

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 214

[DHS No. 2004-0033]

RIN 1615-AA82

### Petitions for Aliens To Perform Temporary Nonagricultural Services or Labor (H-2B)

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** An H-2B alien is someone who comes temporarily to the United States to perform temporary nonagricultural labor or services. The Department of Homeland Security (DHS), after consulting with the Department of Labor (DOL) and the Department of State (DOS), is proposing significant changes to its regulations that are designed to increase the effectiveness of the H-2B nonimmigrant classification. This proposed rule will facilitate use of the H-2B program by United States employers who are unable to find United States workers to perform the temporary labor or services for which the H-2B nonimmigrant is sought. Through this proposed rule, DHS has created a one-step application process whereby certain U.S. employers seeking H-2B temporary workers now will only be required to file one application—the Form I-129, Petition for Nonimmigrant Worker, which will include a modified H supplement containing certain labor attestations. With limited exceptions, U.S. employers will no longer need to file for or receive a labor certification from the Department of Labor. In addition, DHS is reducing significantly the paper-based application process by now requiring that most Form I-129 petitions (including the H supplement) be submitted to USCIS electronically, through e-filing. DHS anticipates that this one-step process and the e-filing will enhance the effectiveness of the H-2B program, reduce costs and delays associated with separate USCIS petition adjudication and DOL labor certification processes, and will match a U.S. employer with a qualified H-2B worker in a more timely fashion. Finally, this proposed rule makes changes that will maintain the integrity of the program through enforcement mechanisms while retaining the current definition of the word “temporary” in 8 CFR 214.2(h)(6)(ii) in order to ensure continued availability of the program to its traditional users. These proposals

will increase the efficiency of the program by eliminating certain regulatory barriers, and improve Government coordination.

**DATES:** Written comments must be submitted on or before February 28, 2005.

**ADDRESSES:** You may submit comments, identified by RIN 1615-AA82 or DHS Docket DHS-2004-0033 by one of the following methods:

- EPA Federal Partner EDOCKET Web site: <http://www.epa.gov/feddocket>. Follow the instructions for submitting comments on the Web site.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: [rfs.regs@dhs.gov](mailto:rfs.regs@dhs.gov). When submitting comments electronically, please include RIN 1615-AA82 or DHS-2004-0033 in the subject line of the message.
- Mail/Hand-delivered/Courier: Director, Regulatory Management Division, Department of Homeland Security, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529.

**Instructions:** All submissions received must include the DHS-2004-0033 or RIN 1615-AA82. All comments received will be posted without change to <http://www.epa.gov/feddocket>, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document below.

**Docket:** For access to the docket to read background documents or comments received, go to <http://www.epa.gov/feddocket>. You may also access the Federal eRulemaking Portal at <http://www.regulations.gov>. Submitted comments may also be inspected at Regulatory Management Division, Department of Homeland Security, U.S. Citizenship and Immigration Services, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC, Monday through Friday, except Federal holidays. Arrangements to inspect submitted comments should be made in advance by calling (202) 514-3291.

**FOR FURTHER INFORMATION CONTACT:** Kevin J. Cummings, Adjudications Officer, Office of Program and Regulation Development, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529, telephone (202) 353-8177.

## SUPPLEMENTARY INFORMATION:

### Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. DHS also invites comments that relate to the economic, environmental, or federalism affects that might result from this proposed rule. Comments that will provide the most assistance to DHS in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change. See **ADDRESSES** above for information on how to submit comments.

#### *What Is an H-2B Nonimmigrant?*

Section 101(a)(15)(h)(ii)(b) of the Immigration and Nationality Act (Act) describes an H-2B alien as an alien coming temporarily to the United States to perform temporary nonagricultural labor or services. This definition is reflected at 8 CFR 214.2(h)(1)(ii)(D) and (h)(6)(i).

#### *Why Is DHS Proposing To Issue This Regulation?*

The H-2B program has existed since 1952. In 1990, Congress attached a limitation on the number of H-2B workers but otherwise the program has not changed to accommodate employers' needs or to offer worker protections. After consulting with DOL and DOS and reviewing the definitions and procedures currently used to regulate the H-2B program, DHS has determined that the H-2B process should be modified to reduce unnecessary burdens that hinder petitioning employers' ability to effectively use this visa category. The current rules require employers to obtain temporary labor certification from the Secretary of Labor before obtaining permission to engage an H-2B worker. The delays in processing applications for labor certification combined with the relatively short period of time for which the worker will be available under current rules have discouraged use of the program. This rule will remove existing regulatory barriers and thus likely lead to more efficiency in the H-2B program.

#### *What Is the Current Petitioning Process for an H-2B Nonimmigrant?*

Section 214(c) of the Act provides that the Secretary of Homeland Security, after consultation with appropriate

entities of the Government and upon petition of the importing employer, will determine whether an alien may be imported as a H-2B nonimmigrant temporary worker. 8 U.S.C. 1184(c)(1). Historically, the consultation requirement has been accomplished by receiving a labor certification from DOL; however, the nature of the consultation is not defined in the statute.

The current regulation at 8 CFR 214.2(h)(6) provides that a petitioner seeking to employ an H-2B nonimmigrant must establish that the alien will not displace United States workers who are capable of performing such services or labor and that the employment of the alien will not adversely affect the wages and working conditions of United States workers. An employer may not file a petition for an H-2B temporary worker unless that employer has obtained a labor certification from the Secretary of Labor. To obtain a labor certification, a prospective employer must test the labor market and, in addition, pay the alien a salary that will not adversely affect the United States labor market. A petitioner must demonstrate that the need for the temporary services or labor is a one-time occurrence, a seasonal need, a peakload need, or an intermittent need. In general, the period of the petitioner's need must be less than one year. Extensions beyond the one-year period of time can be approved in extraordinary circumstances. In determining whether a petitioner's need is temporary, U.S. Citizenship and Immigration Services (USCIS) examines the nature of the petitioner's need, not the nature of the beneficiary's proposed duties.

#### *What Changes Is DHS Proposing in This Rule?*

To better accommodate the needs of United States employers that utilize the H-2B program, DHS is proposing a number of significant changes to the H-2B classification.

First, DHS is proposing to amend 8 CFR 214.2(h)(2) to require most employers seeking an H-2B temporary worker to submit an attestation that meets the requirements of DOL regulations. Currently, an employer seeking a temporary worker is required to file the Form I-129 with USCIS. This form consists of a basic petition and different supplements that apply to the various visa categories. Therefore, an employer petitioning for an H-2B worker currently is required to file an I-129 along with the I-129 H supplement. This rule proposes to revise the current I-129 H supplement to include an attestation from the employer.

Employers will not be required to submit a separate form, as previously required with the labor certification. Under this rule, the revised I-129 H supplement, that includes the attestation information required under DOL regulations (20 CFR 655 subpart A), will be filed along with the Form I-129 to the USCIS. In a small number of cases, DOL's regulations may require other labor documentation. DHS and DOL have consulted and have jointly determined that the proposed attestation developed by DOL satisfies the consultation mandate of section 214(c) of the Act.

Second, DHS is proposing that most employers seeking an H-2B temporary worker file the Form I-129 and H supplement through e-filing. This is a significant change that will significantly reduce the paper-based application process and now require that most Form I-129 petitions (including the H supplement) be submitted to USCIS electronically, through e-filing. Employers who may continue to file paper petitions are those in the logging, entertainment, and professional athletics industries, as well as those H-2B employers in Guam. However, these employers are encouraged to utilize e-filing when submitting Form I-129 petitions, although these employers will still be required to submit the appropriate "paper" temporary labor certification to the service center with jurisdiction over the area of intended employment.

DHS believes the e-filing process will ensure expeditious processing of H-2B petitions and limit the number of potentially incomplete attestations. In addition, it will ease the filing burden on most petitioning employers. Through e-filing, USCIS also will be able to capture statistics more effectively and analyze H-2B program data to identify areas that need improvement as well as any fraud or abuse that may lead to future administrative, civil or criminal enforcement actions against H-2B petitioners and/or aliens.

DHS recognizes that the transition to electronic submissions of H-2B petitions, while an effective method for streamlining the application process and enhancing the effectiveness of the H-2B program, also requires parallel safeguards and protections to address potential abuse or fraud in the e-filing process. DHS notes that the submission of materially false, fictitious, or fraudulent statements to the government already constitutes a violation of 18 U.S.C. 1001. Anyone convicted of a violation of this provision may be fined and/or imprisoned for not more than 5 years. To safeguard the e-filing process,

DHS is incorporating a personal identification number (PIN) and password requirement for applications or petitions submitted electronically. This requirement will be in effect within the DHS electronic filing system prior to the effective date of the H-2B process change and it will be extended to this proposed H-2B process once the process is finalized. DHS is soliciting comments on the e-filing process for H-2B petitions, the use of information collected through the e-filing process for future administrative, civil or criminal enforcement actions, and the types of additional safeguards that should be adopted as part of the e-filing process.

DHS is considering the use of Public Key Infrastructure (PKI) as an additional safeguard to the e-filing process, and encourages the public to provide comments regarding the feasibility of using PKI to this end. DHS also is considering requiring the use of other safeguards in order to authenticate the identity of a party making an electronic submission and to maintain the integrity of the process. DHS is soliciting comments on (1) alternative safeguards that may be appropriate, and (2) the risks that might be associated with an inability to authenticate submissions.

Third, DHS is proposing to amend 8 CFR 214.2(h)(11)(i)(A) to require an employer to provide notification to USCIS within 30 days of the date that the employer terminates the alien's employment or the alien leaves the employment. This will ensure that an approved H-2B petition filed by an employer is closed out when the basis for the alien's status terminates and that USCIS is made aware of the change in employment status. DHS also may develop a process whereby employers may provide notification of termination electronically, through e-filing, rather than forwarding a paper notice to the appropriate USCIS service center. DHS is soliciting comments on this proposal.

Fourth, DHS is proposing to add new paragraphs to 8 CFR 214.2(h)(6)(iii), (F) and (G), and new language to 8 CFR 214.2(h)(11)(iii)(A)(2) that establish a process for USCIS to deny or revoke approval of a Form I-129 if USCIS determines that the statements on the Form I-129 petition are inaccurate, fraudulent, or misrepresented a material fact. Upon such a determination, USCIS may deny the petition pursuant to 8 CFR 214.2(h)(10) or initiate revocation proceedings pursuant to 8 CFR 214.2(h)(11)(iii)(B).

Fifth, DHS is proposing to add a new provision at 8 CFR 214.2(h)(20) to establish a process whereby USCIS will deny, for a specified period of time, all petitions (immigrant and nonimmigrant)

filed by an employer, based upon a finding by DOL that an employer has not complied with attestation conditions (known as debarment). In a separate rulemaking, at 20 CFR 655.13, DOL is proposing an audit and debarment process for employers who are found not to have complied with the required elements of the H-2B attestation. If DOL determines that an employer violated the conditions of the attestation and recommends the employer be debarred for a specified period of time, upon notice from DOL, USCIS will accept DOL's recommendation and debar the petitioner from filing any immigrant or nonimmigrant petitions under new paragraph (h)(20). USCIS notes that it may decide to debar a petitioning employer for a longer period than that recommended by DOL. This additional measure will encourage petitioner compliance with the proposed attestation requirements of the H-2B program. DHS is soliciting comments on whether debarments recommended by DOL should extend to an entity related to the U.S. employer (e.g., an affiliate or successor entity).

Sixth, DHS would like to develop a self-initiated debarment process, separate from the DOL audit and debarment process, which will allow USCIS to debar the petitioner upon a finding by USCIS that the petitioner's statements in the Form I-129 petition are inaccurate, fraudulent, or misrepresent a material fact. Unlike the DOL debarment process, which will be based on random and selected audits of the Form I-129 H Supplements that accompany approved H-2B petitions, USCIS will initiate proceedings when it independently receives information, including through the petition adjudication process or separate investigation (administrative, civil or criminal), indicating that the petitioner's statements in the Form I-129 petition are inaccurate, fraudulent, or misrepresent a material fact (e.g., USCIS receives evidence that the "U.S. employer" filing the Form I-129 petition actually is not a real company or an organization licensed to do business in the United States). DHS is soliciting comments on process, including suggestions on the type of administrative process and procedures that should be adopted for determining that a petitioner should be debarred, the appellate process and whether all immigrant and nonimmigrant petitions should be subject to debarment. DHS also is soliciting comments on whether debarments determined through the USCIS self-initiated process should

extend to an entity related to the U.S. employer (e.g., an affiliate or successor entity).

Seventh, DHS is amending the current regulations relating to the use of agents as petitioners for H-2B temporary workers. The current regulation at 8 CFR 214.2(h)(2)(i)(F) allows U.S. agents to file petitions in cases involving workers who are traditionally self-employed or who use agents to arrange short-term employment with numerous employers, or in the case of foreign employers. In addition, the current regulations at 8 CFR 214.2(h)(2)(i)(F) and (h)(6)(iii)(B) permit foreign employers to use U.S. agents to petition for H-2B temporary workers. This rule proposes to no longer allow the filing of H-2B petitions by agents.

This change is necessary in light of the transition from a labor-certification to an attestation-based petition process for most H-2B petitioning employers. In order to ensure the integrity of the H-2B attestation process, H-2B attestations must be made by the employer, not by a recruiting agent. In addition, DHS believes that it will be easier for USCIS to take action against an employing petitioner, who is making the attestations required under the DOL regulations at 20 CFR 655, subpart A, than against an agent. DHS notes that this is not restricting the use of agents to recruit workers but is instead requiring only that the employer directly petition for the H-2B temporary worker.

Eighth, this rule proposes to codify the current numerical counting procedures for the H-2B classification. Title 8 CFR 214.2(h)(8)(ii)(A) already provides that requests for petition extension or extension of an H-2B alien's stay shall not count against the numerical cap. DHS is amending 8 CFR 214.2(h)(8)(ii) by adding a new paragraph (G) to reflect that, for purposes of the H-2B numerical cap, USCIS will not count amendments to previously approved petitions or petitions for aliens who already hold H-2B status and are seeking to change employers or add a new or additional employer (e.g., concurrent employment). An amended H-2B petition is required in instances where there has been a material change in the terms and conditions of employment or the alien's eligibility for the classification (e.g., a material change in the duties performed by the alien). See 8 CFR 214.2(h)(2)(i)(E). USCIS is also further amending 8 CFR 214.2 by adding a new paragraph (h)(8)(ii)(H) to state that an H-2B nonimmigrant who is employed (or has received an offer of employment) as a fish roe processor, a

fish roe technician, or a supervisor of fish roe processing, shall not be subject to the numerical limitation in a given fiscal year. USCIS is adding new paragraph (h)(8)(ii)(H) to comport with section 14006 of the 2005 Department of Defense Appropriations Act, 2005 (Pub. L. 108-287, August 5, 2004).

Ninth, DHS is proposing to amend 8 CFR 214.2(h)(2)(iii) to require that employers seeking a certain number of aliens to fill H-2B positions only specify the number of positions sought and not name the individual alien on all initial H-2B petitions (i.e., unnamed beneficiaries), unless the beneficiary already is in the United States. DHS is requiring beneficiaries who are already in the United States to be named, as USCIS is responsible for adjudication of the beneficiary's eligibility for H-2B status in such instances. USCIS will require a named beneficiary in all petitions where USCIS is responsible for adjudication of the beneficiary's eligibility for H-2B status.

DHS is soliciting comments from the public on whether USCIS should require all H-2B beneficiaries to be named, as such a requirement would assist DHS in maintaining an accurate count of the number of aliens granted H-2B visas or accorded H-2B status each fiscal year.

The beneficiary of a Form I-129 who was previously in H-2B status for a maximum 3-year period is eligible for a subsequent maximum authorized period of admission (up to one year initially with possible extensions up to 3 years) only if the alien has been outside the United States for a period of 6 months prior to filing of the petition.

Tenth, this rule proposes to amend 8 CFR 214.2(h)(9)(i)(B) to reflect that an H-2B petition, if submitted via e-filing, may not be filed more than 60 days prior to the date of actual need for the beneficiary's services. DOL is concurrently proposing regulations stating that recruitment must occur within 60 days of filing. To ensure accuracy of the labor market test, DHS is proposing to also limit advance filings of H-2B petitions to a maximum period of 60 days. In light of the new streamlined procedures proposed in the DOL and DHS companion rules, DHS is confident that 60 days is a sufficient amount of time to process the H-2B petition and enable the beneficiary to obtain a visa or be accorded H-2B status. DHS solicits comments from the public regarding this change.

Finally, in the event that an employer has submitted an application for change of status, an extension of status, or a petition that requests named beneficiaries and the security check

generates adverse information on a beneficiary who is part of a multiple-beneficiary petition, DHS is proposing to amend 8 CFR 214.2(h)(9)(i)(A) to create a process that will allow for issuance of a partial approval notice to allow the petitioning employer to receive authorization to employ the remainder of the requested H-2B workers. USCIS will continue to process the petitions of the remaining workers to completion.

*Is DOL Proposing any Changes to the Temporary Labor Certification Process?*

Yes. DOL will propose in a separate rulemaking to terminate the existing labor certification process for most H-2B employment, with certain exceptions. These exceptions are employers seeking H-2B workers in logging, the entertainment industry, and professional athletics. DOL has traditionally applied a unique process for workers who fall within these well-defined exceptions and DOL does not intend to modify these unique processes at this time. For all other H-2B employment, instead of the current labor certification process, elements of the H-2B labor certification will be incorporated into an attestation that will be made to the U.S. Government in accordance with DOL regulations. The attestation will be filed electronically, through e-filing, with the Form I-129 petition because the attestation will be contained in the Form I-129 H supplement. Employers will not be required to submit a separate form, as previously required with the labor certification. Employers who may continue to file paper petitions are those in the logging, entertainment, and professional athletics industries, as well as those H-2B employers in Guam. These employers are encouraged to utilize e-filing when submitting Form I-129 petitions, although these employers will still be required to submit the appropriate "paper" temporary labor certification to the service center with jurisdiction over the area of intended employment. DOL will also propose in a separate rulemaking an audit and debarment process for employers who are found not to have complied with the required elements of the attestation.

*What Is the Proposed Attestation Process?*

The attestation process for the H-2B classification will be similar to the process currently used for the H-1B nonimmigrant classification. However, the H-2B attestation will be submitted to USCIS through e-filing. The attestation will be contained in the Form I-129 H supplement and most

employers will not be required to submit a separate form, as previously required with the labor certification. The terms of the attestation are set forth at 20 CFR 655 subpart A. Given that the Form I-129 H supplement is currently required to be submitted with the I-129 petition, DHS is proposing that Form I-129 (including the H supplement that contains the required attestations) be submitted to USCIS through e-filing. This process will ensure that all required elements of the attestation are completed before USCIS adjudicates the petition. In cases where an employer is still required to submit a labor certification (*i.e.*, for employment in Guam and for other employment as designated by DOL in its regulations), the paper labor certification must be submitted to the appropriate USCIS service center regardless of whether the petition was e-filed or not.

*What Will Be the Required Elements of the Attestation?*

The elements of the attestation must meet the DOL requirements set forth at 20 CFR 655, subpart A. If the attestation is complete, and the H-2B petition is otherwise approvable, the H-2B petition may be approved for the length of time specified by the petitioner or determined by USCIS as meeting the petitioner's temporary need, a period that may last for up to one year. Approval of the H-2B petition will constitute evidence that the attestation (included in the Form I-129 H Supplement) also has been accepted and relied upon for purposes of supporting the Form I-129 petition. The validity of the petition and the beneficiary's authorized period of stay may be extended in increments of up to one year, for a maximum period of 3 years, but may not be extended for any time beyond the 3-year period. An employer must submit a new Form I-129 H supplement (which includes the attestation) with each new Form I-129 petition.

*Will the Changes to the Temporary Labor Certification Process Cover All H-2B Employment?*

No. First, it should be noted that DOL has no jurisdiction over Guam with respect to labor certification; therefore the Governor of Guam will retain his authority to issue labor certifications without modification. It has not been demonstrated to DHS that the employment situation in Guam requires DHS to modify the current labor certification provisions for prospective employers in Guam. In addition, the new attestation process will be required only for those employers designated by

DOL at 20 CFR 655.3. Employers in the logging, entertainment, and professional athletics industries are not required to submit an attestation, but must submit a paper labor certification to the USCIS service center with jurisdiction over the area of intended employment.

*What Is the Period of Petition Validity?*

The USCIS service center director may approve an H-2B petition for the length of time specified by the petitioner or determined by USCIS as meeting the petitioner's need, which in certain instances may last for up to one year. The period of validity of the petition and the beneficiary's authorized period of stay may be extended for additional periods of time, as determined by USCIS based on the specific circumstances of the employer, but the petitioner may not be authorized to employ the beneficiary beyond the beneficiary's maximum period of authorized stay (up to one year initially with possible extensions up to 3 years). An employer must submit a new Form I-129 H supplement (which includes the attestation) in order to extend the period of validity of a petition and to obtain an extension of stay for the beneficiary. For petitions filed for employment in Guam, or for petitions requiring labor certification, the maximum period of admission will remain one year and extensions of stay may be granted for an individual worker, in increments of one year, for a maximum period of 3 years.

*How Will USCIS Process Petitions With Multiple Named Beneficiaries When One of the Beneficiaries Takes Longer Than the Others or a Security Check Uncovers Adverse Information About One of the Beneficiaries?*

DHS is proposing to amend 8 CFR 214.2(h)(9)(i)(A) to create a process that will allow for issuance of a partial approval notice in the event that an employer has requested named beneficiaries (for beneficiaries who already are in the United States) and a mandatory security check on one or more of the requested beneficiaries takes longer than the others or a security check uncovers adverse information about one of the beneficiaries.

Accordingly, DHS is proposing to amend 8 CFR 214.2(h)(9)(i)(A) so that, in the event a security check takes more time for one or more beneficiaries on a multiple-beneficiary petition, or a security check uncovers adverse information about one of the beneficiaries, USCIS may issue a partial approval notice to the petitioner that will name which beneficiaries are authorized for H-2B status and

employment, but exclude the name of the beneficiary whose law enforcement checks remain pending. This process will allow USCIS to process H-2B petitions more efficiently for the majority of beneficiaries.

*Will an Employer Be Permitted To Substitute the Names of Beneficiaries on a Petition Before USCIS Issues a Partial Approval Notice?*

No. In order to ensure that petitions are processed as expeditiously as possible, USCIS will make every attempt to issue a partial approval notice without prior notification or contact with the petitioning employer. The proposal to expedite processing in this manner will not allow a petitioning employer to substitute beneficiaries on a pending petition.

*Will an Employer Still Be Permitted To Substitute Beneficiaries on a Petition After USCIS Partial Approval but Prior to an Alien's Admission to the United States?*

Yes. This process does not require amendments to the current substitution process at 8 CFR 214.2(h)(2)(iv), which allow for substitution of beneficiaries on an approved petition, if an employer requests named beneficiaries.

*Will an Employer Be Permitted To Substitute Beneficiaries Who Are Already in the United States in H-2B Status Into a Previously Approved Petition?*

No. DHS is concerned that such a substitution would undermine other proposals in the rule that are intended to strengthen employer reporting requirements. If an employer were allowed to make post-admission substitutions without notification to USCIS, it would limit the ability of USCIS to maintain accurate information concerning the whereabouts and activities of nonimmigrants under the H-2B category. In addition, such substitution would circumvent the required background checks that are currently run on individuals at the time of visa issuance and at the time of admission. Therefore, DHS is amending language at 8 CFR 214.2(h)(2)(i)(D) and 8 CFR 214.2(h)(2)(iii) to clarify that an employer will only be permitted to hire H-2B nonimmigrants who are within the United States if the employer files a new H-2B petition naming the beneficiary or beneficiaries.

*How Will DHS and DOL Monitor and Ensure the Integrity of the H-2B Program?*

DHS and DOL (through separate rulemaking) are proposing several

amendments that will allow both departments to monitor and ensure the integrity of the H-2B program, including DOL random and selected audits of H-2B petitions, and debarment of employers who have made willful misrepresentations in the H-2B petition or failed to comply with the attestation requirements as required by DOL regulations.

DHS is proposing to amend the regulations at 8 CFR 214.2(h)(6)(iii)(B) to require that all United States employers petition directly for the H-2B beneficiary. This amendment will preclude United States agents and/or recruiters acting as agents from filing on behalf of United States employers. DHS is proposing to amend 8 CFR 214.2(h)(6)(iii)(D) to ensure that USCIS processes are coordinated with the results of random and selected audits of attestations that the Secretary of Labor will conduct pursuant to regulations to be issued by DOL. Also, if USCIS determines that an employer has failed to comply with an attestation, USCIS may deny the petition pursuant to 8 CFR 214.2(h)(10) or initiate revocation proceedings pursuant to 8 CFR 214.2(h)(11).

In addition, DHS notes that there are other laws that protect U.S. workers such as the Fair Labor Standards Act and section 274A of the Act, respectively, as well as anti-discrimination statutes.

DOL, through separate rulemaking at 20 CFR part 655, subpart A, will propose to conduct random and selected audits of attestations that have been submitted with the Form I-129 petition to determine whether the information provided by the employer is accurate and is in compliance with the relevant regulations.

DHS is proposing to add a new paragraph (h)(20) to establish a process whereby USCIS will deny all petitions (immigrant and nonimmigrant) filed by an employer for a specified period of time, based upon a finding by DOL that an employer has not complied with attestation conditions (this is known as debarment). In a separate rulemaking, at 20 CFR 655.13, DOL is proposing an audit and debarment process for employers who are found not to have complied with the required elements of the H-2B attestation. If DOL determines that an employer violated the conditions of the attestation and recommends the employer be debarred from filing future attestations for a specified period of time, upon notice from DOL, USCIS will accept DOL's recommendation and debar the petitioner from filing all petitions under new paragraph (h)(20). This process is similar to the H-1B

debarment process under section 212(n)(2)(C) of the Act. The proposed regulation provides that DOL will recommend, through its hearing procedures, a period of debarment based on the severity of the violation when it notifies USCIS that a violation has occurred. USCIS will accord considerable weight to this recommendation when it determines the appropriate period of debarment for the employer. The period of debarment imposed by USCIS will be at least the minimum period recommended by DOL, but USCIS may choose to impose a longer period of debarment.

As mentioned previously, USCIS is also proposing to establish a self-initiated debarment process separate from the DOL audit and debarment process. DHS solicits comments on the administrative process and penalties associated with this debarment process, including the appellate process.

DHS also is considering establishing administrative penalties for program abusers such as requiring recruitment reports with labor attestations. DHS welcomes comments and suggestions on whether DHS should establish administrative penalties and, if so, the type of administrative penalties that should be imposed on non-compliant H-2B employers.

#### **Regulatory Flexibility Act**

DHS has reviewed this regulation in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. Although this rule may affect small entities, it is intended to help employers by eliminating certain regulatory barriers in hiring H-2B workers. This rule removes the burdensome labor certification process and replaces it with a simpler attestation process for H-2B workers that will facilitate processing within the H-2B program.

#### **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.

### 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.

### Executive Order 12866

This rule is considered by DHS to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget (OMB) for review.

DHS has considered both the costs and the benefits of this rule as required in Executive Order 12866 section (b)(6) and has determined that the benefits of this regulation outweigh any costs. That determination is as follows: This proposal is necessary to improve U.S. employers' use of the H-2B program and access to necessary workers in a timely fashion. The current H-2B program requires a U.S. employer to submit to a two-step process, involving two separate agencies, before it can obtain a foreign worker. Petitioning employers must first file a labor certification application with DOL and DOL must approve the labor certification before the employer may file a petition with USCIS for approval based on the labor certification. The processing time and inherent delays associated with this two-step process negatively impact U.S. employers' ability to achieve optimal staffing levels in the time needed to meet their needs. In addition to time delays, the two-step process imposes additional costs in the form of paperwork and correspondence with two agencies.

By including the attestation in the Form I-129 H supplement, DHS has created a one-step process where certain U.S. employers seeking H-2B temporary workers now only will be required to file one application package—the Form I-129 with the Form I-129 H supplement—with one agency, DHS. This one-step process benefits employers by reducing costs and delays associated with separate USCIS petition adjudication and DOL labor certification processes, thereby allowing the employer to be matched with a qualified H-2B worker in a more timely fashion.

The one-step process also alleviates processing costs to the agencies due to separate filing requirements. Finally, these changes enhance the effectiveness of the H-2B program while maintaining integrity through enforcement by DOL and DHS with debarment processes for non-compliant H-2B employers. In addition to consolidating the filing process, this rule would make the actual submission of the necessary information itself easier (for eligible employers) by incorporating the required attestations into the Form I-129 H Supplement and permitting petitioning employers to file the required Form I-129 petition (including the H supplement) electronically, through e-filing.

In addition, because this rule proposes to cease requiring named beneficiaries for workers not in the United States, within the context of USCIS processing, this rule will further alleviate processing delays that result when USCIS performs background checks on each named H-2B beneficiary. DOS currently performs background checks on all beneficiaries before visa issuance, so this process retains all requisite security measures while eliminating duplication of work between USCIS and DOS.

There are no new costs to the public associated with this rule. No new or additional requirements are being created by this rule. Though the revisions to the Form I-129 H Supplement to include attestations as required under DOL regulations (20 CFR part 655, subpart A), are considered a new information collection under the Paperwork Reduction Act, these revisions will not create any additional burden on petitioning U.S. employers. In fact, the revisions reduce the current paperwork burden for such employers by removing the requirement that certain U.S. employers seeking an H-2B temporary work comply with a two-step filing process to obtain temporary labor in this visa category.

### Executive Order 13132

The 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.

### Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

### Paperwork Reduction Act

Employers are currently required to file a Form I-129 with the H supplement when petitioning for H-2B workers. This proposed rule revises the current H supplement to require petitioners to attest to certain information on the H Supplement when petitioning USCIS for H-2B workers. This attestation is made to the U.S. Government in accordance with DOL regulations, and is provided to USCIS as a part of the H Supplement with the Form I-129 petition filing in order to streamline processing. Under the Paperwork Reduction Act of 1995, OMB considers the attestation an information collection requirement subject to review. Accordingly, this information collection has been submitted to OMB for review. Written comments are encouraged and will be accepted until March 28, 2005. 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 functions 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 This Information Collection

(1) *Type of information collection:* Revision.

(2) *Title of Form/Collection:* H Supplement to USCIS Form I-129, Petition for Nonimmigrant Worker.

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

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Individuals. The H Supplement to Form I-129 is required evidence for an employer petitioning for an alien to come to the U.S. temporarily to perform services or labor as an H-1B, H-2A, H-2B or H-3 nonimmigrant worker.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 368,948 inclusive of all I-129 filings at 2.75 hours per response.

(6) *An estimate of the total of public burden (in hours) associated with the collection:* Approximately 1,014,607 burden hours inclusive of all I-129 filings.

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, 3rd Floor, Washington, DC 20529; Attention: Richard A. Sloan, Director, 202-514-3291.

**List of Subjects in 8 CFR Part 214**

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

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

**PART 214—NONIMMIGRANT CLASSES**

1. The authority citation for part 214 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1186a, 1187, 1221, 1281, 1282, 1301-1305; 1372; 1379; 1731-32; sec. 14006, Pub. L. 108-287; sec. 643, Pub. L. 104-208; 110 Stat. 3009-708; 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.

- 2. Section 214.2 is amended by:
  - a. Revising paragraph (h)(1)(ii)(D);
  - b. Revising paragraphs (h)(2)(i)(A), (C), and (D);
  - c. Adding the term “A United States agent” to read: “Except in the case of a petition for an H-2B worker, a United States agent” at the beginning of paragraph (h)(2)(i)(F), introductory text;
  - d. Revising paragraphs (h)(2)(ii) and (iii);
  - e. Revising paragraphs (h)(6)(iii)(A), (B), (C), (D) and (E);

- f. Adding new paragraphs (h)(6)(iii)(F) and (G);
- g. Revising paragraph (h)(6)(iv);
- h. Revising paragraphs (h)(6)(vi)(A), (B), (C) and (D);
- i. Adding new paragraphs (h)(8)(ii)(G) and (H);
- j. Revising paragraphs (h)(9)(i)(A) and (B), (h)(9)(iii)(B)(1) and (h)(9)(iii)(B)(2)(i) and (ii);
- k. Adding introductory text to paragraph (h)(11)(i);
- l. Revising paragraphs (h)(11)(i)(A) and (h)(11)(iii)(A)(2);
- m. Revising paragraph (h)(13)(iv);
- n. Revising paragraph (h)(15)(ii)(C);
- o. Redesignating paragraph (h)(15)(ii)(D) as (h)(15)(ii)(E) and by adding a new paragraph (h)(15)(ii)(D); and by
- p. Adding a new paragraph (h)(20).

The revisions and additions read as follows:

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

\* \* \* \* \*  
 (h) \* \* \*  
 (1) \* \* \*  
 (ii) \* \* \*

(D) An H-2B classification applies to an alien who is coming temporarily to the United States to perform nonagricultural work of a temporary or seasonal nature, if unemployed persons capable of performing such service or labor cannot be found in this country. This classification does not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession. The temporary or permanent nature of the services or labor to be performed shall be determined by the USCIS. This classification also requires a labor certification or attestation, as prescribed by the Department of Labor at 20 CFR 655.3.

\* \* \* \* \*

(2) *Petitions*—(i) *Filing of petitions*—(A) *General.* A United States employer seeking to classify an alien as an H-1B, H-2A, H-2B, or H-3 temporary employee shall file a petition on Form I-129, Petition for Nonimmigrant Worker with the Form I-129 H supplement, only with the service center which has jurisdiction in the area where the alien will perform services, or receive training, even in emergent situations, except as provided in this paragraph. With the exception of employers seeking H-2B workers in logging, the entertainment industry, and professional athletics, a United States employer seeking to classify an alien as an H-2B temporary employee shall file electronically, through e-filing, the

Form I-129 petition with H Supplement as provided in 8 CFR 214.2(h)(6)(iii)(C). For U.S. employers seeking H-2B temporary workers in logging, the entertainment industry, and professional athletics, the U.S. employer may e-file the Form I-129, or file the paper Form I-129 with the required temporary labor certification to the USCIS service center that has jurisdiction over the area where the alien will perform services. Regardless of which filing option U.S. employers in logging, the entertainment industry, and professional athletics choose, such employers will still be required to submit a paper temporary labor certification to the USCIS service center with jurisdiction over the area of intended employment. A United States employer seeking to classify an alien as an H-1C nonimmigrant registered nurse shall file a petition on Form I-129 at the Vermont Service Center. Petitions in Guam and the Virgin Islands, and petitions involving special filing situations as determined by USCIS Headquarters, shall be filed with the local USCIS office or a designated USCIS office. The petitioner may submit a legible photocopy of a document in support of the visa petition in lieu of the original document. However, the original document shall be submitted if requested by the USCIS.

\* \* \* \* \*

(C) *Services or training for more than one employer.* If the beneficiary will perform nonagricultural services for, or receive training from more than one United States employer, each employer must file a separate petition, the Form I-129 with H Supplement, and, if required, a labor certification with the service center that has jurisdiction over the area where the alien will perform services or receive training.

(D) *Change of employers.* If the alien is in the United States and seeks to change employers, the prospective new employer (except in the case of H-2As), must file a petition on Form I-129, with the fee required in 8 CFR 103.7(b)(1) and, if required, with a labor certification, naming the beneficiary, and requesting classification and extension of the alien’s stay in the United States. A prospective new employer may not substitute an alien who is within the United States into any previously approved petition. 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 8 CFR 214.2(h)(13). The

alien is not authorized to begin the employment with the new petitioner until the petition is approved.

\* \* \* \* \*

(ii) *Multiple beneficiaries.* More than one beneficiary may be included in an H-1C, H-2A, H-2B, or H-3 petition, and a labor certification or attestation for H-2B petitions, if the beneficiaries will be performing the same service, or receiving the same training, for the same period of time, and in the same location.

(iii) *Named beneficiaries.* An H-2B petition shall not include the name(s) of the beneficiary(ies) at the time of filing, unless the beneficiary is within the United States. For employment that requires labor certification, if all of the beneficiaries covered by an H-2B labor certification have not been identified at the time a petition is filed, multiple petitions may be filed at different times with a copy of the same labor certification; however, each petition must have been filed within 90 days of certification. Each petition must reference all previously filed petitions for that labor certification. For H-2B employment that requires an attestation, a U.S. employer must file a new Form I-129 H Supplement with each petition filed on behalf of name beneficiaries. The Form I-129 H Supplement must reflect the same number of beneficiaries that are being requested on the H-2B petition. An initial H-2A petition may contain both named and unnamed beneficiaries and the total number of beneficiaries must agree with the number of positions on the labor certification request. The number stated on the labor certification or Form I-129 H Supplement does not need to agree with the number of aliens requested on a subsequent request for extension.

\* \* \* \* \*

(6) \* \* \*  
(iii) \* \* \*

(A) With the exceptions of employment for which the Department of Labor provides labor certification, when filing a petition with the director to classify an alien as an H-2B worker, the petitioner shall submit an H Supplement, that includes an attestation that complies with 20 CFR part 655, subpart A, for each United States metropolitan statistical area in which a beneficiary will be employed. In the territory of Guam, the petitioning employer shall apply for temporary labor certification with the Governor of Guam. For other employment for which the Department of Labor requires labor certification, the petitioning employer shall apply for temporary labor certification with the Secretary of Labor. The labor certification or Form I-129 H

Supplement shall be considered sufficient evidence that no United States workers capable of performing the temporary services or labor are available and that the alien's employment will not adversely affect the wages and working conditions of similarly employed United States workers.

(B) An H-2B petition may only be filed by the employer seeking to hire an individual as an H-2B temporary worker. An agent may not file an H-2B petition on behalf of any employer. The petitioning employer shall consider available United States workers for the temporary services or labor, and shall offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the United States.

(C) The petitioner may not file an H-2B petition unless the United States petitioner has submitted a Form I-129 H Supplement or otherwise has applied for and received the appropriate labor certification as prescribed by the Department of Labor at 20 CFR 655.3. H-2B petitions must be filed electronically with the Form I-129 and H supplement through e-filing at the appropriate DHS website, unless the application requires a DOL temporary labor certification. A new H supplement must be filed with each Form I-129 petition and must reflect the same number of workers requested on the Form I-129 petition. All applications for labor certification or I-129 H supplements must be filed within the time limits prescribed or accepted by each category.

(D) The Governor of Guam shall separately establish procedures for providing temporary labor certifications. Furthermore, the Secretary of Labor shall separately establish procedures for providing temporary labor certifications for employers seeking H-2B workers in logging, the entertainment industry, and professional athletics. The Secretary of Labor may implement a program to conduct random and selected audits to ensure the integrity of the attestation portion of the I-129 H supplement and to ensure compliance with the relevant regulatory provisions.

(E) For petitions that require a labor certification from the Governor of Guam for employment in Guam or from the Secretary of Labor for other employment, as prescribed by the Department of Labor at 20 CFR 655.3, the petitioner may file a paper Form I-129 with the required paper labor certification to the appropriate USCIS service center with jurisdiction over the area where the alien will perform services.

(F) The certification from the Governor of Guam or the Secretary of Labor is advisory in nature and does not establish the temporary nature of the position or the beneficiary's eligibility. The service center director may deny the H-2B petition, pursuant to 8 CFR 214.2(h)(10) if the director determines that the statements on the Form I-129 petition were inaccurate, fraudulent, or misrepresented a material fact.

(G) The service center director may institute revocation proceedings as described in paragraph (h)(11) of this section if the director determines that the statements on the Form I-129 petition were inaccurate, fraudulent, or misrepresented a material fact.

(iv) *Labor certifications for H-2B employment—(A) Labor certifications.* For H-2B employment requiring a labor certification, an H-2B petition for temporary employment shall be accompanied by:

(1) A certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers; or

(2) A notice stating the reasons why such certification cannot be made. Such notice shall address the availability of United States workers in the occupation and the prevailing wages and working conditions of United States workers in the occupation.

(B) *Attachment to a petition requiring labor certification.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence must be filed with the service center director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted shall be considered in adjudicating the petition. The countervailing evidence presented by the petitioner shall be in writing and shall address availability of United States workers, the prevailing wage rate for the occupation in the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

(C) *U.S. Virgin Islands.* Labor certifications filed under section 101(a)(15)(H)(ii)(b) of the Act for



employment in the United States Virgin Islands may be approved only for entertainers and athletes and only for periods not to exceed 45 days.

(D) *Validity period for labor certifications.* The Secretary of Labor may issue a temporary labor certification for a period up to one year.

\* \* \* \* \*

(vi) \* \* \*

(A) *Labor certification or notice.* A temporary labor certification or a notice that certification cannot be made issued by the Governor of Guam in the case of employment in Guam; a temporary labor certification or notice that certification cannot be made issued by the Secretary of Labor in the case of employment for which labor certification is required;

(B) *Countervailing evidence.* Evidence to rebut the Governor of Guam's or, in the case of employment for which the Department of Labor requires labor certification, the Secretary of Labor's notice that certification cannot be made;

(C) *Alien's qualifications.* Documentation that the alien qualifies for the job offer as specified in the application for labor certification or petition (including the H supplement), except in petitions where the labor certification or petition (including the H supplement) requires no education, training, experience, or special requirements of the beneficiary; and

(D) *Statement of need.* A statement describing in detail the temporary situation or conditions which make it necessary to bring the alien to the United States and whether the need is a one-time occurrence, seasonal, peakload, or intermittent and lasting less than one year. If the need is seasonal, peakload, or intermittent, the statement shall indicate whether the situation or conditions are expected to be recurrent. The statement shall be made on the Form I-129 H supplement, which must be filed concurrently with the H-2B petition.

\* \* \* \* \*

(8) \* \* \*

(ii) \* \* \*

(G) USCIS will not count towards the numerical limitation in a given fiscal year petitions requesting extensions of H-2B status, amendments to previously approved H-2B petitions, or petitions for aliens who already hold H-2B status and are seeking to change employers or add an additional employer (i.e. concurrent employment).

(H) The numerical limitation in a given fiscal year shall not apply to an H-2B nonimmigrant who is employed (or has received an offer of employment) as a fish roe processor, a fish roe technician, or a supervisor of fish roe processing.

(9) \* \* \*

(i) \* \* \*

(A) If a petitioner has requested named beneficiaries because the beneficiaries are within the United States, the approval notice shall include the name of each beneficiary approved for that classification. Further, all approval notices shall include the requested classification and the petition's period of validity. A petition for more than one beneficiary and/or multiple services may be approved in whole or in part. In the event that a security check for one of the requested beneficiaries takes more time than is required for the other beneficiaries on a multiple-beneficiary petition, USCIS may issue a partial approval notice without notifying the petitioner of the specific information relating to the beneficiary(ies) not included on the approval notice. The approval notice shall identify only those beneficiaries approved for classification under section 101(a)(15)(H) of the Act.

(B) An H-2B petition, if submitted via e-filing, may not be filed more than 60 days prior to the date of actual need for the beneficiary's services.

\* \* \* \* \*

(iii) \* \* \*

(B) \* \* \*

(1)(i) *General.* Except as provided in paragraph (h)(9)(iii)(B)(1)(ii) of this section, the approval of a petition to accord an alien a classification under section 101(a)(15)(ii)(b) of the Act shall be valid for the length of time as determined by the USCIS as meeting the petitioner's need, not to exceed a period of up to one year.

(ii) *Labor certification attached.* If a certification by the Governor of Guam or the Secretary of Labor is attached to a petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act, the approval of the petition may be valid for a period of up to one year.

(2) \* \* \*

(i) *Countervailing evidence.* If a petition is submitted containing a notice from the Governor of Guam that certification cannot be made, and is not accompanied by countervailing evidence, the petitioner shall be informed that he or she may submit the countervailing evidence in accordance with paragraph (h)(6)(iii)(E) of this section.

(ii) *Approval.* In any case where the service center director decides that approval of the H-2B petition is warranted despite the issuance of a notice by the Governor of Guam that certification cannot be made, the approval shall be certified by the service

center director to the Director, Administrative Appeals Office, pursuant to 8 CFR 103.4. In emergent situations, the certification may be presented by telephone to the Director, Administrative Appeals Office, Headquarters. If approved, the petition is valid for the period of established need not to exceed one year. There is no appeal from a decision that has been certified to the Director, Administrative Appeals Office.

\* \* \* \* \*

(11) \* \* \*

(i) *General.* The service center director may revoke a petition at any time, even after the expiration of the approval of the petition.

(A) The petitioner shall immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(H) of the Act and 8 CFR 214.2(h). A new Form I-129 H supplement and an amended petition on Form I-129 shall be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner shall report explaining the change(s) within 30 days, unless the reason the beneficiary is no longer employed is due solely to the expiration of his or her period of authorized admission as an H nonimmigrant. The notification shall include the name of the petitioner and beneficiary, the receipt number for the approved petition, whether the beneficiary began employment with the petitioner, the dates the beneficiary was employed by the petitioner, if applicable, and a statement of the reason the beneficiary is no longer employed by the petitioner.

\* \* \* \* \*

(iii) \* \* \*

(A) \* \* \*

(2) The statement of facts contained in the petition were not true and correct or the assertions made in the labor attestation were inaccurate, fraudulent, or misrepresented a material fact; or

\* \* \* \* \*

(13) \* \* \*

(iv) *H-2B and H-3 limitation on admission.* An H-2B alien who has spent 3 years in the United States under section 101(a)(15)(H) and/or (L) of the Act; an H-3 alien participant in a special education program who has spent 18 months in the United States under section 101(a)(15)(H) and/or (L) of the Act; and an H-3 alien trainee who has spent 24 months in the United States under section 101(a)(15)(H) and/or (L) of the Act is not eligible for an extension, change status, or readmission

to the United States under section 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

\* \* \* \* \*

(15) \* \* \*

(ii) \* \* \*

(C) *H-2A extension of stay.* An extension of stay for the beneficiary of an H-2A petition may be authorized for a period of up to one year, but not beyond the validity of the temporary labor certification, except as provided for in 8 CFR 214.2(h)(5)(x).

(D) *H-2B extension of stay.* For employment on Guam and for other groups requiring labor certification, an extension of stay for the beneficiary of an H-2B petition may be authorized for the validity of the labor certification or for a period of up to one year. For all other H-2B petitions, an extension of stay may be authorized for the petition validity period or for a period of up to one year. In all cases, the alien's total period of stay as an H-2B worker may not exceed 3 years, except that in the Virgin Islands, the alien's total period of stay may not exceed 45 days.

\* \* \* \* \*

(20) *Debarments.* Upon notification to USCIS that the Secretary of Labor has made a finding that the petitioning employer has violated the H-2B attestation requirements, the USCIS will not approve immigrant petitions under section 204 of the Act or nonimmigrant petitions under section 214(c) of the Act for at least the minimum period of time recommended by the Secretary of Labor.

\* \* \* \* \*

Dated: January 13, 2005.

**Tom Ridge,**

*Secretary of Homeland Security.*

[FR Doc. 05-1240 Filed 1-26-05; 8:45 am]

BILLING CODE 4410-10-P

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## DEPARTMENT OF LABOR

### Employment and Training Administration

#### 20 CFR Part 655

RIN 1205-AB36

#### Post-Adjudication Audits of H-2B Petitions in All Occupations Other Than Excepted Occupations in the United States

**AGENCIES:** Employment and Training Administration, Labor.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** An H-2B nonimmigrant is admitted temporarily to the United States to perform temporary nonagricultural labor or services. The Department of Labor's Employment and Training Administration (DOL or ETA) and the Department of Homeland Security (DHS) simultaneously are proposing changes to the procedures for the issuance of H-2B visas. Under this proposed rule, H-2B petitions filed with DHS, with the exception of workers in logging, the entertainment industry, or professional athletics, will require employers to satisfy specific attestations concerning labor market issues. These attestations have been developed by the DOL and are included in this rule and are incorporated in the DHS regulation. In addition, the DOL will receive information on petitions that have been approved and received final adjudication from the DHS. The DOL will be conducting post-adjudication audits of attestations submitted in support of selected approved H-2B petitions received from the DHS.

**DATES:** Interested persons are invited to submit written comments on the proposed rule on or before February 28, 2005.

**ADDRESSES:** You may submit comments, identified by Regulatory Information Number (RIN) 1205-AB36, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the website instructions for submitting comments.

- E-mail: Comments may be submitted by e-mail to [H2B.Comments@dol.gov](mailto:H2B.Comments@dol.gov). Include RIN 1205-AB36 in the subject line of the message.

- U.S. Mail: Submit written comments to the Assistant Secretary, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210, Attention: William Carlson, Chief, Division of Foreign Labor Certification. Because of security measures, mail directed to Washington, DC is sometimes delayed. We will only consider comments postmarked by the U.S. Postal Service or other delivery service on or before the deadline for comments.

*Instructions:* All submissions received must include the RIN 1205-AB36 for this rulemaking. Receipt of submissions will not be acknowledged. Because DOL continues to experience occasional delays in receiving postal mail in the Washington, DC area, commenters using mail are encouraged to submit any comments early.

Comments will be available for public inspection during normal business hours at the address listed above for mailed comments. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this proposed rule may be obtained in alternative formats (e.g., large print, Braille, audiotape, or disk) upon request. To schedule an appointment to review the comments and/or to obtain the proposed rule in an alternative format, contact the Division of Foreign Labor Certification at (202) 693-3010 (this is not a toll-free number).

**FOR FURTHER INFORMATION CONTACT:** William Carlson, Chief, Division of Foreign Labor Certification, Employment and Training Administration, 200 Constitution Avenue, NW., Room C-4312, Washington, DC 20210, telephone: (202) 693-3010 (this is not a toll-free number).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Currently, 20 CFR part 655, subpart A, provides that a petitioner seeking to employ an H-2B nonimmigrant must establish that employment of the alien will not adversely affect United States workers who are capable of performing such services or labor and the employment of the alien will not adversely affect the wages and working conditions of similarly employed United States workers. A petitioner may not file a petition with the DHS for an H-2B temporary worker unless the employer has applied for and received a labor certification from DOL or the Governor of Guam, as appropriate. In order to obtain a labor certification, a prospective employer must test the United States labor market and, in addition, agree to pay the alien a salary that will not adversely affect the wages of United States workers similarly employed. A petitioner must demonstrate that the need for the temporary services or labor is a one-time occurrence, a seasonal need, a peak load need, or an intermittent need. The period of the petitioner's need must be less than one year.

##### II. Proposal

###### 1. Process

Under the redesigned H-2B program, the DHS will continue to administer the petition adjudication process. However, the employer now will be required to conduct recruitment before filing its petition. The employer also will be required to submit, as part of its petition, attestations concerning labor