision by DHS.

*Comment:* Some commenters suggested that DHS should recognize that some assistance in recruiting and/or in the visa application and admission process could be conducted informally by friends or family members, not as a for-profit activity, and requested DHS to specify facilitators and recruiters that fall under these provisions.

*Response:* Since assistance in recruiting and in the visa application or admission process that is provided without charge is not precluded by this rule, DHS determined that it is not necessary for the final rule to reference such assistance.

*Comment:* There were additional suggestions to prevent fraud and to protect laborers' rights, as well as administrative recommendations.

*Response:* Because these comments exceeded the scope of the proposed rule, they are not addressed in this final rule.

#### b. Employer Attestation

*Comment:* One out of 8 commenters supported the proposed addition to require H-2A petitioners to attest that they will not materially change the information provided on the Form I-129 and the temporary labor certification; that they have not received, nor intend to receive, any fee, compensation, or other form of remuneration from prospective H-2A workers; and whether they used a facilitator, recruiter, or any other similar employment service, to locate foreign workers, and if so, to name such facilitators, recruiters, or placement services. Seven commenters wrote that the employer attestation would not reduce the amount of paperwork required by an employer nor streamline the process.

*Response:* DHS has carefully considered the attestation requirement, and has determined that a separate attestation requirement would be a duplicative addition to the regulations. However, an attestation relates to eligibility requirements that the petitioner must demonstrate on the H-2A petition which the petitioner must sign as being true and correct. DHS is instead amending the Form I-129 to include the attestation requirements.

*Comment:* Many commenters pointed out that there are some minor activities in the overall scope of work on an agricultural operation and the workers' secondary duties change from season to season. They suggested that the narrow

and restrictive view of unchanging duties in the proposed rule could result in good-faith employers violating this portion of the rule.

*Response:* While the final rule does not contain a separate attestation requirement, these comments relate to the requirement that the petitioner notify DHS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility. 8 CFR 214.2(h)(11)(i)(A). DHS does not agree with these commenters' interpretations and understands that farm laborers generally perform several duties and their secondary duties may vary from season to season. For example, while a worker's main duty may be to harvest the crop, there may be a time when he or she is required to drive a tractor, to transport the crop to a processor, or to repair farm equipment. Incidental duties that are associated with the worker's main duty and are part of routine farm maintenance are not considered material changes and do not require the filing of a new petition. See 8 CFR 214.2(h)(2)(i)(E).

DOL also provides a clarification in its final rule to reflect that work activity of the type typically performed on a farm and incident to the agricultural labor or services for which an H-2A labor certification was approved may be performed by an H-2A worker. DHS is in agreement with DOL's clarification, which will ensure that H-2A workers can engage in minor amounts of other incidental farm work activity during periods when they are not performing the agricultural labor of services that is the subject of their application.

*Comment:* Commenters suggested that the listing of facilitators, recruiters, or placement services should only be required where workers were actually recruited, and not in the instances where workers were assisted with the visa application process.

*Response:* While the final rule does not include a separate attestation requirement where the listing of facilitators, recruiters, or placement services would be required, the revised H-2A petition will request the petitioner to include this information. DHS agrees with the commenters' concerns. DHS recognizes that listing all services used potentially may be overly burdensome and of limited utility to DHS. The revised H-2A petition instead will request the petitioner to provide the names of the facilitators, recruiters, or placement services that actually located the H-2A beneficiaries on the petition.

*Comment:* One commenter suggested that the attestation provision include an agreement by the employer agreeing to

unhindered and unannounced inspections by U.S. Immigration and Customs Enforcement (ICE) and DOL.

*Response:* The final rule does not include the suggested addition. DHS has determined that it is not necessary to include such a provision because such inspections are separately authorized by law. See 8 CFR 214.2(h)(5)(vi)(A). Additionally, DOL authorities are within the jurisdiction of DOL, rather than DHS. As such, it is not necessary that an employer agree to inspections.

#### 5. Petition Notification Requirements and Liquidated Damages

*Comment:* Seventy-three out of 74 commenters objected to the modified notification and liquidated damages provisions in the proposed rule.

*Response:* After careful consideration, and in response to the commenters' objections, DHS has modified the proposed notification requirements. DHS also has removed the increase in liquidated damages and, instead, will return to the current liquidated damages provision under 8 CFR 214.2(h)(5)(vi)(A).

*Comment:* Many commenters objected to the proposed requirements to notify DHS if an H-2A worker fails to report for work within 5 days after the employment start date stated on the petition or the worker's employment is terminated more than 5 days before the employment end date stated on the petition. For example, the commenters stated that the majority of late arrivals of H-2A workers to the worksite are caused by slow processing at U.S. government agencies or emergencies beyond the employer's control. In some cases, employers stagger workers' arrival at the consulate and at the worksite to accommodate logistical arrangements, such as transportation. Further, many commenters suggested that, given that work in agriculture is dependent upon weather, it is rare that an employer can accurately predict months in advance of the actual date when the growing season will end, and many agricultural employers use the latest likely ending date on a temporary labor certification.

*Response:* DHS believes that the notification requirements should be retained, but agrees with the commenters' concerns regarding the practical application of the proposal. Therefore, the final rule modifies the notification requirements to address the commenters' concerns. The final rule requires petitioners to provide notification to DHS in the following instances: Where an H-2A worker fails to report to work within five workdays of the employment start date on the H-2A petition or within five workdays of

the start date established by the employer, whichever is later; where the agricultural labor or services for which H-2A workers were hired is completed more than 30 days earlier than the end date stated on the H-2A petition; or where the H-2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired. New 8 CFR 214.2(h)(5)(vi)(B)(1). DHS believes that the modified notification requirements are more workable for employers and are responsive to the commenters' concerns. Recognizing that there could be various reasons beyond the employer's control causing prospective employees' late arrival at the worksite, the final rule allows the petitioner to use a different employment start date than the start date stated in the H-2A petition to accommodate the employees' late arrival. It also changes the notification timeframes for employment that is terminated earlier than the end date stated on the petition, depending on whether the termination occurs before the work is completed or due to early completion of the work. In addition, the final rule amends 8 CFR 214.2(h)(11)(i)(A) to cross-reference the notification provision.

Where an employer establishes a different start date from that on the H-2A petition, the final rule adds the requirement that the employer retain evidence of the changed employment start date for a 1-year period. A retention period of 1 year was chosen to parallel the 1-year retention period for notifications. Such documentation must also be made available for inspection on request by DHS officers. New 8 CFR 214.2(h)(5)(vi)(B)(2). DHS is adding this requirement to ensure that providing a more flexible timeframe for the notification requirement will not result in misrepresentations regarding the employment start date.

*Comment:* Many commenters who objected to the modified notification requirements also stated that a notification within 48 hours would be difficult, if not impossible, because, in many circumstances, it may be impossible for the employer to know with certainty that the H-2A worker absconded from the worksite.

*Response:* DHS disagrees with the commenters concerns that the notification period would be too difficult to meet based on the speed with which an employer will gain knowledge of the worker's abscondment. An absconder is defined as a worker who has not reported to work for 5 workdays without the consent of the employer. The final rule clarifies that the time period is 5

consecutive workdays. New 8 CFR 214.2(h)(5)(vi)(E). The employer's obligation to notify DHS of an abscondment would thus not be triggered by the employer's subjective determination that the worker has indeed absconded, but rather by an objectively measured event: The passage of five consecutive workdays during which the alien has failed to report to work without the consent of the employer.

While DHS does not believe that the proposed notification period would be too onerous on employers, DHS recognizes that imposing a 48-hour time period for filing notifications may be difficult for those employers that do not conduct business 7 days of the week, such as those employers that are closed on weekends and holidays. Therefore, the final rule clarifies that the notification period is 2 workdays rather than the proposed 48 hours. New 8 CFR 214.2(h)(5)(vi)(B)(1).

*Comment:* Many comments suggested that the requirement to pay \$500 in liquidated damages for failing to meet the notification requirement is excessive and will be a potential disincentive to use the H-2A program because the failure to comply with the notification requirement, an event triggering liquidated damages, could be merely a failure to notify within the required timeframe as opposed to failure to notify at all. Most of these comments suggested that DHS not increase the liquidated damages amount from the amount set forth in the current regulations (\$10) or, at most, increase them only by a much smaller amount, to a level not exceeding \$50 per instance.

*Response:* In response to public comments, DHS has decided to remove the proposed increase in liquidated damages to \$500 and instead will retain the liquidated damages requirement under 8 CFR 214.2(h)(5)(vi)(B)(3). Under the current provision, an employer who fails to comply with the notification requirements, as revised under this final rule, must pay liquidated damages in the amount of \$10.

*Comment:* With respect to the process following the failure to meet the notification requirements, some commenters suggested that the 10-day timeframe within which an employer is required to reply to a notice prior to being assessed liquidated damages would impose an unreasonable hardship on small employers who could be in their busy season when such a notice arrives. They recommended that employers be afforded 30 days to respond.

*Response:* The final rule adopts this suggestion and provides that the

petitioner will be given written notice and 30 days to reply to such notice if DHS has determined that the petitioner has violated the notification requirements and it has not received the notification. New 8 CFR 214.2(h)(5)(vi)(C).

*Comment:* One comment suggested that the imposition of liquidated damages must include a provision for due process with such "hefty" amounts at stake.

*Response:* By including a notice requirement, as stated above, and an opportunity to reply within 30 days, DHS believes that new 8 CFR 214.2(h)(5)(vi)(C) provides sufficient due process.

*Comment:* Several commenters were concerned about the cost that employers will have to incur to send the notification to DHS by certified mail or similar means in order to comply with the notification requirements within 48 hours.

*Response:* In reply to these comments, DHS is not including in the final rule the requirement that the notification be in writing. See new 8 CFR 214.2(h)(5)(vi)(B)(1), (h)(5)(vi)(C), and (h)(11)(i)(A). A notice outlining the manner in which the notification may be made will be published in the **Federal Register**. DHS will provide a designated e-mail address for employers to send notifications. DHS believes that designating a dedicated e-mail address for employers' notification purpose will reduce the burden on employers. DHS will also provide a designated mailing address for employers without ready access to email.

*Comment:* A question was raised during a stakeholder meeting held during the comment period of the proposed rule as to what an H-2A employer needs to do in order to replace an H-2A worker whose employment is terminated or who has left the country.

*Response:* Upon further consideration, DHS agrees that an accommodation should be made for employers who lose H-2A workers before the work is completed. Under the current provision at 8 CFR 214.2(h)(5)(ix), an employer may file an H-2A petition to replace an H-2A worker whose employment was terminated early. However, the provision does not address the two additional situations covered by the notification provisions: When workers fail to show up at the worksite or abscond and leave the employer without a sufficient workforce to complete the work. Therefore, the final rule amends 8 CFR 214.2(h)(5)(ix) to allow an employer to file an H-2A petition to replace H-2A workers in the following

three instances: (a) Where an H-2A worker's employment was terminated prior to the completion of work and earlier than the date stated in the H-2A petition; (b) where a prospective H-2A worker has failed to report to work within five workdays of the employment start date on the temporary labor certification or within five workdays of the date established by their employer, whichever is later; or (c) where an H-2A worker absconds from the worksite. Under this revised provision, a petitioner would be able to file an H-2A petition using a copy of the previously approved temporary labor certification to replace the absent H-2A worker.

*Comment:* Some commenters suggested that the employer, who did not know of job placement-related fee payments made by prospective workers, should not be penalized and therefore should be able to quickly replace the worker with another H-2A worker.

*Response:* As discussed above, an H-2A petition will be denied or revoked if DHS determines that the employer knew or has reason to know that the H-2A worker paid or agreed to pay a job placement-related fee. If the employer did not know or have reason to know of such payment, the provision will not apply and the petition cannot be denied or revoked on this basis. Therefore, it is not necessary for the final rule to cover this possibility.

#### 6. Violations of H-2A Status

*Comment:* Ten commenters objected to the proposal to revise 8 CFR 214.2(h)(5)(viii)(A) to provide that any violation of a condition of H-2A status within the 5 years prior to adjudication of a new H-2A petition would result in a denial of H-2A status. DHS did not receive any other comments on this proposal.

*Response:* Based on the objections of the commenters, DHS will modify the proposed rule as discussed below.

*Comment:* Most of the ten commenters suggested that some aliens may have unwittingly violated their previous H-2A status by absconding from their jobs as a result of their employer's illegal or inappropriate conduct, thereby causing them to engage in a protest leading to their termination or being forced to quit.

*Response:* DHS agrees that this situation should not trigger the consequences of 8 CFR 214.2(h)(5)(viii)(A). The final rule clarifies that an alien will be precluded from being granted H-2A status where he or she violated the conditions of H-2A status within the 5 years prior to adjudication of a new H-2A petition by

DHS, except where the violation occurred through no fault of his or her own, such as where the alien absconded from the worksite as a result of the employer's illegal or inappropriate conduct. The prospective employer would have the opportunity to explain the circumstances surrounding the alien's previous status violation in its petition, as would the alien in conjunction with his or her application for H-2A status and/or an H-2A visa.

*Comment:* One comment arguing against the revision stated that DHS lacks the authority to impose additional or more restrictive grounds of inadmissibility than those provided in the INA.

*Response:* DHS does not find that this revision is an imposition of an additional ground of inadmissibility. This revision simplifies the current provision to apply to all violations of the H-2A status rather than to the two currently identified in the regulations, namely, remaining beyond the specific period of authorized stay and engaging in unauthorized employment. Further, section 214(a)(1) of the INA (8 U.S.C. 1184(a)(1)) provides authority for this requirement as a condition for H-2A admission. Under that section, the Secretary of Homeland Security is granted the authority to establish the conditions of nonimmigrant admission by regulation.

#### 7. Revocation of Labor Certification

*Comment:* Twenty out of 21 commenters objected to the proposed revision to 8 CFR 214.2(h)(5)(11)(ii) providing for the immediate and automatic revocation of an H-2A petition upon the revocation of the temporary labor certification by DOL.

*Response:* After carefully considering the commenters' objections and discussing with DOL, the final rule adopts the proposal for the following reasons.

*Comment:* Many of these commenters objected to this change because a petition revocation will terminate the employment authorization of the workers and make it impossible for the employer to legally continue in business. They were concerned that DOL would make revocation of a labor certification immediate during the pendency of an employer's appeal of the revocation.

*Response:* In its final H-2A rule, DOL provides for a stay of revocation until the conclusion of any DOL administrative appeal. DHS believes that this DOL provision addresses these commenters' concerns. Therefore, under this final rule, DHS will revoke an H-2A petition as soon as DOL has

adjudicated any administrative appeal that may have been filed and informs DHS of their decision to revoke the temporary labor certification.

*Comment:* A few commenters wrote that this proposed change will provide no relief for affected workers who stand to lose their jobs and their ability to earn sufficient wages that they had expected by taking H-2A employment. These commenters suggested that the former employer (whose petition was revoked) should be obligated to pay for subsistence costs for the aliens during the 30-day period.

*Response:* In response to these comments, the final rule provides a 30-day grace period for H-2A workers who are in the United States based on an approved petition that is later revoked because of DOL's revocation of the temporary labor certification. New 8 CFR 214.2(h)(5)(xii). During this 30-day period, such workers will be in an authorized period of stay. They may choose to find new employment and apply for an extension of stay or depart the United States. As discussed above, however, at this time, DHS does not believe that it may require employers to pay wages for workers who remain in the United States nor transportation expenses for those who chose to return to their country of origin.

#### 8. Permitting H-2A Petitions for Nationals of Participating Countries

*Comment:* Five comments addressed the proposed rule to include a new provision at 8 CFR 214.2(h)(5)(i)(F) (and complementary provision at 8 CFR 214.2(h)(5)(viii)(D)) precluding DHS from approving an H-2A petition filed on behalf of one or more aliens from countries determined by the Secretary of Homeland Security to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. One commenter supported this proposed change. Two commenters sought modification to the provision, while another sought additional time to comment on the provision. A final commenter disagreed that the proposal would improve the H-2A process generally.

*Response:* After reviewing all comments, DHS has modified this proposal in the final rule for the reasons and in the manner as discussed below.

Instead of publishing a list of countries that consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals or residents who are subject to a final removal order, DHS at this time will be publishing in a notice in the **Federal**

**Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H-2A temporary worker program. DHS is making this modification to the rule in consideration of public comments received recommending DHS rework the proposal in order to make the process more positive and to encourage countries to improve cooperation in the repatriation of their nationals.

In designating countries to allow the participation of their nationals in the H-2A program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the 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.

Designation of countries on the list of eligible countries will be valid for one year from publication. The designation shall be without effect at the end of that one-year period. The Secretary, with the concurrence of the Secretary of State, expects to publish a new list prior to the expiration of the previous designation by publication of a notice in the **Federal Register**, considering a variety of factors including, but not limited to the four factors for the designation of a participating country described above.

Initially, the list will be composed of countries that are important for the operation of the H-2A program and are cooperative in the repatriation of their nationals. The countries included on the list are the countries whose nationals contributed the vast majority of the total beneficiaries of the H-2A and H-2B programs during the last three fiscal years.

The Secretary of Homeland Security may allow a national from a country not on the list to be named as a beneficiary on an H-2A petition and to participate in the H-2A program based on a determination that such participation is in the U.S. interest. The Secretary's determination of such a U.S. interest will take into account a variety of factors, including but not limited to consideration of: (1) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among workers from a country

currently on the list of eligible countries for participation in the program; (2) evidence that the beneficiary has been admitted to the United States previously in H-2A status and has complied with the terms of that status; (3) the potential for abuse, fraud, or other harm to the integrity of the H-2A visa program through the potential admission of a beneficiary from a country not currently on the list of eligible countries for participation in the program; and (4) such other factors as may serve the U.S. interest. Therefore, DHS is requiring petitioners for beneficiaries who are nationals of countries not designated as participating countries to name each beneficiary. Additionally, petitions for beneficiaries from designated countries and undesignated countries are to be filed separately. These changes will permit DHS to more easily adjudicate H-2A petitions involving nationals of countries not named on the list by permitting DHS to properly evaluate the factors used to make a determination of U.S. interest, discussed above, without slowing the adjudication of petitions for nationals of designated countries.

As discussed in the proposed rule, DHS expects that the provisions in this rule intended to increase the flexibility of the H-2A visa program, complemented by the streamlining proposals the Department of Labor is making in its H-2A rule, will increase the appeal of the H-2A program to U.S. agricultural employers. See 73 FR 8230, 8234-5 (Feb. 13, 2008). While a more efficient H-2A program is anticipated to reduce the number of aliens entering the country illegally to seek work, it also could lead to an increase in the number of H-2A workers that abscond from their workplace or overstay their immigration status. Therefore, the success of the program will depend significantly upon countries accepting the return of their nationals.

Petitions may only be filed and approved on behalf of beneficiaries who are citizens, subjects, nationals or residents of a country that is included in the list of participating countries published by notice in the **Federal Register** or, in the case of an individual beneficiary, an alien whose participation in the H-2A program has been determined by the Secretary of Homeland Security to be in the U.S. interest. See new 8 CFR 214.2(h)(5)(i)(F). Likewise, in order to be admitted as an H-2A, aliens must be nationals of countries included on the list of participating countries or, in the case of an individual beneficiary, an alien whose participation in the H-2A program has been determined by the Secretary of Homeland Security to be in

the U.S. interest. See new 8 CFR 214.2(h)(5)(viii)(D). To ensure program integrity, such petitioners must state the nationality of all beneficiaries on the petition, even if there are beneficiaries from more than one country. See new 8 CFR 214.2(h)(2)(iii).

#### 9. Period of Admission

*Comment:* Sixteen out of 18 commenters supported the proposal to revise 8 CFR 214.2(h)(5)(viii)(B) by extending the H-2A admission period following the expiration of the H-2A petition from 10 to 30 days. These commenters believed that it would make the H-2A program a more cost efficient program.

*Response:* Based on the support of these commenters, the final rule adopts this proposal. New 8 CFR 214.2(h)(5)(viii)(B).

*Comment:* Several commenters who supported this proposed change also suggested that employers should be obligated to pay for their former employees' subsistence costs during the 30-day period, as the aliens would not be permitted to work during that time.

*Response:* Because H-2A workers are not required to remain in the United States during the additional 30-day period, DHS does not think that employers should be responsible for subsistence costs during that period. In addition, as discussed above, DHS does not think that it may impose such costs at this time.

*Comment:* Two commenters opposed the proposal. One commenter did not provide a reason for the opposition. The other commenter stated that this change would create a period of too much downtime where the worker is not accounted for and does not seem to have any significant benefits.

*Response:* DHS disagrees with these concerns. DHS believes that the benefit of extending the H-2A admission period following the expiration of the H-2A petition to 30 days would be to provide the H-2A worker enough time to prepare for departure or apply for an extension of stay based on a subsequent offer of employment if the worker chooses to do so. Having a 30-day extension would facilitate the new benefit that the final rule provides for a worker to continue to be employment authorized while awaiting for an extension of H-2A status based on a petition filed by a new employer who is a registered user in good standing of USCIS' E-Verify program.

#### 10. Interruptions in Accrual Towards 3-Year Maximum Period of Stay

*Comment:* Nine out of 12 commenters supported the proposed rule reducing

the length of time that interrupts an H-2A worker's accrual of time in H-2A status for purposes of calculating when the worker has reached the 3-year maximum period of stay. They supported this change because it would allow a worker to engage in a longer employment period, which would benefit both employers and employees.

*Response:* DHS agrees that this proposal would benefit both employers and H-2A workers. Accordingly, the final rule adopts the proposed revision, reducing the minimum period spent outside the United States that would be considered interruptive of accrual of time towards the 3-year limit, where the accumulated stay is 18 months or less, to 45 days. If the accumulated stay is longer than 18 months, the required interruptive period will be 2 months. See new 8 CFR 214.2(h)(5)(viii)(C).

*Comment:* One comment suggested that the existing exception for the H-1B, H-2B, and H-3 commuters under 8 CFR 214.2(h)(13)(v) be extended to the H-2A classification.

*Response:* The current regulation at 8 CFR 214.2(h)(13)(v) provides that the limitations on admission in H-1B, H-2B, and H-3 status do not apply to H-1B, H-2B, and H-3 individuals (1) who did not reside continually in the United States and whose employment was seasonal, intermittent, or for less than 6 months per year, and (2) who reside abroad and regularly commute to the United States. DHS does not believe that it is appropriate to extend this provision to H-2A commuters; therefore, the final rule does not include the suggested revision to 8 CFR 214.2(h)(13)(v). The H-2A classification is unique in that H-2A employment sites change from season to season. While some employment sites may be within reasonable commuting distance from the border, it cannot be anticipated that all of the alien's worksites will also be, particularly given the variabilities of growing seasons and work hours inherent in the agricultural industry. What may be reasonable commuting distance based on an 8-hour day may not be if the alien worker is required to work longer hours during the height of the growing season.

It is reasonable to assume that most aliens do not have ready access to transportation to and from their home country and the particular worksite where they are employed. As such, few H-2A workers will actually be able to commute from their homes abroad to the United States on a regular basis. Further, by statute, employers must guarantee many employee benefits such as housing, meals, tools, workers' compensation insurance, and return

transportation. Section 218(c)(4) of the INA requires employers to provide housing to all H-2A workers in accordance with specific regulations. 8 U.S.C. 1188(c)(4). Employer-provided housing must meet the standards set forth under 29 CFR 1910.142 or 20 CFR 654.404-654.417. Since the statute does not contain any provision to release employers from their responsibility to provide housing to their employees, DHS does not think it appropriate to apply the commuter exception to the H-2A classification given the special nature and variabilities of H-2A agricultural work.

*Comment:* One commenter objected to this proposal stating that it would encourage more illegal aliens to come into the country and lead to illegal aliens who are already in the country to stay longer.

*Response:* DHS does not believe that reducing the time spent outside the United States to be interruptive of accrual of time towards the 3-year limit in H-2A status would encourage more illegal aliens to come to the U.S. or stay in the U.S. longer. This provision is meant to cause less disruptive breaks in the H-2A employment, benefiting both H-2A workers and their employers, and does not apply to those who attempt to enter the U.S. illegally or to those who are already here illegally.

*Comment:* One commenter stated that it would like to employ H-2A workers for 3 consecutive years.

*Response:* The current regulations provide that an alien worker's total period of stay in H-2A nonimmigrant status may last up to 3 years. A temporary need by a single employer for H-2A workers in excess of one year is possible where an H-2A employer satisfies DHS and DOL that such longer-term need is generated by "extraordinary circumstances." See 8 CFR 214.2(h)(5)(iv)(A).

DHS believes that the reduction of the time to be spent outside the United States to be considered interruptive of accrual of time towards the 3-year limit in H-2A status provided in this final rule would benefit employers by reducing the amount of time that they are required to be without the services of needed workers. At the same time, this will not violate the temporary and seasonal nature of employment requirements under the H-2A program.

#### 11. Post-H-2A Waiting Period

*Comment:* Twelve out of 15 commenters supported the proposed rule suggesting the reduction of the waiting period from 6 months to 3 months for an H-2A worker who has reached the 3-year ceiling on H-2A

nonimmigrant status prior to seeking H-2A nonimmigrant status again (or any other nonimmigrant status based on agricultural activities). These commenters supported this proposal, stating that it will enhance the workability of the H-2A program for employers while not offending the fundamental temporary nature of employment under the H-2A program.

*Response:* DHS agrees with the comments in support of this proposal. Accordingly, the final rule adopts the proposed reduction in waiting time without change. New 8 CFR 214.2(h)(5)(viii)(C).

*Comment:* One commenter argued that this provision may lead to the displacement of U.S. workers and make some desirable year-round agricultural work unavailable to the domestic workforce. The commenter suggested that employers, including farm labor contractors, may string together several short-term job opportunities to offer job stability for a longer term, which would be desirable for many U.S. farm workers.

*Response:* DHS disagrees that a reduction in the waiting period will result in the displacement of U.S. farm workers. In order to protect U.S. workers, the law requires H-2A employers to obtain a temporary labor certification certifying that there are insufficient U.S. workers who are able, willing, qualified, and available to perform agricultural temporary labor or services, and that the H-2A employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. If an employer is able to find U.S. workers by offering job stability for a longer period, it will not be allowed to or have no need to utilize the H-2A program. DHS believes that this streamlining measure will encourage employers who are unable to secure their workforce among U.S. workers to use the H-2A program instead of hiring individuals who have no legal immigration status and are unauthorized to work.

*Comment:* One commenter objected to this proposal, stating that it would encourage more illegal aliens to come into the country and lead illegal aliens who are already in the country to stay longer. Another commenter objected to the proposal but did not provide a reason.

*Response:* DHS adopts this proposal because it believes that a shorter waiting period would better meet the needs of employers in the time-sensitive agricultural industry. The H-2A program is for agricultural employers, who experience labor shortage among U.S. workers, to rely on alien workers to

perform agricultural labor or services of a temporary or seasonal nature. DHS does not agree that this provision would increase the presence of illegal aliens in the United States.

#### 12. Extending Status With a New Employer and Participation in E-Verify

*Comment:* Two commenters supported the proposal to provide for employment authorization to H-2A workers awaiting an extension of H-2A status based on a petition filed by a new employer. Twelve out of 15 comments opposed conditioning employment authorization on the new employer's participation in the E-Verify program, but supported the proposal to provide for employment authorization to H-2A workers awaiting an extension of H-2A status based on a petition filed by a new employer.

*Response:* After considering the commenters' objections and concerns, the final rule adopts this proposal at new 8 CFR 274a.12(b)(21), as discussed below. Note that new 8 CFR 274a.12(b)(21) does not include a cross reference to 8 CFR 214.6. This cross reference relates to TN nonimmigrants and was erroneously included in the proposed rule.

*Comment:* Many commenters questioned the reliability of the E-Verify program. Some commenters suggested that E-Verify has high error rates that disproportionately affect foreign-born U.S. workers.

*Response:* DHS believes that these concerns are misplaced and factually inaccurate. The "Findings of the Web Basic Pilot Evaluation" reported that currently 99.5 percent of all work-authorized employees queried through E-Verify were verified without receiving a Tentative Non-Confirmation (TNC) or having to take any type of corrective action.<sup>1</sup> Over the past year, E-Verify has automated its registration process, instituted a system change to reduce the incidence of typographical errors, incorporated a photo screening tool to combat identity fraud, added Monitoring and Compliance staff to maintain system integrity, added new databases that are automatically checked by the system, and established a new process for employees to call DHS' toll-free number to address citizenship mismatches as an alternative to visiting the Social Security Administration (SSA). These changes have been implemented in an effort to establish efficient and effective verification. A series of enhancements that E-Verify has implemented reduces

mismatch rates among newly naturalized citizens and newly arriving workers. Under DHS management and in partnership with SSA, the program is continuously improving its processes to decrease mismatch rates and ensure that E-Verify is fast, easy to use, and protects employees' rights.

*Comment:* Some commenters stated that some employers have little or no occasion to use the E-Verify program and probably little facility with it and argued that the provision is not fair to such employers.

*Response:* E-Verify is a free and voluntary program. This provision is not a requirement for employers to obtain H-2 employees, but rather is a condition for the alien obtaining an extension of status and employment authorization pending adjudication of a new H-2A petition filed by another employer. DHS continues to believe that the provision will provide a valuable incentive for employers to participate in the E-Verify program, thereby reducing opportunities for aliens without employment authorization to work in the agricultural sector.

*Comment:* One comment suggested that, assuming DHS has the authority to provide for portability without statutory authorization, DHS should fully use the H-1B portability provisions as the model to allow portability for the period the petition is pending.

*Response:* DHS has general authority to grant employment authorization. See INA section 274A(h), 8 U.S.C. 1324a(h). In an industry in which an estimated half of the 1.1 million workers in the United States are illegal aliens, DHS has determined that it is appropriate to restrict the benefit of portability during petition pendency to only those employers that have demonstrated good business/corporate citizenship through enrollment in E-Verify.

*Comment:* One commenter who objected to the proposal suggested that the provision to extend employment authorization would act as an inducement for a worker to breach his work contract and to change employers prior to fulfillment of the contractual obligations, which would be a violation of INA section 218(c)(3)(B), 8 U.S.C. 1188(c)(3)(B).

*Response:* DHS disagrees that this provision would act as such an inducement. While it is true that this provision would enable an alien to work for a new employer prior to approval of the new H-2A petition, the purpose of this provision is to enable agricultural workers to change worksites and employers as soon as they complete one agricultural job. Even if this provision acted as an inducement for some aliens

to change employers before completion of the first job (e.g., to get a higher paying job), DHS believes that the overall benefit to the agricultural industry, the alien worker, and the U.S. public in allowing the alien worker to change job locations at the end of each job assignment without having to wait for the successor employer's petition to be approved outweighs the possibility of abuse of this privilege by the alien worker or the new petitioning employer.

*Comment:* This same commenter also suggested that the proposed change to 8 CFR 214.2(h)(2)(i)(D) would create the possibility that an extension for an H-2A employee within the three-year period of stay may not be granted for employment with the same employer.

*Response:* DHS disagrees with the commenter's interpretation of the proposed provision. The cited provision is specifically for change of employers. The provision for extensions of stay is governed by 8 CFR 214.2(h)(15); the rule does not amend this provision.

*Comment:* One commenter stated that this proposal conditioning employment authorization on the new employer's participation in the E-Verify program seems to be a waste of time because the state workforce agency (SWA) is required to verify workers' eligibility under the DOL's rule.

*Response:* The E-Verify program supplements the employer's obligation under section 274A(a) of the INA, 8 U.S.C. 1324a(a), to complete Forms I-9 (Employment Eligibility Verification) at the time of each new hire. The SWA's responsibility is to verify the employment authorization of applicants seeking referral under a job order. SWAs are encouraged, but not required, to enroll in E-Verify. Additionally, under INA Section 274A(a)(5), employers can rely on the SWA's verification of employment authorization only where the documentation complies with all statutory and regulatory requirements, including 8 CFR 274a.6. Incentivizing E-Verify enrollment by agricultural employers will thus reduce opportunities for unauthorized agricultural workers, not just in the situations where employers are not able to rely on a SWA's verification, but in other situations outside the SWA referral process where workers apply for employment.

#### 13. Miscellaneous Changes to H-2A Program

##### a. Extensions of Stay Without New Temporary Labor Certifications

*Comment:* Two comments suggested changes to the proposal that would allow, in emergent circumstances, an

<sup>1</sup> <http://www.uscis.gov/files/article/WebBasicPilotRprtSept2007.pdf>.

application for an extension of stay for an H-2A nonimmigrant worker to not contain an approved temporary labor certification, under certain conditions.

*Response:* The final rule retains the provision as stated in the proposed rule. New 8 CFR 214.2(h)(5)(x).

*Comment:* One comment recommended that this provision continue to be automatically available upon request and that petitioners not be required to make a case for emergent circumstances.

*Response:* The proposed rule revised the provision at 8 CFR 214.2(h)(5)(x) to improve its readability, making no substantive changes to the provision. This provision originally was meant to allow H-2A employers to obtain a necessary workforce in case of emergencies over which employers have no control (e.g., changed weather conditions), for up to two weeks. DHS does not believe that the provision should be extended beyond situations involving emergent circumstances. Many agricultural employers stated in their comments to other proposals that, due to the uncertainty as to when the growing season would end, they normally use the latest likely ending date when they apply for a temporary labor certification. Many employers further indicated that most work is completed before the date on the temporary labor certification. DHS believes that it is reasonable to provide an opportunity for an employer to file an H-2A petition without obtaining a new temporary labor certification only in emergent circumstances.

*Comment:* The other comment asked DHS to have the parameters of emergent circumstances include any instance that the employer could not have reasonably foreseen at the time that the petition was filed.

*Response:* DHS has determined that it will not include additional parameters to the provision. To do so would unnecessarily reduce the flexibility that the provision currently provides.

#### b. Filing Locations

*Comment:* Commenters were supportive of the proposed modifications to the general filing provision at 8 CFR 214.2(h)(2)(i)(A) applicable to H-1B, H-2A, H-2B, and H-3 classifications by removing specific reference to filing locations announced in the **Federal Register** and providing that the form instructions will contain information regarding appropriate filing locations for these nonimmigrant visa petitions.

*Response:* In the absence of negative comments on these revisions, and to maintain flexibility in the regulations to

accommodate changing case management needs, the final rule adopts these modifications without change.

New 8 CFR 214.2(h)(2)(i)(A). The final rule also makes conforming amendments to 8 CFR 214.2(h)(2)(i)(B) and 214.2(h)(2)(i)(C), replacing references to filing locations based on where the petitioner is located, will perform services, or receive training, or based on an established agent, with reference to the form instructions. In addition, revised 8 CFR 214.2(h)(2)(i)(B) replaces the reference to "Service office," referring to the Immigration and Naturalization Service, with "USCIS."

*Comment:* DHS received one comment with respect to filing locations specific to logging employers who will need to begin using the H-2A classification once DOL's final rule making changes to the H-2A classification takes effect. Currently, such employers use the H-2B classification. 20 CFR part 655, subpart C. Under the DOL final rule, they instead would need to use the H-2A classification. The comment concerned the current filing location for H-2A petitions at USCIS' California Service Center, as announced in a notice published in the **Federal Register** on November 9, 2007. See 72 FR 63621. The comment requested that logging employers be allowed to continue to file their petitions at USCIS' Portland, Maine field office, the current filing location for H-2B petitions for loggers, because the Portland office is familiar with the unique characteristics and needs of the industry.

*Response:* At present, DHS has no plan to change its central filing location for H-2A petitions at the California Service Center. This central filing location ensures timely processing and consistent adjudication of H-2A petitions. Once DOL's final rule takes effect and requires logging employers to use the H-2A classification, and beginning on the effective date of this rule, logging employers will be required to file petitions on behalf of their prospective workers in accordance with the H-2A regulations and form instructions for H-2A petitions. As DHS monitors the processing of these petitions, if DHS determines that it is more prudent to change the filing location for logging employers to the Portland, Maine field office or any other DHS office, DHS may change the filing location via the form instructions for the H-2A petition. Note that within 30 days from the effective date of this rule (and the DOL rule), logging employers will be required to file change of status petitions for their workers who are present in the United States in H-2B

status to ensure that logging workers will be classified as H-2A workers.

#### 14. DHS Policy Applicable to H-2A Shepherders

*Comment:* Ten out of 12 commenters objected to the proposal to impose on H-2A shepherders the same departure requirement applicable to all H-2A workers.

*Response:* After carefully considering the commenters' objections, DHS has determined that it will change its policy regarding H-2A shepherders as proposed for the reasons discussed below.

*Comment:* Many commenters who objected to this proposal suggested that the existing policy was developed based on the understanding that tending and caring for sheep over extensive expanses of open range for long periods of time is a skilled and exacting occupation that requires considerable training and experience.

*Response:* Although DHS recognizes the special nature of this unique type of agricultural work, it does not change the nonimmigrant nature of the H-2A classification. See INA section 101(a)(15)(H)(ii)(a), 8 U.S.C. 1101(a)(15)(H)(ii)(a). The statute provides that an H-2A worker is a nonimmigrant who has a residence in a foreign country that he has no intention of abandoning and who is coming temporarily to the United States to perform agricultural labor or services. Without a departure from the United States after reaching the 3-year maximum period of stay, an H-2A worker cannot be considered a nonimmigrant, and his or her stay cannot be considered temporary. All other H-2A workers must depart the United States after reaching the 3-year maximum period of stay, regardless of the employer's need or the degree of skill or experience required of those workers; the same rule should apply to H-2A shepherders.

*Comment:* A few commenters also argued that the history of the sheep industry shows that its existing practice is in keeping with Congressional intent.

*Response:* DHS is aware that foreign workers skilled in shepherding were admitted during the early 1950s for permanent employment under special laws enacted by Congress. However, Congress permitted the special laws to expire after the issuance of "Spanish Shepherders, Report of Subcommittee No. 1 of the Committee on the Judiciary, House of Representatives," a report by the House Judiciary Committee on February 14, 1957, which undertook an investigation during 1955 and 1956 to examine allegations that a number of

foreign shepherders admitted under the special laws were leaving sheepherding shortly after arrival in the U.S. and were employed in other industries.<sup>2</sup> The report by the House Judiciary Committee substantiated many of these allegations. In the report, the Committee recommended “that the practice of admitting alien shepherders under special legislation should be discontinued and that the problem of supplying legitimate needs of the American sheep-raising and wool-growing industry, should be met administratively under existing general law, specifically under section 101(a)(15)(H)(ii), of the Immigration and Nationality Act.” The report also states the following:

[I]t is further believed that the employment in the sheep-raising and woolgrowing industry is not different in nature from the employment of foreign skilled workers in other branches of agriculture and industry. It is not believed that the shepherders should benefit from a special preferential and privileged treatment and that they should be admitted as immigrants entering this country for permanent residence. Inquiries and studies have conclusively shown that the legitimate interest of American employers will be better served if workers for the sheep-raising and woolgrowing industry were admitted temporarily for appropriate periods of time, and that at the conclusion of such periods they were required to return to their country of origin and to their families, while other workers—from domestic labor sources, if available—or other foreign workers similarly skilled be given opportunity to accept temporary employment.

It was the Committee’s opinion that no additional special legislation should be enacted to admit foreign shepherders and the importation of foreign shepherders should be governed by the H-2 temporary worker provision. DHS acknowledges that the aforementioned legislative history predates the policy established by the Immigration and Naturalization Service (INS) and now DHS to refrain from applying the three-year maximum period of stay to H-2A aliens who work as shepherders. However, DHS has concluded that this policy is inconsistent with the temporary nature required by the statutory provisions governing H-2A program.

*Comment:* One commenter asked why such special procedures are available only for shepherders. Another commenter suggested that DHS should adapt the special procedures for shepherders to all occupations engaged in the range production of other livestock such as cattle and horses.

*Response:* It is believed that the policy regarding shepherders was grandfathered from a series of bills enacted by Congress in the early 1950s to provide relief for the sheep-raising industry by making available special nonquota immigrant visas to skilled alien shepherders. DHS disagrees that the special procedures should be extended to all occupations engaged in the range production of other livestock. DHS has determined that all H-2A occupations should be subject to the same statutory standard and that the special procedures should be curtailed rather than extended to other H-2A occupations. With the effective date of this final rule, DHS will begin to enforce on H-2A shepherders the same departure requirement applicable to all other H-2A workers. However, DHS will not revoke any currently valid H-2A petitions that have been approved for shepherders.

*Comment:* One commenter recommended that the time period required outside the country between periods of stay be reduced to two weeks for shepherders.

*Response:* For the reasons stated above, DHS believes that the same statutory and regulatory standards for all other H-2A occupations should be applied to shepherders.

#### 15. Temporary Worker Visa Exit Program

On August 10, 2007, the Administration announced that it would establish a new land-border exit system for guest workers, starting on a pilot basis. The proposed rule included an exit system pilot program applicable to H-2A nonimmigrants. Under the proposed program, an alien admitted on an H-2A visa at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. Details of the program, such as designated ports of entry, would be announced in a notice published in the **Federal Register**.

*Comments:* A few comments generally supported the proposal or encouraged more strict measures to ensure foreign workers’ departure within their authorized periods of stay. However, many commenters criticized this proposal for singling out the H-2A population and unfairly seeking to punish them by imposing an undue burden on them. They suggested that workers should be permitted to use all ports to enter the United States and should not be required to depart through the same ports of entry through which they entered because the original

port of entry through which they entered may not be the most convenient if workers transfer to another employer. Some commenters pointed out that it would be difficult to effectively educate H-2A workers about the required method for exit, which will likely cause them to violate the requirement inadvertently. Many commenters expressed concerns about the unknown factors of the program such as the number and location of ports through which a worker can enter and return, timeliness of the process, and overall convenience or inconvenience for a worker. Others suggested that DHS should provide sufficient time and opportunities to answer stakeholders’ concerns or questions.

*Response:* DHS has determined that it will adopt, with due consideration of commenters’ concerns, the Temporary Worker Visa Exit Program Pilot for H-2A workers in this final rule. See new 8 CFR 215.9. DHS will inform H-2A workers of their obligations through an educational effort among the workers, foreign governments, agricultural industry, association leaders, and U.S. employers. Before implementation of the program, DHS will implement a comprehensive communications program that engages stakeholders and reaches travelers. This communications program may include giving walk-away materials to H-2A workers when they enter the country and utilizing outreach methods such as creating customer-focused products and proactive/reactive media relations program.

Under the H-2A land exit pilot program, DHS will explore ways that participating workers can register their final departure from the United States at select ports of entry. Only those workers who enter through these designated ports will be required to register their final departure for purposes of this pilot.

### III. Rulemaking Requirements

#### A. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

<sup>2</sup> [http://www.foreignlaborcert.doleta.gov/fm/fm\\_24-01.htm](http://www.foreignlaborcert.doleta.gov/fm/fm_24-01.htm).

*B. Executive Order 12866*

This rule has been designated as significant under Executive Order 12866. Thus, under section 6(a)(3)(C) of the Executive Order, DHS is required to prepare an assessment of the benefits and costs anticipated to occur as a result of this regulatory action and provide the assessment to the Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs.

## 1. Public Comments on the Estimated Costs and Benefits of the Proposed Rule

DHS invited the public to comment on the extent of any potential economic impact of this rule on small entities, the scope of these costs, or more accurate means for defining these costs. As a result, DHS received one comment directly related to the regulatory cost benefit analysis performed for the proposed rule which indicated that woolgrowers would have to hire double the number of employees as they currently do and that expenses would increase by at least 25 to 50 percent for each shepherd employer. The comment provided no supporting data or calculations to explain exactly how this result would occur, and USCIS was unable to determine how the outcome of a requirement for an employee to go home for 3 months every 3 years would result in a doubling of the number of annual employees. Therefore, no changes were made as a result of the comment.

## 2. Summary of Final Rule Impacts

In summary, this rule makes several changes to the H-2A visa program that DHS believes are necessary to encourage and facilitate the lawful employment of foreign temporary and seasonal agricultural workers. A complete analysis has been performed in accordance with the Executive Order and is available for review in the rulemaking docket for this rule at <http://www.regulations.gov>. The results of the cost benefit analysis are summarized as follows:

## i. Government Costs

The exit pilot program provided for in this rule will cost the Federal Government at least \$2 million in labor costs per year to implement.

## ii. Transferred Costs

A total cost of between \$16.5 million and \$55 million will be imposed on all H-2A petitioning firms for all H-2A workers each year as a result of this rule banning placement fee payments by employees. Those costs may range from an average of around \$1,700 to almost

\$6,000 per employer, based on the average number of H-2A workers requested per employer petition. The total annual costs of the time for H-2A employees to comply with the exit requirements of this rule are estimated to be around \$184,332, based on the opportunity cost of the time lost to the employer while registering.

The annual information collection costs imposed by the employer notification requirements in this rule are estimated to be \$13,713.

The volume of applications is expected to increase from an average of 6,300 per year to around 9,900 per year. The burden of compliance both in time and fees per application will not increase above that currently imposed as a result of this rule.

## iii. Benefits

This rule will benefit applicants by:

- Reducing delays caused by Interagency Border Inspection System (IBIS) checks holding up the petition application process.
- Reducing disruption of the life and affairs of H-2A workers in the United States.
- Protecting laborers' rights by precluding payment of some fees by the alien.
- Prevent the filing of requests for more workers than needed, visa selling, coercion of alien workers and their family members, or other practices that exploit workers and stigmatize the H-2A program.
- Encouraging employers who currently hire seasonal agricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers.
- Minimizing immigration fraud and human trafficking.

*C. Executive Order 13132*

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*D. Executive Order 12988*

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996),

imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DHS has completed the required review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

*E. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), requires Federal agencies to conduct a regulatory flexibility analysis which describes the impact of a rule on small entities whenever an agency is publishing a notice of proposed rulemaking. In accordance with the RFA, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

## 1. Number of Regulated Entities

The H-2A program is used mainly by farms engaged in the production of livestock, livestock products, field crops, row crops, tree crops, and various other enterprises. The affected industries do not include support activities for agriculture. Therefore, in accordance with the RFA, USCIS has identified the industry affected by this rule as described in the North American Industry Classification System (NAICS) as encompassing NAICS subsectors 111,

Crop Production, and 112, Animal Production.<sup>3</sup>

In fiscal year 2007, USCIS received 6,212 Form I-129 petitions for H-2A employees, approved petitions for 78,089 H-2A workers, and 71,000 new workers were hired. In fiscal year 2006, USCIS received 5,667 Form I-129 petitions and approved 5,448 of them for 56,183 workers. Also, in fiscal year 2006, 6,717 employers requested certification from the Department of Labor (DOL) for 64,146 H-2A workers, and for those workers, the Department of State (DOS) issued 37,149 H-2A visas. In fiscal year 2005, USCIS approved Form I-129 petitions for 49,229 workers, 6,725 employers requested certification from DOL for 50,721 employees, and 31,892 visas were issued by DOS. Thus, in recent years, USCIS has received approximately 6,300 petitions per year for an average of 70,000 total H-2A workers per year. This rule is projected to result in an approximately 40,000 additional H-2A workers and 3,600 new Form I-129 petitions per year, for a total of 9,900 petitions for a total of 110,000 workers. In 2006, there were 2,089,790 farms in the United States and about 752,000 workers employed in agricultural jobs. Thus, approximately 0.47 percent of all farmers are expected to use the H-2A program and 14.6 percent of all farm workers will be aliens employed under the H-2A program.

## 2. Size Categories of Affected Entities

The U.S. Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121 provide that farms with average annual receipts of less than \$750,000 qualify as a small business for Federal Government programs. According to the United States Department of Agriculture National Agricultural Statistics Service (NASS), 44,348, or 2.1 percent, of the 2,128,982 farms in 2002 in the U.S. had gross cash receipts of more than \$500,000 and 97.9 percent of farms have sales of less than \$500,000.<sup>4</sup> Based on these numbers, USCIS concludes that the majority of entities affected by this rule are categorized as small entities according to the SBA size standards.

The average of 11 foreign workers per year would require an expenditure of about \$141,000 in annual labor

expenses just for the farm's foreign workers, not including benefits. In the 2002 Census of Agriculture, 50,311 farms, or only 2.4 percent of all "farms" reported having any hired employees at all, and only 31,210 farms, or 1.5 percent of all farms, reported hired labor expenses in excess of \$100,000 per year. Also, the 9,900 annual petitions that DHS projects it will receive after this rule takes effect represent only one-half of one percent of the 2,128,982 farms in 2002, and the 110,000 annual H-2A nonimmigrant workers account for only 14.6 percent of the 824,030 total hired farm workers reported in the 2002 Agricultural Census. Further, the 2002 Census reported that 53.3 percent of all farms reported a net loss, and only 329,490 farms reported annual net income of more than \$25,000.<sup>5</sup> Taken together, these data indicate that for the farms that use the H-2A program to be viable, they are likely to be on the upper bounds of the small business size standard of \$750,000 in gross cash receipts.

## 3. Other Firms That May Be Affected by This Change

A number of firms with headquarters or a significant presence in the United States recruit employees in the employees' home countries to come to the United States for temporary employment. Also, many farms hire an agent in the U.S. to help them locate workers and complete applications and petitions. Some agents collect an initial retainer from an employer and then charge additional fees based on the number of workers, the application fees, the advertising costs required, and other expenses. The total charges an employer pays the agent per H-2A employee ranges from around \$500 to \$4,000, including travel expenses and all application and petition fees. The actual cost depends on the home country, the skills needed for the position, and the general complexity of the worker's and employer's respective situations. This rule will not affect the ability of the recruiter or agent to collect a fee from the employer. This rule does not affect the fee agents may charge per employee to process the employer's DOL, DOS, and DHS certification, application, and petition. This rule would only affect recruiting firms to the extent that it would render the employee ineligible for H-2A employment by collecting a fee, as soon as the potential employer

becomes aware that the recruiter or agent has charged the employee a fee.

## 4. Significance of Impact

DHS has determined that this rule will require affected employers to pay between \$150 and \$500 per employee because recruiter fees that are now being paid by employees will be shifted by recruiters from employees to employers. This rule will also add \$13,713 in information collection costs for absconder reporting for an average cost per employee of \$0.13. Based on an average of 11 employees hired by each H-2A petitioner, average costs added by this rule will be between \$1,651 and \$5,501 per affected entity. For the purpose of determining the significance of the impacts of this rule, this analysis uses the costs at the high end of the range of possible impacts, or \$5,501 per employer, in order that any errors in determining the impacts on small entities be on the side of an over-estimation. Again, most of the affected entities are classified as small.

Guidelines suggested by the SBA Office of Advocacy provide that, to illustrate the impact could be significant, the cost of the proposed regulation may exceed 1 percent of the gross revenues of the entities in a particular sector or 5 percent of the labor costs of the entities in the sector.

The average duration of H-2A employment based on the difference between employment start and end dates for workers granted H-2A status in fiscal years 2007 and 2008 was 236 days. Thus, a new H-2A employee in 2008 worked an average of 33.7 weeks. Assuming that the typical employee worked an 8 hour workday and took two days per week off from work, the employee would have worked 169 days and accrued 1,352 hours. Using the U.S. Department of Labor hourly wage rate for the H-2A worker of \$9.49, plus a multiplier of 1.4 to account for fringe benefits, DHS calculated the average hourly wage at approximately \$13.29.<sup>6</sup> Multiplying the hourly compensation costs by the hours worked provides an average compensation cost for an H-2A employee for the period he or she is in the United States of about \$17,968. If the employer is required to pay a recruiter or reimburse the employee \$500 for a recruiting fee, and if that employee absconds requiring the employer to file a report, the added cost of \$501 is only 2.78 percent of the \$17,968 annual salary for only one H-2A worker. Since the cost increase per H-2A employee is less than 5 percent of

<sup>3</sup> U.S. Small Business Administration, Table of Small Business Size Standards, [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/serv\\_sstd\\_tablepdf.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/serv_sstd_tablepdf.pdf).

<sup>4</sup> Economic Class of Farms by Market Value of Agricultural Products Sold and Government Payments: 2002 [http://www.nass.usda.gov/census/census02/volume1/us/st99\\_1\\_003\\_003.pdf](http://www.nass.usda.gov/census/census02/volume1/us/st99_1_003_003.pdf).

<sup>5</sup> Economic Class of Farms by Market Value of Agricultural Products Sold and Government Payments: 2002 [http://www.nass.usda.gov/census/census02/volume1/us/st99\\_1\\_003\\_003.pdf](http://www.nass.usda.gov/census/census02/volume1/us/st99_1_003_003.pdf).

<sup>6</sup> Available at: <http://www.dol.gov/compliance/topics/wages-foreign-workers.htm>.

the costs associated with hiring only an H-2A worker, it would not be possible for the average cost increase imposed by this rule to exceed 5 percent of the average labor costs of the sector, because, among other reasons, H-2A workers are not expected to make up the entire workforce of all petitioners.

Also, as stated above, guidelines provided by the SBA Office of Advocacy suggest that an added cost of more than one percent of the gross revenues of the affected entities in a particular sector may be a significant impact. USCIS believes that it is unlikely that an employer will incur costs of \$5,501 due to this rulemaking, as it is the high end of the range of possible costs. Again, if each firm affected by this rule hires the average of 11 workers and all 11 are recruited by a firm that charges or causes the employer to reimburse all 11 employees \$500, the additional cost of this rule could reach as high as \$5,500 per employer.

The actual revenue of the typical H-2A employer is unknown. However, according to the SBA table of size standards in the Small Business Size Regulations (13 CFR part 121), the annual gross revenue threshold for farms is \$750,000. USCIS believes that the farms that use the H-2A program are likely to be on the upper bounds of the small business size standard of \$750,000 in gross cash receipts. If an employer hires 11 employees and incurs recruiting costs of \$500 for every one of them, the \$5,500 added cost represents only 0.73 percent of \$750,000. To further illustrate, for \$5,500 to exceed one percent of annual revenues, sales would have to be \$550,000 per year or less. While 97.9 percent of all farms have annual sales of less than \$500,000, only 36 percent of all farms hire any employees. USCIS believes that farms below annual sales of \$500,000 would be very unlikely to hire 11 temporary seasonal employees and incur the \$5,500 in added costs. Therefore, USCIS believes that the costs of this rulemaking to small entities will not exceed one percent of annual revenues.

Therefore, using both average annual labor costs and the percentage of the affected entities' annual revenue stream as guidelines, USCIS concludes that this rule will not have a significant economic impact on a substantial number of small entities.

#### 5. Impact on U.S.-Based Recruiting Firms

As outlined above, recruiting firms' activities may be affected tangentially by this rule's provisions. Nonetheless, the effect of the fee prohibition on recruiting companies, staffing firms, or

employment agents is not a new compliance requirement on regulated entities. Establishment of a non-immigrant temporary worker program was intended to alleviate seasonal labor shortages. The formation of firms that recruit workers in foreign countries is an unintended consequence of these programs since those firms are not the intended recipients of the benefits that are supposed to inure to participants in those programs. In any event, DHS does not believe the prohibition on charging aliens for H-2A job referrals will cause a significant economic impact on the affected placement, recruiting, or staffing firms because they may, and are expected to, transfer those costs to the employers, as analyzed above.

#### 6. Certification

For these reasons, DHS certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### F. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

#### G. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163 (1995) (PRA), all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or record-keeping requirements inherent in a rule. It is estimated that this rule will require employers to file 3,600 more petitions using Form I-129 (OMB Control No. 1615-0009) for H-2A workers. In addition, this rule will require revisions to the Form I-129 (H Classification Supplement to the Form I-129).

This is a final rule and the revision to this information collection was not previously submitted and approved by OMB. USCIS is now requesting comments under the emergency review and clearance procedures of the PRA on this revision no later than February 17, 2009. When submitting comments on the information collection, your comments should address one or more of the following four points:

1. Evaluate whether the collection of information is necessary for the proper performance of the agency, including

whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of the information on those who are to respond, including through the use of any and all appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of Information Collection for Form I-129.

- a. *Type of information collection:* Revision of currently approved collection.

- b. *Title of Form/Collection:* Petition for Nonimmigrant Worker.

- c. *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I-129 (H Classification Supplement to the Form I-129), and U.S. Citizenship and Immigration Services.

- d. *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals or Households.

This form is used by an employer to petition for aliens to come to the U.S. temporarily to perform services, labor, and training or to request extensions of stay or changes in nonimmigrant status for nonimmigrant workers.

- e. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 368,548 respondents at 2.75 hours per response.

- f. *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 1,013,507 burden hours.

All comments and suggestions or questions regarding additional information should be directed to the Department of Homeland Security, U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, Attention: Chief, 202-272-8377.

In addition, this rule will allow employers of H-2A employees to employ H-2A workers for up to 120 days while they are awaiting an extension of status based on a new employer if the employer registers for E-Verify. It is estimated that 9,801 more firms will have to enroll in E-Verify so they may hire an employee under the

120-day extended authorization. Accordingly, USCIS will submit an OMB correction worksheet (OMB 83–C) to OMB increasing the number of respondents, burden hours and annual costs.

**List of Subjects**

*8 CFR Part 214*

Administrative practice and procedure, Aliens, Cultural exchange programs, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students, Victims.

*8 CFR Part 215*

Administrative practice and procedure, Aliens.

*8 CFR Part 274a*

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

■ Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

**PART 214—NONIMMIGRANT CLASSES**

■ 1. The authority citation for part 214 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185, 1186a, 1187, 1221, 1253, 1281, 1282, 1301–1305 and 1372; section 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 8 CFR part 2.

■ 2. Section 214.2 is amended by:

- a. Revising paragraphs (h)(2)(i)(A) through (D);
- b. Revising paragraph (h)(2)(iii);
- c. Revising paragraphs (h)(5)(i)(A) through (C);
- d. Adding a new paragraph (h)(5)(i)(F);
- e. Removing last sentence from (h)(5)(ii);
- f. Revising paragraph (h)(5)(v)(B);
- g. Revising paragraph (h)(5)(v)(C);
- h. Revising paragraph (h)(5)(vi);
- i. Revising paragraphs (h)(5)(viii)(A) through (C);
- j. Revising paragraph (h)(5)(ix);
- k. Revising paragraph (h)(5)(x);
- l. Adding new paragraphs (h)(5)(xi) and (xii);
- m. Adding a new sentence to the end of paragraph (h)(11)(i)(A); and by
- n. Revising paragraph (h)(11)(ii).

The revisions and additions read as follows:

**§214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

- (h) \* \* \*
- (2) \* \* \*
- (i) \* \* \*

(A) *General.* A United States employer seeking to classify an alien as an H–1B, H–2A, H–2B, or H–3 temporary employee must file a petition on Form I–129, Petition for Nonimmigrant Worker, as provided in the form instructions.

(B) *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I–129 shall be where the petitioner is located for purposes of this paragraph.

(C) *Services or training for more than one employer.* If the beneficiary will perform nonagricultural services for, or receive training from, more than one employer, each employer must file a separate petition with USCIS as provided in the form instructions.

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer must file a petition on Form I–129 requesting classification and an extension of the alien’s stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien’s extension of stay must conform to the limits on the alien’s temporary stay that are prescribed in paragraph (h)(13) of this section. Except as provided by 8 CFR 274a.12(b)(21) or section 214(n) of the Act, 8 U.S.C. 1184(n), the alien is not authorized to begin the employment with the new petitioner until the petition is approved. An H–1C nonimmigrant alien may not change employers.

\* \* \* \* \*

(iii) *Naming beneficiaries.* H–1B, H–1C, and H–3 petitions must include the name of each beneficiary. All H–2A and H–2B petitions must include the name of each beneficiary who is currently in the United States, but not the name of those beneficiaries who are not currently in the United States. However, a petitioner filing an H–2B petition on behalf of workers who are not present in the United States that is supported by a temporary labor certification requiring education, training, experience, or special requirements of the beneficiary,

must name all the requested workers in the petition. Unnamed beneficiaries must be shown on the petition by total number. If all of the beneficiaries covered by an H–2A or H–2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions for that temporary labor certification. All H–2A petitions on behalf of workers who are not from a country that has been designated as a participating country in accordance with paragraph (h)(5)(i)(F)(1) of this section must individually name all the workers in the petition who fall within this category. All H–2A petitions must state the nationality of all beneficiaries, whether or not named, even if there are beneficiaries from more than one country. H–2A petitions for workers from designated participating countries and non-designated countries should be filed separately.

\* \* \* \* \*

- (5) \* \* \*
- (i) \* \* \*

(A) *General.* An H–2A petition must be filed on Form I–129 with a single valid temporary agricultural labor certification. The petition may be filed by either the employer listed on the temporary labor certification, the employer’s agent, or the association of United States agricultural producers named as a joint employer on the temporary labor certification.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition or series of petitions based on the same temporary labor certification may not exceed the number of workers indicated on that document. A single petition can include more than one beneficiary if the total number does not exceed the number of positions indicated on the relating temporary labor certification.

(C) [Reserved]

\* \* \* \* \*

(F) *Eligible Countries.* (1)(i) H–2A petitions may only be approved for nationals of countries that the Secretary of Homeland Security has designated as participating countries, with the concurrence of the Secretary of State, in a notice published in the **Federal Register**, taking into account factors, including but not limited to:

(A) 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;

(B) The number of final and unexecuted orders of removal against

citizens, subjects, nationals and residents of that country;

(C) The number of orders of removal executed against citizens, subjects, nationals and residents of that country; and

(D) Such other factors as may serve the U.S. interest.

(ii) A national from a country not on the list described in paragraph (h)(5)(i)(F)(1)(i) of this section may be a beneficiary of an approved H-2A petition upon the request of a petitioner or potential H-2A petitioner, if the Secretary of Homeland Security, in his sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(A) 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 paragraph (h)(5)(i)(F)(1)(i) of this section;

(B) Evidence that the beneficiary has been admitted to the United States previously in H-2A status;

(C) The potential for abuse, fraud, or other harm to the integrity of the H-2A visa program through the potential admission of a beneficiary from a country not currently on the list; and

(D) Such other factors as may serve the U.S. interest.

(2) Once published, any designation of participating countries pursuant to paragraph (h)(5)(i)(F)(1)(i) of this section shall be effective for one year after the date of publication in the **Federal Register** and shall be without effect at the end of that one-year period.

\* \* \* \* \*

(v) \* \* \*

(B) *Evidence of employment/job training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met the certification's minimum employment and job training requirements, if any are prescribed, as of the date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of the past employer or employers' detailed statement(s) or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be

obtained, and submit affidavits from persons who worked with the beneficiary that demonstrate the claimed employment or job training.

(C) *Evidence of education and other training.* For petitions with named beneficiaries, a petition must be filed with evidence that the beneficiary met all of the certification's post-secondary education and other formal training requirements, if any are prescribed in the labor certification application as of date of the filing of the labor certification application. For petitions with unnamed beneficiaries, such evidence must be submitted at the time of a visa application or, if a visa is not required, at the time the applicant seeks admission to the United States. Evidence must be in the form of documents, issued by the relevant institution(s) or organization(s), that show periods of attendance, majors and degrees or certificates accorded.

(vi) *Petitioner consent and notification requirements—(A) Consent.* In filing an H-2A petition, a petitioner and each employer consents to allow access to the site by DHS officers where the labor is being performed for the purpose of determining compliance with H-2A requirements.

(B) *Agreements.* The petitioner agrees to the following requirements:

(1) To notify DHS, within 2 workdays, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if:

(i) An H-2A worker fails to report to work within 5 workdays of the employment start date on the H-2A petition or within 5 workdays of the start date established by his or her employer, whichever is later;

(ii) The agricultural labor or services for which H-2A workers were hired is completed more than 30 days earlier than the employment end date stated on the H-2A petition; or

(iii) The H-2A worker absconds from the worksite or is terminated prior to the completion of agricultural labor or services for which he or she was hired.

(2) To retain evidence of such notification and make it available for inspection by DHS officers for a 1-year period beginning on the date of the notification. To retain evidence of a different employment start date if it is changed from that on the petition by the employer and make it available for inspection by DHS officers for the 1-year period beginning on the newly-established employment start date.

(3) To pay \$10 in liquidated damages for each instance where the employer cannot demonstrate that it has complied with the notification requirements, unless, in the case of an untimely

notification, the employer demonstrates with such notification that good cause existed for the untimely notification, and DHS, in its discretion, waives the liquidated damages amount.

(C) *Process.* If DHS has determined that the petitioner has violated the notification requirements in paragraph (h)(5)(vi)(B)(1) of this section and has not received the required notification, the petitioner will be given written notice and 30 days to reply before being given written notice of the assessment of liquidated damages.

(D) *Failure to pay liquidated damages.* If liquidated damages are not paid within 10 days of assessment, an H-2A petition may not be processed for that petitioner or any joint employer shown on the petition until such damages are paid.

(E) *Abscondment.* An H-2A worker has absconded if he or she has not reported for work for a period of 5 consecutive workdays without the consent of the employer.

\* \* \* \* \*

(viii) \* \* \*

(A) *Effect of violations of status.* An alien may not be accorded H-2A status who, at any time during the past 5 years, USCIS finds to have violated, other than through no fault of his or her own (e.g., due to an employer's illegal or inappropriate conduct), any of the terms or conditions of admission into the United States as an H-2A nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(B) *Period of admission.* An alien admissible as an H-2A nonimmigrant shall be admitted for the period of the approved petition. Such alien will be admitted for an additional period of up to one week before the beginning of the approved period for the purpose of travel to the worksite, and a 30-day period following the expiration of the H-2A petition for the purpose of departure or to seek an extension based on a subsequent offer of employment. Unless authorized under 8 CFR 274a.12 or section 214(n) of the Act, the beneficiary may not work except during the validity period of the petition.

(C) *Limits on an individual's stay.* Except as provided in paragraph (h)(5)(viii)(B) of this section, an alien's stay as an H-2A nonimmigrant is limited by the term of an approved petition. An alien may remain longer to engage in other qualifying temporary agricultural employment by obtaining an extension of stay. However, an individual who has held H-2A status for a total of 3 years may not again be

granted H-2A status until such time as he or she remains outside the United States for an uninterrupted period of 3 months. An absence from the United States can interrupt the accrual of time spent as an H-2A nonimmigrant against the 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 2 months. Eligibility under paragraph (h)(5)(viii)(C) of this section will be determined in admission, change of status or extension proceedings. An alien found eligible for a shorter period of H-2A status than that indicated by the petition due to the application of this paragraph (h)(5)(viii)(C) of this section shall only be admitted for that abbreviated period.

(ix) *Substitution of beneficiaries after admission.* An H-2A petition may be filed to replace H-2A workers whose employment was terminated earlier than the end date stated on the H-2A petition and before the completion of work; who fail to report to work within five days of the employment start date on the H-2A petition or within five days of the start date established by his or her employer, whichever is later; or who abscond from the worksite. The petition must be filed with a copy of the certification document, a copy of the approval notice covering the workers for which replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated or absconded worker's name, date and country of birth, termination date, and the reason for termination, and the date that USCIS was notified that the alien was terminated or absconded, if applicable. A petition for a replacement will not be approved where the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notification required by paragraph (h)(5)(vi)(B)(1) of this section.

(x) *Extensions in emergent circumstances.* In emergent circumstances, as determined by USCIS, a single H-2A petition may be extended for a period not to exceed 2 weeks without an additional approved labor certification if filed on behalf of one or more beneficiaries who will continue to be employed by the same employer that previously obtained an approved petition on the beneficiary's behalf, so long as the employee continues to perform the same duties and will be employed for no longer than 2 weeks after the expiration of previously-

approved H-2A petition. The previously approved H-2A petition must have been based on an approved temporary labor certification, which shall be considered to be extended upon the approval of the extension of H-2A status.

(xi) *Treatment of petitions and alien beneficiaries upon a determination that fees were collected from alien beneficiaries.* (A) *Denial or revocation of petition.* As a condition to approval of an H-2A petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H-2A petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of H-2A employment (other than the lesser of the fair market value or actual costs of transportation and any government-mandated passport, visa, or inspection fees, to the extent that the payment of such costs and fees by the beneficiary is not prohibited by statute or Department of Labor regulations, unless the employer agent, facilitator, recruiter, or employment service has agreed with the alien to pay such costs and fees).

(1) If USCIS determines that the petitioner has collected, or entered into an agreement to collect, such prohibited fee or compensation, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner has reimbursed the alien in full for such fees or compensation, or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(2) If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H-2A employment, the H-2A petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to the filing of the petition, the petitioner or the facilitator, recruiter, or similar employment service has reimbursed the alien in full for such fees or compensation or, where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated.

(3) If USCIS determines that the beneficiary paid the petitioner such fees or compensation as a condition of obtaining the H-2A employment after the filing of the H-2A petition, the petition will be denied or revoked on notice.

(4) If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation as a condition of obtaining the H-2A employment after the filing of the H-2A petition and with the knowledge of the petitioner, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or where such fee or compensation has not yet been paid by the alien worker, that the agreement has been terminated, or notifies DHS within 2 workdays of obtaining knowledge in a manner specified in a notice published in the **Federal Register**.

(B) *Effect of petition revocation.* Upon revocation of an employer's H-2A petition based upon paragraph (h)(5)(xi)(A) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)) for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

(C) *Reimbursement as condition to approval of future H-2A petitions.* (1) *Filing subsequent H-2A petitions within 1 year of denial or revocation of previous H-2A petition.* A petitioner filing an H-2A petition within 1 year after the decision denying or revoking on notice an H-2A petition filed by the same petitioner on the basis of paragraph (h)(5)(xi)(A) of this section must demonstrate to the satisfaction of USCIS, as a condition of approval of such petition, that the petitioner or agent, facilitator, recruiter, or similar employment service has reimbursed the beneficiary in full or that the petitioner has failed to locate the beneficiary. If the petitioner demonstrates to the satisfaction of USCIS that the beneficiary was reimbursed in full, such condition of approval shall be satisfied with respect to any subsequently filed H-2A petitions, except as provided in paragraph (h)(5)(xi)(C)(2). If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate the beneficiary with respect to each H-2A petition filed within 1 year after the decision denying or revoking the previous H-2A petition on the basis of paragraph (h)(5)(xi)(A) of this section but has failed to do so, such condition of approval shall be deemed satisfied with respect to any H-2A petition filed 1 year or more after the denial or revocation. Such reasonable efforts shall

include contacting any of the beneficiary's known addresses.

(2) *Effect of subsequent denied or revoked petitions.* An H-2A petition filed by the same petitioner subsequent to a denial under paragraph (h)(5)(xi)(A) of this section shall be subject to the condition of approval described in paragraph (h)(5)(xi)(C)(1) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

(xii) *Treatment of alien beneficiaries upon revocation of labor certification.* The approval of an employer's H-2A petition is immediately and automatically revoked if the Department of Labor revokes the labor certification upon which the petition is based. Upon revocation of an H-2A petition based upon revocation of labor certification, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment.

\* \* \* \* \*

(11) \* \* \*

(i) \* \* \*

(A) \* \* \* However, H-2A petitioners must send notification to DHS pursuant to paragraph (h)(5)(vi) of this section.

\* \* \* \* \*

(ii) *Immediate and automatic revocation.* The approval of any petition is immediately and automatically revoked if the petitioner goes out of business, files a written withdrawal of the petition, or the Department of Labor revokes the labor certification upon which the petition is based.

\* \* \* \* \*

**PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES**

■ 3. The authority citation for part 215 continues to read as follows:

**Authority:** 8 U.S.C. 1104; 1184; 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1365a note, 1379, 1731-32.

■ 4. Section 215.9 is added to read as follows:

**§ 215.9 Temporary Worker Visa Exit Program.**

An alien admitted on an H-2A visa at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of his or her authorized period of stay through a port of entry participating in the program and present designated biographic and/

or biometric information upon departure. U.S. Customs and Border Protection will establish a pilot program by publishing a Notice in the **Federal Register** designating which H-2A workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

**PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

■ 5. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

- 6. Section 274a.12 is amended by:
  - a. Removing the word “or” at the end of paragraph (b)(19);
  - b. Removing the period at the end of paragraph (b)(20), and adding “; or” in its place; and by
  - c. Adding a new paragraph (b)(21).  
The addition reads as follows:

**§ 274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(b) \* \* \*

(21) A nonimmigrant alien within the class of aliens described in 8 CFR 214.2(h)(1)(ii)(C) who filed an application for an extension of stay pursuant to 8 CFR 214.2 during his or her period of admission. Such alien is authorized to be employed by a new employer that has filed an H-2A petition naming the alien as a beneficiary and requesting an extension of stay for the alien for a period not to exceed 120 days beginning from the “Received Date” on Form I-797 (Notice of Action) acknowledging receipt of the petition requesting an extension of stay, provided that the employer has enrolled in and is a participant in good standing in the E-Verify program, as determined by USCIS in its discretion. Such authorization will be subject to any conditions and limitations noted on the initial authorization, except as to the employer and place of employment. However, if the District Director or Service Center director adjudicates the application prior to the expiration of this 120-day period and denies the application for extension of stay, the employment authorization under this paragraph (b)(21) shall automatically terminate upon 15 days after the date of the denial decision. The employment authorization shall also terminate automatically if the employer fails to remain a participant in good standing in

the E-Verify program, as determined by USCIS in its discretion.

\* \* \* \* \*

**Paul A. Schneider,**

*Deputy Secretary.*

[FR Doc. E8-29888 Filed 12-12-08; 8:45 am]

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**DEPARTMENT OF JUSTICE**

**Executive Office for Immigration Review**

**8 CFR Parts 1001, 1003, 1292**

[Docket No. EOIR 160F; A.G. Order No. 3028-2008]

**RIN 1125-AA59**

**Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances**

**AGENCY:** Executive Office for Immigration Review, Justice.

**ACTION:** Final rule.

**SUMMARY:** This final rule adopts, in part, the proposed changes to the rules and procedures concerning the standards of representation and professional conduct for practitioners who appear before the Executive Office for Immigration Review (EOIR), which includes the immigration judges and the Board of Immigration Appeals (Board). It also clarifies who is authorized to represent and appear on behalf of individuals in proceedings before the Board and the immigration judges. Current regulations set forth who may represent individuals in proceedings before EOIR and also set forth the rules and procedures for imposing disciplinary sanctions against practitioners who engage in criminal, unethical, or unprofessional conduct, or in frivolous behavior before EOIR. The final rule increases the number of grounds for discipline, improves the clarity and uniformity of the existing rules, and incorporates miscellaneous technical and procedural changes. The changes herein are based upon the Attorney General's initiative for improving the adjudicatory processes for the immigration judges and the Board, as well as EOIR's operational experience in administering the disciplinary program since the current process was established in 2000.

**DATES:** *Effective date:* This rule is effective January 20, 2009.

**FOR FURTHER INFORMATION CONTACT:** John N. Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600,