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## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Part 214

[CIS No. 2621-18; DHS Docket No. USCIS-2018-0004]

RIN 1615-AC21

## DEPARTMENT OF LABOR

### Employment and Training Administration

### 20 CFR Part 655

[DOL Docket No. 2017-0003]

RIN 1205-AB88

### Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program

**AGENCY:** U.S. Citizenship and Immigration Services, Department of Homeland Security and Employment and Training Administration and Wage and Hour Division, Department of Labor.

**ACTION:** Temporary rule.

**SUMMARY:** The Secretary of Homeland Security, in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H-2B nonimmigrant visas to authorize the issuance of up to an additional 15,000 through the end of Fiscal Year (FY) 2018. This increase is based on a time-limited statutory authority and does not affect the H-2B program in future fiscal years. The Departments are promulgating regulations to implement this determination.

**DATES:** This final rule is effective from May 31, 2018 through September 30, 2018, except for 20 CFR 655.66, which is effective from May 31, 2018 through September 30, 2021.

**FOR FURTHER INFORMATION CONTACT:** Regarding 8 CFR part 214: Kevin J.

Cummings, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Ave. NW, Suite 1100, Washington, DC 20529-2120, telephone (202) 272-8377 (not a toll-free call). Regarding 20 CFR part 655: William W. Thompson, II, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, Box #12-200, 200 Constitution Ave. NW, Washington, DC 20210, telephone (202) 513-7350 (this is not a toll-free number).

Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1-877-889-5627 (TTY/TDD).

#### SUPPLEMENTARY INFORMATION:

##### Table of Contents

- I. Background
  - A. Legal Framework
  - B. H-2B Numerical Limitations Under the INA
  - C. FY 2018 Omnibus
  - D. Joint Issuance of the Final Rule
- II. Discussion
  - A. Statutory Determination
  - B. Numerical Increase of up to 15,000
  - C. Business Need Standard—Irreparable Harm
  - D. DHS Petition Procedures
  - E. DOL Procedures
- III. Statutory and Regulatory Requirements
  - A. Administrative Procedure Act
  - B. Regulatory Flexibility Act
  - C. Unfunded Mandates Reform Act of 1995
  - D. Small Business Regulatory Enforcement Fairness Act of 1996
  - E. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)
  - F. Executive Order 13132 (Federalism)
  - G. Executive Order 12988 (Civil Justice Reform)
  - H. National Environmental Policy Act
  - I. Paperwork Reduction Act

#### I. Background

##### A. Legal Framework

The Immigration and Nationality Act (INA) establishes the H-2B nonimmigrant classification for a nonagricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . .

temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition DHS for classification of prospective temporary workers as H-2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa. Finally, the INA requires that “[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],<sup>1</sup> after consultation with appropriate agencies of the Government.” INA section 214(c)(1), 8 U.S.C. 1184(c)(1).

DHS regulations provide that an H-2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification (TLC) from the Department of Labor (DOL) issued pursuant to regulations established at 20 CFR part 655. 8 CFR 214.2(h)(6)(iii)(A), (C)–(E), (iv)(A); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). The TLC serves as DHS’s consultation with DOL with respect to whether a qualified U.S. worker is available to fill the petitioning H-2B employer’s job opportunity and whether a foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D).

In order to determine whether to issue a labor certification, the Departments have established regulatory procedures under which DOL certifies whether a qualified U.S. worker is available to fill the job opportunity described in the employer’s petition for a temporary nonagricultural worker, and whether a foreign worker’s employment in the job opportunity will adversely affect the wages or working conditions of

<sup>1</sup> As of March 1, 2003, in accordance with section 1517 of Title XV of the Homeland Security Act of 2002 (HSA), Public Law 107-296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions which were transferred from the Attorney General or other Department of Justice official to the Department of Homeland Security by the HSA “shall be deemed to refer to the Secretary” of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, Title XV, § 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

similarly employed U.S. workers. *See* 20 CFR part 655, subpart A. The regulations establish the process by which employers obtain a TLC, and the rights and obligations of workers and employers.

The INA also authorizes DHS to impose appropriate remedies against an employer for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H-2B nonimmigrant worker. INA section 214(c)(14)(A), 8 U.S.C. 1184(c)(14)(A). The INA expressly authorizes DHS to delegate certain enforcement authority to DOL. INA section 214(c)(14)(B), 8 U.S.C. 1184(c)(14)(B); *see also* INA section 103(a)(6), 8 U.S.C. 1103(a)(6). DHS has delegated its authority under INA section 214(c)(14)(A)(i), 8 U.S.C. 1184(c)(14)(A)(i) to DOL. *See* DHS, Delegation of Authority to DOL under Section 214(c)(14)(A) of the Immigration and Nationality Act (Jan. 16, 2009); *see also* 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of, among other things, an H-2B petition and a DOL-approved TLC). This enforcement authority has been delegated within DOL to the Wage and Hour Division (WHD), and is governed by regulations at 29 CFR part 503.

#### B. H-2B Numerical Limitations Under the INA

The INA sets the annual number of aliens who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status to perform temporary nonagricultural work at 66,000, to be distributed semi-annually beginning in October and in April. *See* INA sections 214(g)(1)(B) and 214(g)(10), 8 U.S.C. 1184(g)(1)(B) and 8 U.S.C. 1184(g)(10). Up to 33,000 aliens may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation will be available for employers seeking to hire H-2B workers during the second half of the fiscal year.<sup>2</sup> If insufficient petitions are approved to use all H-2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals in the next fiscal year.

Because of the intense demand for H-2B visas in recent years, the semi-annual visa allocation, and the regulatory requirement that employers

apply for labor certification 75 to 90 days before the start date of work,<sup>3</sup> employers who wish to obtain visas for their workers under the semi-annual allotment must act early to receive a TLC and file a petition with USCIS. As a result, DOL typically sees a significant spike in TLC applications from employers seeking to hire H-2B temporary or seasonal workers during the United States' warm weather months. For example, in FY 2018, based on *Applications for Temporary Labor Certification* filed on January 1, 2018, DOL's Office of Foreign Labor Certification (OFLC) certified more than 75,500 worker positions for start dates of work on April 1, a number nearly two and one-half times greater than the entire semi-annual visa allocation. USCIS received sufficient H-2B petitions to meet the second half of the fiscal year regular cap by February 27, 2018.<sup>4</sup> This was the earliest date that the cap was reached in a respective fiscal year since FY 2009 and reflects an ongoing trend of high H-2B program demand. This is further represented by Congress authorizing additional H-2B workers through the FY 2016 reauthorization of the returning worker cap exemption; the supplemental cap authorized by section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115-31 (FY 2017 Omnibus); and section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115-141 (FY 2018 Omnibus), which is discussed below.

#### C. FY 2018 Omnibus

On March 23, 2018, the President signed the FY 2018 Omnibus which contains a provision (section 205 of Division M, hereinafter "section 205") permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H-2B visas available to U.S. employers, notwithstanding the otherwise established statutory numerical limitation. Specifically, section 205 provides that "the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of

American businesses cannot be satisfied in [FY] 2018 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor," may increase the total number of aliens who may receive an H-2B visa in FY 2018 by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from the H-2B numerical limitation.<sup>5</sup> This rule implements the authority contained in section 205.

In FY 2017, Congress enacted section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115-31, which was a statutory provision materially identical to section 205 of the FY 2018 Omnibus pertaining to the FY 2017 H-2B visa allocation. Following consultation with the Secretary of Labor, the Secretary of Homeland Security determined that the needs of some American businesses could not be satisfied in FY 2017 with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor. Based on this determination, on July 19, 2017, DHS and DOL jointly published a temporary final rule allowing an increase of up to 15,000 additional H-2B visas for those businesses that attested to a level of need such that, if they did not receive all of the workers requested on the Petition for a Nonimmigrant Worker (Form I-129), they were likely to suffer irreparable harm, *i.e.*, suffer a permanent and severe financial loss.<sup>6</sup> A total of 12,294 H-2B workers were approved for H-2B classification under petitions filed pursuant to the FY 2017 supplemental cap increase. The vast majority of the H-2B petitions received under the FY 2017 supplemental cap increase requested premium processing and were adjudicated within 15 calendar days.

#### D. Joint Issuance of This Final Rule

As they did in implementing the FY 2017 Omnibus H-2B supplemental cap<sup>7</sup>, the Departments have determined that it is appropriate to issue this final temporary rule jointly. This

<sup>5</sup> The highest number of returning workers in any such fiscal year was 64,716, which represents the number of beneficiaries covered by H-2B returning worker petitions that were approved for FY 2007. DHS also considered using an alternative approach, under which DHS measured the number of H-2B returning workers admitted at the ports of entry (66,792 for FY 2007).

<sup>6</sup> Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program*, 82 FR 32987, 32998 (Jul. 19, 2017).

<sup>7</sup> 82 FR 32987 (Jul. 19, 2017).

<sup>3</sup> 20 CFR 655.15(b).

<sup>4</sup> On March 1, 2018, USCIS announced that it had received a sufficient number of petitions to reach the congressionally mandated H-2B cap for FY 2018. USCIS began receiving petitions for the second half of the fiscal year on February 21 and received requests for more workers than the number of H-2B visas available in the first five business days beginning on that date. As a result, USCIS, in accordance with applicable regulations, conducted a lottery on February 28 to randomly select enough petitions to meet the cap. 8 CFR 214.2(h)(8)(ii)(B).

<sup>2</sup> The Federal Government's fiscal year runs from October 1 of the budget's prior year through September 30 of the year being described. For example, fiscal year 2018 is from October 1, 2017 through September 30, 2018.

determination is related to ongoing litigation following conflicting court decisions concerning DOL's authority to independently issue legislative rules to carry out its consultative and delegated functions pertaining to the H-2B program under the INA.<sup>8</sup> Although DHS and DOL each have authority to independently issue rules implementing their respective duties under the H-2B program, the Departments are implementing section 205 in this manner to ensure there can be no question about the authority underlying the administration and enforcement of the temporary cap increase. This approach is consistent with rules implementing DOL's general consultative role under section 214(c)(1) of the INA, 8 U.S.C. 1184(c)(1), and delegated functions under sections 103(a)(6) and 214(c)(14)(B), 8 U.S.C. 1103(a)(6), 1184(c)(14)(B).<sup>9</sup> See 8 CFR 214.2(h)(6)(iii)(A) & (C), (iv)(A).

## II. Discussion

### A. Statutory Determination

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that the needs of some American businesses cannot be satisfied in FY 2018 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with section 205 of the FY 2018 Omnibus, the Secretary of Homeland Security has determined that it is appropriate, for the reasons stated below, to raise the numerical limitation on H-2B nonimmigrant visas by up to an additional 15,000 for the remainder of the fiscal year. Consistent with such authority, the Secretary of Homeland Security has decided to increase the H-2B cap for FY 2018 by up to 15,000 additional visas for those American businesses that attest to a level of need such that, if they do not receive all of the workers under the cap increase, they are likely to suffer irreparable harm, *i.e.*, suffer a permanent and severe financial loss. These businesses must attest that they will likely suffer irreparable harm and must retain documentation, as attested below, supporting this attestation.

The Secretary of Homeland Security's determination to increase the numerical limitation is based on the conclusion that some businesses risk closing their doors in the absence of a cap increase. Some stakeholders have reported that

access to additional H-2B visas is essential to the continued viability of some small businesses that play an important role in sustaining the economy in their states, while others have stated that an increase is unnecessary and raises the possibility of abuse, by, among other things, creating an incentive for employers who, unable to hire workers under the normal 66,000 annual cap, would misrepresent their actual need in order to hire H-2B workers from amongst the limited number of newly available visa numbers under the Omnibus.<sup>10</sup> The Secretary of Homeland Security has deemed it appropriate, notwithstanding such risk of abuse, to take immediate action to avoid irreparable harm to businesses; such harm would in turn result in wage and job losses by their U.S. workers, and other adverse downstream economic effects.<sup>11</sup>

The decision to direct the benefits of this cap increase to businesses that need workers to avoid irreparable harm, rather than directing the cap increase to any and all businesses seeking temporary workers, is consistent with the Secretary of Homeland Security's broad discretion under section 205. Section 205 provides that the Secretary of Homeland Security, upon satisfaction of the statutory business need standard, may increase the numerical limitation to meet such need.<sup>12</sup> The scope of the assessment called for by the statute is

<sup>10</sup> Other stakeholders have reported abuses of the H-2B program. For example, the Government Accountability Office, has recommended increased worker protections in the H-2B program based on certain abuses of the program by unscrupulous employers and recruiters. See U.S. Government Accountability Office, *H-2A and H-2B Visa Programs: Increased Protections Needed for Foreign Workers*, GAO-15-154 (Washington, DC, revised 2017), <http://www.gao.gov/assets/690/684985.pdf>; U.S. Government Accountability Office, *H-2B Visa Program: Closed Civil Criminal Cases Illustrate Instances of H-2B Workers Being Targets of Fraud and Abuse*, GAO-10-1053 (Washington, DC, 2010), <http://www.gao.gov/assets/320/310640.pdf>; see also Testimony of Stephen G. Bronars, *The Impact of the H-2B Program on the U.S. Labor Market, before the Senate Subcommittee on Immigration and the National Interest* (June 8, 2016), [https://www.judiciary.senate.gov/imo/media/doc/06-08-16B\\_BronarsTestimony.pdf](https://www.judiciary.senate.gov/imo/media/doc/06-08-16B_BronarsTestimony.pdf). Preliminary Analysis of the Economic Impact of the H-2B Worker Program on Virginia's Economy, Thomas J. Murray (Sep. 2011), <http://web.vims.edu/GreyLit/VIMS/mrr11-12.pdf>.

<sup>11</sup> See Randel K. Johnson & Tamar Jacoby, U.S. Chamber of Commerce & ImmigrationWorks USA, *The Economic Impact of H-2B Workers* (Oct. 28, 2010), available at [https://www.uschamber.com/sites/default/files/documents/files/16102\\_LABR%2520H2BReport\\_LR.pdf](https://www.uschamber.com/sites/default/files/documents/files/16102_LABR%2520H2BReport_LR.pdf). (last visited Apr. 27, 2018).

<sup>12</sup> DHS believes it is reasonable to infer that Congress intended, in enacting the FY 2018 Omnibus, to authorize the Secretary to allocate any new H-2B visas authorized under section 205 to the entities with the "business need" that serves as the basis for the increase.

quite broad, and accordingly delegates the Secretary of Homeland Security broad discretion to identify the business needs she finds most relevant. Within that context, DHS has determined to focus on the businesses with the most permanent, severe potential losses, for the below reasons.

First, DHS interprets section 205's reference to "the needs of American businesses" as describing a need different than the need required of employers in petitioning for an H-2B worker.<sup>13</sup> If the term "needs" in section 205 referred to the same business need under the existing H-2B program, it would not have been necessary for Congress to reference such need, because Congress could have relied on existing statute and regulations. Alternatively, Congress could have made explicit reference to such statute and regulations. In addition, Congress authorized the 205 provision with materially identical language to that enacted in the FY 2017 Omnibus, which suggests that Congress does not object to the FY 2017 joint temporary rule's approach to implementing "need." See, *e.g.*, *Public Citizen v. FAA*, 988 F.2d 186, 194 (D.C. Cir. 1993) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citation and quotation marks omitted). Accordingly, DHS interprets this authority as authorizing DHS to address a heightened business need, beyond the existing requirements of the H-2B program. DOL concurs with this interpretation.

Second, this approach limits the increase in a way that is consistent with the implementation of the FY 2017 supplemental cap, and provides protections against adverse effects on U.S. workers that may result from a broader cap increase. Although there is not enough time remaining in FY 2018 to conduct more formal analysis of such effects and the calendar does not lend itself to such additional efforts, the Secretary of Homeland Security has determined that in the particular circumstances presented here, it is appropriate to tailor the availability of this temporary cap increase to those businesses likely to suffer irreparable harm, *i.e.*, those facing permanent and severe financial loss.

Under this rule, employers must also meet, among other requirements, the

<sup>13</sup> A petitioning employer must demonstrate that it has a temporary need for the services or labor for which it seeks to hire H-2B workers. See 8 CFR 214.2(h)(6)(ii); 20 CFR 655.6.

<sup>8</sup> See *Temporary Non-Agricultural Employment of H-2B Aliens in the United States*, 80 FR 24042 (Apr. 29, 2015) (codified at 8 CFR part 214, 20 CFR part 655, and 29 CFR part 503).

<sup>9</sup> See, *e.g.*, *id.*

generally applicable requirements that insufficient qualified U.S. workers are available to fill the petitioning H-2B employer's job opportunity and that the foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly employed U.S. workers. INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D); 20 CFR 655.1. To meet this standard, in order to be eligible for additional visas under this rule, employers must have a valid TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D), and 20 CFR 655 subpart A. Under DOL's H-2B regulations, TLCs expire on the last day of authorized employment. 20 CFR 655.55(a). Therefore, in order to have an unexpired TLC, the date on the employer's visa petition must not be later than the last day of authorized employment on the TLC. This rule also requires an additional recruitment for certain petitioners, as discussed below.

Accordingly, this rule increases the FY 2018 numerical limitation by up to 15,000 to ensure a sufficient number of visas to meet the level of demand in past years, but also restricts the availability of such visas by prioritizing only the most significant business needs. These provisions are each described in turn below.

#### *B. Numerical Increase of up to 15,000*

DHS expects the increase of up to 15,000 visas<sup>14</sup> to be sufficient to meet at least the same amount of need as the H-2B returning worker provision met in FY 2016 and the supplemental cap met in FY 2017. Section 205 of the FY 2018 Omnibus sets as the maximum limit for any increase in the H-2B numerical limitation for FY 2018, the highest

<sup>14</sup> In contrast with section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1), which establishes a cap on the number of individuals who may be issued visas or otherwise provided H-2B status, and section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10), which imposes a first half of the fiscal year cap on H-2B issuance with respect to the number of individuals who may be issued visas or are accorded [H-2B] status" (emphasis added), section 205 only authorizes DHS to increase the number of available H-2B visas. Accordingly, DHS will not permit individuals authorized for H-2B status pursuant to an H-2B petition approved under section 205 to change to H-2B status from another nonimmigrant status. See INA section 248, 8 U.S.C. 1258; see also 8 CFR pt. 248. If a petitioner files a petition seeking H-2B workers in accordance with this rule and requests a change of status on behalf of someone in the United States, the change of status request will be denied, but the petition will be adjudicated in accordance with applicable DHS regulations. Any alien authorized for H-2B status under the approved petition would need to obtain the necessary H-2B visa at a consular post abroad and then seek admission to the United States in H-2B status at a port of entry.

number of H-2B returning workers<sup>15</sup> who were exempt from the cap in previous years. Consistent with the statute's reference to H-2B returning workers, in determining the appropriate number by which to increase the H-2B numerical limitation, the Secretary of Homeland Security focused on the number of visas allocated to returning workers in years in which Congress enacted "returning worker" exemptions from the H-2B numerical limitation. During each of the years the returning worker provision was in force, U.S. employers' standard business needs for H-2B workers exceeded the normal 66,000 cap.

Under the most recent returning worker statute in FY 2016, 18,090 returning workers were approved for H-2B petitions, despite Congress having reauthorized the returning worker program with more than three-quarters of the fiscal year remaining. Of those 18,090 workers authorized for admission, 13,382 were admitted into the United States or otherwise acquired H-2B status. While section 205 does not limit the issuance of additional H-2B visas to returning workers, the Secretary of Homeland Security, in consideration of the statute's reference to returning workers, determined that it would be appropriate to use these recent figures as a basis for the maximum numerical limitation under section 205.

The Secretary of Homeland Security also considered the number of H-2B workers who were approved under the FY 2017 supplemental H-2B cap.<sup>16</sup> Out of a maximum of 15,000 supplemental H-2B visas for FY 2017, a total of 12,294 beneficiaries were approved for H-2B classification. Although fewer beneficiaries were approved for H-2B classification than the available number of visas in FY 2017, the Secretary has determined that it is appropriate to authorize 15,000 additional visas again, as employers will have a longer period in which to submit their petitions due to the earlier publication date of this rule, thereby allowing for the possibility of more petitions being filed this fiscal year than in FY 2017.

<sup>15</sup> During fiscal years 2005 to 2007, and 2016, Congress enacted "returning worker" exemptions to the H-2B visa cap, allowing workers who were counted against the H-2B cap in one of the three preceding fiscal years not to be counted against the upcoming fiscal year cap. Save Our Small and Seasonal Businesses Act of 2005, Public Law 109-13, Sec. 402 (May 11, 2005); John Warner National Defense Authorization Act, Public Law 109-364, Sec. 1074, (Oct. 17, 2006); Consolidated Appropriations Act of 2016, Public Law 114-113, Sec. 565 (Dec. 18, 2015).

<sup>16</sup> See section 543 of Div. F of the Consolidated Appropriations Act, 2017, Public Law 115-31.

#### *C. Business Need Standard—Irreparable Harm*

To file an H-2B petition during the remainder of FY 2018, petitioners must meet all existing H-2B eligibility requirements, including having an approved, valid and unexpired TLC per 8 CFR 214.2(h)(6) and 20 CFR part 655 subpart A. In addition, the petitioner must submit an attestation in which the petitioner affirms, under penalty of perjury, that it meets the business need standard set forth above. Under that standard, the petitioner must be able to establish that if it does not receive all of the workers under the cap increase, it is likely to suffer irreparable harm, that is, permanent and severe financial loss. Although the TLC process focuses on establishing whether a petitioner has a need for workers, the TLC does not directly address the harm a petitioner may face in the absence of such workers; the attestation addresses this question. The attestation must be submitted directly to USCIS, together with Form I-129, the valid TLC, and any other necessary documentation. As in the rule implementing the FY 2017 temporary cap increase, the new attestation form is included in this rulemaking as Appendix A.

The attestation serves as prima facie initial evidence to DHS that the petitioner's business is likely to suffer irreparable harm.<sup>17</sup> Any petition received lacking the requisite attestation may be denied in accordance with 8 CFR 103.2(b)(8)(ii). Although this regulation does not require submission of evidence at the time of filing of the petition, other than an attestation, the employer must have such evidence on hand and ready to present to DHS or DOL at any time starting with the date of filing, through the prescribed document retention period discussed below.

In addition to the statement regarding the irreparable harm standard, the attestation will also state that the employer: Meets all other eligibility criteria for the available visas; will comply with all assurances, obligations, and conditions of employment set forth in the Application for Temporary Employment Certification (Form ETA 9142B and Appendix B) certified by the DOL for the job opportunity (which serves as the TLC); will conduct additional recruitment of U.S. workers, in accordance with this rulemaking; and will document and retain evidence of such compliance. The process under this regulation is similar to the process

<sup>17</sup> An employer may request fewer workers on the H-2B petition than the number of workers listed on the TLC.

the Departments have employed with respect to the statutory provisions authorizing seafood employers to stagger the border crossings of H-2B workers. For seafood employers, a similar attestation, which provides that the employer has conducted additional recruitment, is provided to the consular officer at the time the H-2B worker applies for a visa and/or to the U.S. Customs and Border Protection officer at the time the worker seeks admission at a port of entry. *See* 20 CFR 655.15(f). Because the attestation will be submitted to USCIS as initial evidence with Form I-129, a denial of the petition based on or related to statements made in the attestation is appealable under existing USCIS procedures. Specifically, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b).

The requirement to provide a post-TLC attestation to USCIS is sufficiently protective of U.S. workers given that the employer, in completing the TLC process, has already made one unsuccessful attempt to recruit U.S. workers. In addition, the employer is required to retain documentation, which must be provided upon request, supporting the new attestations, including a recruitment report for any additional recruitment required under this rule. Accordingly, USCIS may issue a denial or a request for additional evidence in accordance with 8 CFR 103.2(b) or 8 CFR 214.2(h)(11) based on such documentation, and DOL's OFLC and WHD will be able to review this documentation and enforce the attestations during the course of an audit examination or investigation. Although the employer must have such documentation on hand at the time it files the petition, the Departments have determined that if employers were required to submit the attestations to DOL before seeking a petition from DHS or to complete all recruitment before submitting a petition, the attendant delays would render any visas unlikely to satisfy the needs of American businesses given processing timeframes and that there are only a few months remaining in this fiscal year.

In accordance with the attestation requirement, under which petitioners attest that they meet the irreparable harm standard, and the documentation retention requirements at 20 CFR 655.66, the petitioner must retain documents and records meeting their burden to demonstrate compliance with this rule, and must provide the documents and records upon the request of DHS or DOL, such as in the event of an audit or investigation.

Supporting evidence may include, but is not limited to, the following types of documentation:

(1) Evidence that the business is or would be unable to meet financial or contractual obligations without H-2B workers, including evidence of contracts, reservations, orders, or other business arrangements that have been or would be cancelled absent the requested H-2B workers, and evidence demonstrating an inability to pay debts/bills;

(2) Evidence that the business has suffered or will suffer permanent and severe financial loss during the period of need, as compared to the period of need in prior years, such as: Financial statements (including profit/loss statements) comparing present period of need as compared to prior years; bank statements, tax returns or other documents showing evidence of current and past financial condition; and relevant tax records, employment records, or other similar documents showing hours worked and payroll comparisons from prior years to current year;

(3) Evidence showing the number of workers needed in previous seasons to meet the employer's temporary need as compared to those currently employed, including the number of H-2B workers requested, the number of H-2B workers actually employed, the dates of their employment, and their hours worked (for example, payroll records), particularly in comparison to the weekly hours stated on the TLC. In addition, for employers that obtain authorization to employ H-2B workers under this rule, evidence showing the number of H-2B workers requested under this rule, the number of workers actually employed, including H-2B workers, the dates of their employment, and their hours worked (for example, payroll records), particularly in comparison to the weekly hours stated on the TLC; and/or

(4) Evidence that the business is dependent on H-2B workers, such as: number of H-2B workers compared to U.S. workers needed prospectively or in the past; business plan or reliable forecast showing that, due to the nature and size of the business, there is a need for a specific number of H-2B workers.

These examples of potential evidence, however, will not exclusively or necessarily establish that the business meets the irreparable harm standard, and petitioners may retain other types of evidence they believe will satisfy this standard. If an audit or investigation occurs, DHS or DOL will review all evidence available to it to confirm that the petitioner properly attested to DHS

that their business would likely suffer irreparable harm. If DHS subsequently finds that the evidence does not support the employer's attestation, DHS may deny or revoke the petition consistent with existing regulatory authorities and/or notify DOL. In addition, DOL may independently take enforcement action, including, among other things, to debar the petitioner from using the H-2B program generally for not less than one year or more than 5 years from the date of the final agency decision and may disqualify the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision. *See, e.g.*, 20 CFR 655.73; 29 CFR 503.20, 503.24.<sup>18</sup>

To the extent that evidence reflects a preference for hiring H-2B workers over U.S. workers, an investigation by other agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division, may be warranted. *See* INA section 274B, 8 U.S.C. 1324b (prohibiting certain types of employment discrimination based on citizenship status or national origin). Moreover, DHS and WHD may refer potential discrimination to IER under the Memorandum of Understanding between IER and DHS. <https://www.justice.gov/crt/partnerships>. In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify USCIS's Fraud Detection and National Security Directorate by contacting the general H-2B complaint address at [ReportH2BAbuse@uscis.dhs.gov](mailto:ReportH2BAbuse@uscis.dhs.gov).<sup>19</sup>

DHS, in exercising its statutory authority under INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and section 205 of the FY 2018 Omnibus, is responsible for adjudicating eligibility for H-2B classification. As in all cases, the burden rests with the petitioner to establish eligibility by a preponderance of the evidence. INA section 291, 8 U.S.C. 1361. Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed

<sup>18</sup> Pursuant to the statutory provisions governing enforcement of the H-2B program, INA section 214(c)(14), 8 U.S.C. 1184(c)(14), a violation exists under the H-2B program where there has been a willful misrepresentation of a material fact in the petition or a substantial failure to meet any of the terms and conditions of the petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions. *See, e.g.*, 29 CFR 503.19.

<sup>19</sup> DHS may publicly disclose information regarding the H-2B program consistent with applicable law and regulations.

attestation, DHS may deny the petition in accordance with 8 CFR 103.2(b)(8)(ii). Further, where the initial evidence submitted with the petition contains inconsistencies or is inconsistent with other evidence in the petition and underlying TLC, DHS may issue a Request for Evidence, Notice of Intent to Deny, or Denial in accordance with 8 CFR 103.2(b)(8). In addition, where it is determined that an H-2B petition filed pursuant to the FY 2018 Omnibus was granted erroneously, the H-2B petition approval may be revoked, *see* 8 CFR 214.2(h)(11).

Because of the particular circumstances of this regulation, and because the attestation plays a vital role in achieving the purposes of this regulation, DHS and DOL intend that the attestation requirement be non-severable from the remainder of the regulation. Thus, in the event the attestation requirement is enjoined or held invalid, the remainder of the regulation, with the exception of the retention requirements, is also intended to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

#### D. DHS Petition Procedures

To petition for H-2B workers under this rule, the petitioner must file a Form-129 in accordance with applicable regulations and form instructions, an unexpired TLC, and the attestation described above. *See* new 8 CFR 214.2(h)(6)(x). The attestation must be filed on Form ETA-9142-B-CAA-2, Attestation for Employers Seeking to Employ H-2B Nonimmigrants Workers Under Section 205 of Division M of the Consolidated Appropriations Act, which is attached to this rulemaking as Appendix A. *See* 20 CFR 655.64. A petitioner is required to retain a copy of such attestation and all supporting evidence for 3 years from the date the associated TLC was approved, consistent with 20 CFR 655.56 and 29 CFR 503.17. *See* new 20 CFR 655.66. Petitions submitted pursuant to the FY 2018 Omnibus will be processed in the order in which they were received. Petitioners may also choose to request premium processing of their petition under 8 CFR 103.7 (e), which allows for expedited processing for an additional fee.

To encourage timely filing of any petition seeking a visa under the FY 2018 Omnibus, DHS is notifying the public that the petition may not be approved by USCIS on or after October 1, 2018. *See* new 8 CFR 214.2(h)(6)(x). Petitions pending with USCIS that are

not approved before October 1, 2018 will be denied and any fees will not be refunded. *See* new 8 CFR 214.2(h)(6)(x).

USCIS's current processing goals for H-2B petitions that can be adjudicated without the need for further evidence (*i.e.*, without a Request for Evidence or Notice of Intent to Deny) are 15 days for petitions requesting premium processing and 30 days for standard processing.<sup>20</sup> Given USCIS's processing goals for premium processing, DHS believes that 15 days from the end of the fiscal year is the minimum time needed for petitions to be adjudicated, although USCIS cannot guarantee the time period will be sufficient in all cases. Therefore, if the increase in the H-2B numerical limitation to 15,000 visas has not yet been reached, USCIS will stop accepting petitions received after September 14, 2018.<sup>21</sup> *See* new 8 CFR 214.2(h)(6)(x)(C). Such petitions will be rejected and the filing fees will be returned.

As with other Form I-129 filings, DHS encourages petitioners to provide a duplicate copy of Form I-129 and all supporting documentation at the time of filing if the beneficiary is seeking a nonimmigrant visa abroad. Failure to submit duplicate copies may cause a delay in the issuance of a visa to otherwise eligible applicants.<sup>22</sup>

#### E. DOL Procedures

All employers are required to have an approved and valid TLC from DOL in order to file a Form I-129 petition with DHS, in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D). Employers with an approved TLC will have already conducted recruitment, as set forth in 20 CFR 655.40-48, to determine whether U.S. workers are qualified and available to perform the work for which H-2B workers are sought. In addition to the recruitment already conducted, employers with current labor certifications containing a start date of work before April 15, 2018, must

conduct a fresh round of recruitment for U.S. workers. As noted in the 2015 H-2B comprehensive rule, U.S. workers seeking employment in these jobs typically do not search for work months in advance, and cannot make commitments about their availability for employment far in advance of the work. *See* 80 FR 24041, 24061, 24071. Given the 75-90 day labor certification process applicable in the H-2B program generally, employer recruitment typically occurs between 40 and 60 days before the start date of employment. Therefore, employers with TLCs containing a start date of work before April 15, 2018, likely began their recruitment around February 15, 2018, and likely ended it about March 5, 2018, more than two and one half months ago. In order to provide U.S. workers a realistic opportunity to pursue jobs for which employers will be seeking foreign workers under this rule, the Departments have determined that employers with start dates of work before April 15, 2018 have not conducted recent recruitment so that the Departments can reasonably conclude that there are *currently* an insufficient number of U.S. workers qualified and available to perform the work absent an additional, though abbreviated, recruitment attempt. Although the April 15 threshold for additional recruitment identified in this rule is earlier than the June 1 date for which additional recruitment was required in the FY 2017 rule, the April 15 threshold reflects a similar timeframe between the end of the employer's recruitment and publication of the regulation as that provided under the FY 2017 rule. In the FY 2017 rule, the Departments determined that an employer's initial recruitment efforts, which occurred approximately three months before publication, could no longer be considered current without a more recent recruitment attempt. This same analysis applies to this FY 2018 rule.

Therefore, employers with still valid TLCs with a start date of work before April 15, 2018, will be required to conduct additional recruitment, and attest that the recruitment will be conducted, as follows. The employer must place a new job order for the job opportunity with the State Workforce Agency (SWA), serving the area of intended employment. The job order must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 5 days beginning not later than the next business day after submitting a petition for H-2B workers to USCIS.

<sup>20</sup> These processing goals are not binding on USCIS; depending on the evidence presented, actual processing times may vary from these 15- and 30-day periods.

<sup>21</sup> In FY 2017, USCIS used September 15th as the cutoff date for accepting petitions filed under the supplemental cap. The 15 days for processing was tied to the Premium Processing clock. However, in FY 2018, September 15, 2018 is a Saturday, when USCIS does not accept petitions. USCIS therefore revised the date to September 14th, 2018 to remain consistent with the expectation of adjudication within the premium processing clock and to avoid potential confusion and frustration from petitioners who might have otherwise expected their petitions to be received on the 15th but would instead face rejection.

<sup>22</sup> Petitioners should note that under section 205, the H-2B numerical increase relates to the total number of aliens who may receive a visa under section 101(a)(15)(H)(ii)(b) of the INA in this fiscal year.

The employer must also follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications. In addition, eligible employers will also be required to place one newspaper advertisement, which may be published online or in print on any day of the week, meeting the advertising requirements of 20 CFR 655.41, during the period of time the SWA is actively circulating the job order for intrastate clearance. Employers must retain the additional recruitment documentation, including a recruitment report that meets the requirements for recruitment reports set forth in 20 CFR 655.48(a)(1)(2) & (7), together with a copy of the attestation and supporting documentation, as described above, for a period of 3 years from the date that the TLC was approved, consistent with the document retention requirements under 20 CFR 655.56. These requirements are similar to those that apply to certain seafood employers who stagger the entry of H-2B workers under 20 CFR 655.15(f).

The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until 2 business days after the last date on which the job order is posted. The 2 business day requirement permits a brief additional period of time to enable U.S. workers to contact the employer following the job order or newspaper advertisement. Consistent with 20 CFR 655.40(a), applicants can be rejected only for lawful job-related reasons.

DOL's WHD has the authority to investigate the employer's attestations, as the attestations are a required part of the H-2B petition process under this rule and the attestations rely on the employer's existing, approved TLC. Where a WHD investigation determines that there has been a willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations, WHD may institute administrative proceedings to impose sanctions and remedies, including (but not limited to) assessment of civil money penalties, recovery of wages due, make whole relief for any U.S. worker who has been improperly rejected for employment, laid off or displaced, and/or debarment for 1 to 5 years. See 29 CFR 503.19, 503.20. This regulatory authority is consistent with WHD's existing enforcement authority and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.66, the petitioner must retain documents and records

evidencing compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

DHS has the authority to verify any information submitted to establish H-2B eligibility before or after the petition has been adjudicated by USCIS. See, e.g., INA section 103 204, and 214 (8 U.S.C. 1103, 1154, 1184) and 8 CFR part 103 and 214.2(h). DHS's verification methods may include, but are not limited to: Review of public records and information; contact via written correspondence or telephone; unannounced physical site inspections; and interviews. USCIS will use information obtained through verification to determine H-2B eligibility and assess compliance with the requirements of the H-2B program. Subject to the exceptions described in 8 CFR 103.2(b)(16), USCIS will provide petitioners with an opportunity to address any adverse or derogatory information that may result from a USCIS compliance review, verification, or site visit after a formal decision is made on a petition or after the agency has initiated an adverse action that may result in revocation or termination of an approval.

DOL's OFLC has the existing authority to conduct audit examinations on adjudicated *Applications for Temporary Employment Certification*, and verify any information supporting the employer's attestations under 20 CFR 655.70. Where an audit examination determines that there has been fraud or willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations or failure to comply with the audit examination process, OFLC may institute appropriate administrative proceedings to impose sanctions on the employer. These sanctions may result in revocation of an approved TLC, the requirement that the employer undergo assisted recruitment in future filings of an *Application for Temporary Employment Certification* for a period of up to 2 years, and/or debarment from the H-2B program and any other foreign labor certification program administered by the DOL for 1 to 5 years. See 29 CFR 655.71, 655.72, 655.73. Additionally, OFLC has the authority to provide any finding made or documents received during the course of conducting an audit examination to the DHS, WHD, IER, or other enforcement agencies. OFLC's existing audit authority is independently authorized, and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.66, the petitioner

must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

Petitioners must also comply with any other applicable laws in their recruitment, such as avoiding unlawful discrimination against U.S. workers based on their citizenship status or national origin. Specifically, the failure to recruit and hire qualified and available U.S. workers on account of such individuals' national origin or citizenship status may violate INA section 274B, 8 U.S.C. 1324b.

### III. Statutory and Regulatory Requirements

#### A. Administrative Procedure Act

This rule is issued without prior notice and opportunity to comment and with an immediate effective date pursuant to the Administrative Procedure Act (APA). 5 U.S.C. 553(b) and (d).

#### 1. Good Cause To Forgo Notice and Comment Rulemaking

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." The good cause exception for forgoing notice and comment rulemaking "excuses notice and comment in emergency situations, or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174, 1179 (D.C. Cir. 2004). Although the good cause exception is "narrowly construed and only reluctantly countenanced," *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir.1992) the Departments have appropriately invoked the exception in this case, for the reasons set forth below.

In this case, the Departments are bypassing advance notice and comment because of the exigency created by section 205 of Div. M of the Consolidated Appropriations Act, 2018 (FY 2018 Omnibus), which went into effect on March 23, 2018 and expires on September 30, 2018. USCIS received more than enough petitions to meet the H-2B visa statutory cap for the second half of the FY 2018 during the first five business days that those petitions could be filed. Therefore, USCIS conducted a lottery on February 28, 2018 to randomly select a sufficient number of petitions to meet the cap. USCIS rejected and returned the petitions and associated filing fees to petitioners that were not selected, as well as all cap-subject petitions received after February

27, 2018. Given high demand by American businesses for H-2B workers, and the short period of time remaining in the fiscal year for U.S. employers to avoid the economic harms described above, a decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, and would therefore complicate and likely preclude the Departments from successfully exercising the authority in section 205.

Courts have found “good cause” under the APA when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. Courts have held that an agency may use the good cause exception to address “a serious threat to the financial stability of [a government] benefit program,” *Nat’l Fed’n of Fed. Emps. v. Devine*, 671 F.2d 607, 611 (D.C. Cir. 1982), or to avoid “economic harm and disruption” to a given industry, which would likely result in higher consumer prices, *Am. Fed’n of Gov’t Emps. v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

Consistent with the above authorities, the Departments have bypassed notice and comment to prevent the “serious economic harm to the H-2B community,” including associated U.S. workers, that could result from ongoing uncertainty over the status of the numerical limitation, *i.e.*, the effective termination of the program through the remainder of FY 2018. See *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). The Departments note that this action is temporary in nature, *see id.*,<sup>23</sup> and includes appropriate conditions to ensure that it affects only those businesses most in need.

## 2. Good Cause To Proceed With an Immediate Effective Date

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed’n of Gov’t Emps., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th

Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement given that this rule is necessary to prevent U.S. businesses from suffering irreparable harm and therefore causing significant economic disruption.

## B. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. See 5 U.S.C. 603(a), 604(a). This final rule is exempt from notice and comment requirements for the reasons stated above. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this final rule. Accordingly, the Departments are not required to either certify that the final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

## C. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. The value equivalent of \$100 million in 1995 adjusted for inflation to 2017 levels by the Consumer Price Index for All Urban Consumer (CPI-U) is \$161 million.

This rule does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation (\$161 million in 2017 dollars), and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

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

This temporary rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996, Public Law 104–121, 804, 110 Stat. 847, 872 (1996), 5 U.S.C. 804(2). This rule has not been found to 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 or export markets.

## E. Executive Orders 12866 (Regulatory Planning and Review), 13563 (Improving Regulation and Regulatory Review), and 13771 (Reducing Regulation and Controlling Regulatory Costs)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs.

The Office of Management and Budget (OMB) has determined that this rule is a “significant regulatory action” although not an economically significant regulatory action. Accordingly, OMB has reviewed this regulation. OMB considers this final rule to be an Executive Order 13771 deregulatory action.

## 1. Summary

With this final rule, DHS is authorizing up to an additional 15,000 visas for the remainder of FY 2018, pursuant to the FY 2018 Omnibus, to be available to certain U.S. businesses under the H-2B visa classification. By the authority given under the FY 2018 Omnibus, DHS is increasing the H-2B cap for the remainder of FY 2018 for those businesses that: (1) Show that there are an insufficient number of qualified U.S. workers to meet their needs in FY 2018; and (2) attest that their businesses are likely to suffer

<sup>23</sup> Because the Departments have issued this rule as a temporary final rule, this rule—with the sole exception of the document retention requirements—will be of no effect after September 30, 2018, even if Congress includes an authority similar to section 205 in a subsequent act of Congress.



irreparable harm without the ability to employ the H-2B workers that are the subject of their petition. This final rule aims to help prevent such harm by allowing them to hire additional H-2B

workers within FY 2018. DHS estimates that the total cost of this rule ranges from \$8,027,906 (rounded) to \$10,306,023 (rounded) depending on the combination of petitions filed by

each type of filer.<sup>24</sup> Table 1 (below) provides a brief summary of the provision and its impact.

TABLE 1—SUMMARY OF PROVISION AND IMPACT

Current provision	Changes resulting from the proposed provisions	Expected cost of the proposed provision	Expected benefit of the proposed provision
The current statutory cap limits H-2B visa allocations by 66,000 workers a year.	<p>The amended provisions would allow for up to 15,000 additional H-2B visas for the remainder of the fiscal year.</p> <p>Petitioners would also be required to fill out newly created Form ETA-9142-B-CAA-2, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 205 of Div. M of the Consolidated Appropriations Act, 2018.</p>	<ul style="list-style-type: none"> <li>The total estimated cost to file Form I-129 would be \$2,024,162 (rounded) if human resource specialists file, \$2,989,687 (rounded) if in-house lawyers file, and \$4,111,474 (rounded) if outsourced lawyers file.</li> <li>If a Form I-907 is submitted as well, the total estimated cost to file for Form I-907 would be a maximum of \$3,839,617 if human resource specialists file, \$3,921,285 if in-house lawyers file, and \$4,030,421 if outsourced lawyers file.</li> <li>DHS may incur some additional adjudication costs as more applicants may file Form I-129. However, these additional costs are expected to be covered by the fees paid for filing the form.</li> <li>The total estimated cost to petitioners to complete and file Form ETA-9142-B-CAA-2 is \$2,164,127.</li> </ul>	<ul style="list-style-type: none"> <li>Eligible petitioners would be able to hire the temporary workers needed to prevent their businesses from suffering irreparable harm.</li> <li>U.S. employees of these businesses would avoid harm.</li> <li>Serves as initial evidence to DHS that the petitioner meets the irreparable harm standard.</li> </ul>

Source: USCIS and DOL analysis.

2. Background and Purpose of the Rule

The H-2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of qualified U.S. workers to perform nonagricultural work of a temporary or seasonal nature. For an H-2B nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: (1) Receive a TLC from DOL and (2) file a Form I-129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I-129.<sup>25</sup> Up to 33,000 aliens may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation will be available for employers seeking to hire H-2B workers during the second half of

the fiscal year.<sup>26</sup> Any unused numbers from the first half of the fiscal year will be available for employers seeking to hire H-2B workers during the second half of the fiscal year. However, any unused H-2B numbers from one fiscal year do not carry over into the next and will therefore not be made available.<sup>27</sup>

The H-2B cap for the second half of FY 2018 was reached on February 27, 2018. Normally, once the H-2B cap has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional cap-subject visas to become available. However, on March 23, 2018, the President signed the FY 2018 Omnibus that contains a provision (Sec. 205 of Div. M) authorizing the Secretary of Homeland Security, under certain circumstances, to increase the number of H-2B visas available to U.S.

employers, notwithstanding the established statutory numerical limitation. After consulting with the Secretary of Labor, the Secretary of Homeland Security has determined it is appropriate to exercise her discretion and raise the H-2B cap by up to an additional 15,000 visas for the remainder of FY 2018 for those businesses who would qualify under certain circumstances.

3. Population

This temporary rule would impact those employers who file Form I-129 on behalf of the nonimmigrant worker they seek to hire under the H-2B visa program. More specifically, this rule would impact those employers who could establish that their business is likely to suffer irreparable harm because they cannot employ the H-2B workers

<sup>24</sup> Calculation: Petitioner costs to file (Form I-129: \$2,024,162 (rounded) to \$4,111,474 (rounded)) + (Form I-907 \$3,839,617 to \$4,030,421) + (Form ETA-9142-B-CAA-2 \$2,164,127) = \$8,027,906 (rounded) to \$10,306,022 (rounded).

<sup>25</sup> Revised effective 1/18/2009; 73 FR 78104.

<sup>26</sup> See INA section 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B), INA section 214(g)(10) and 8 U.S.C. 1184(g)(10).

<sup>27</sup> A TLC approved by the Department of Labor must accompany an H-2B petition. The employment start date stated on the petition generally must match the start date listed on the TLC. See 8 CFR 214.2(h)(6)(iv)(A) and (D).

requested on their petition in this fiscal year. Due to the temporary nature of this rule and the limited time left for these additional visas to be available, DHS believes it is more reasonable to assume that eligible petitioners for these additional 15,000 visas will be those employers that have already completed the steps to receive an approved TLC prior to the issuance of this rule.<sup>28</sup> According to DOL OFLC's certification data for FY 2018, there were about 4,978 H-2B certifications with expected work start dates between April 1 and September 30, 2018. However, many of these certifications have already been filled under the existing cap. Of the 4,978 certifications, we estimated that 1,902 certifications would have been filled with the second semi-annual statutory cap of 33,000 visas.<sup>29</sup> We believe that the remaining certifications of 3,076 (= 4,978 - 1,902) represents the pool of employers with approved certifications that may apply for additional H-2B workers under this rule, and therefore serves as a reasonable proxy for the number of petitions we may receive under this rule.

#### 4. Cost-Benefit Analysis

The costs for this form include filing costs and the opportunity costs of time to complete and file the form. The current filing fee for Form I-129 is \$460 and the estimated time needed to complete and file Form I-129 for H-2B classification is 4.26 hours.<sup>30</sup> The time burden of 4.26 hours for Form I-129 also includes the time to file and retain documents. The application must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. 8 CFR 214.2(h)(2). Due to the expedited nature of this rule, DHS was unable to obtain data on the number of Form I-129 H-2B applications filed directly by a petitioner and those that are filed by a lawyer on behalf of the petitioner. Therefore, DHS presents a range of estimated costs including if only human resource (HR) specialists

<sup>28</sup> Note that as in the standard H-2B visa issuance process, petitioning employers must still apply for a temporary labor certification and receive approval from DOL before submitting the Form I-129 petition with USCIS.

<sup>29</sup> Between October 1, 2017, and April 15, 2018, DOL approved a total of 4,978 certifications for 86,391 H-2B positions with work start date between April and September in 2018. Therefore, we estimated that the average number of H-2B positions per certification is 17.35 (=86,391/4,978) and the number of certifications that would have been filled with the second semi-annual statutory cap of 33,000 is 1,902 (=33,000/17.35).

<sup>30</sup> The public reporting burden for this form is 2.26 hours for Form I-129 and an additional 2 hours for H Classification Supplement. See Form I-129 instructions at <https://www.uscis.gov/i-129>.

file Form I-129 or if only lawyers file Form I-129.<sup>31</sup> Further, DHS presents cost estimates for lawyers filing on behalf of applicants based on whether all Form I-129 applications are filed by in-house lawyers or by outsourced lawyers.<sup>32</sup> DHS presents an estimated range of costs assuming that only HR specialists, in-house lawyers, or outsourced lawyers file these forms, though DHS recognizes that it is likely that filing will be conducted by a combination of these different types of filers.

To estimate the total opportunity cost of time to petitioners who complete and file Form I-129, DHS uses the mean hourly wage rate of HR specialists of \$31.84 as the base wage rate.<sup>33</sup> If applicants hire an in-house or outsourced lawyer to file Form I-129 on their behalf, DHS uses the mean hourly wage rate of \$68.22 as the base wage rate.<sup>34</sup> Using the most recent Bureau of Labor Statistics (BLS) data, DHS calculated a benefits-to-wage multiplier of 1.46 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.<sup>35</sup> DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.46 to estimate the full cost of employee wages. The total per hour wage is \$46.49 for an HR specialist

<sup>31</sup> For the purposes of this analysis, DHS assumes a human resource specialist or some similar occupation completes and files these forms as the employer or petitioner who is requesting the H-2B worker. However, DHS understands that not all entities have human resources departments or occupations and, therefore, recognizes equivalent occupations may prepare these petitions.

<sup>32</sup> For the purposes of this analysis, DHS adopts the terms "in-house" and "outsourced" lawyers as they were used in the DHS, U.S. Immigration and Customs Enforcement (ICE) analysis, "Final Small Entity Impact Analysis: Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" at G-4 (posted Aug. 5, 2008), available at <http://www.regulations.gov/#!documentDetail;D=ICEB-2006-0004-0922>. The DHS ICE analysis highlighted the variability of attorney wages and was based on information received in public comment to that rule. We believe the distinction between the varied wages among lawyers is appropriate for our analysis.

<sup>33</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics, May 2017, Human Resources Specialist: <https://www.bls.gov/oes/2017/may/oes131071.htm>.

<sup>34</sup> U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics May 2017, Lawyers: <https://www.bls.gov/oes/2017/may/oes231011.htm>.

<sup>35</sup> The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour) / (Wages and Salaries per hour). See Economic News Release, U.S. Department of Labor, Bureau of Labor Statistics, Table 1. Employer costs per hour worked for employee compensation and costs as a percent of total compensation: Civilian workers, by major occupational and industry group (December 2017), available at [https://www.bls.gov/news.release/archives/eccec\\_03202018.pdf](https://www.bls.gov/news.release/archives/eccec_03202018.pdf).

and \$99.60 for an in-house lawyer.<sup>36</sup> In addition, DHS recognizes that an entity may not have in-house lawyers and therefore, seek outside counsel to complete and file Form I-129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS estimates the total per hour wage is \$170.55 for an outsourced lawyer.<sup>37</sup> If a lawyer submits Form I-129 on behalf of the petitioner, Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative), must accompany the Form I-129 submission.<sup>38</sup> DHS estimates the time burden to complete and submit Form G-28 for a lawyer is 53 minutes (0.88 hour, rounded). For this analysis, DHS adds the time to complete Form G-28 to the opportunity cost of time to lawyers for filing Form I-129 on behalf of a petitioner. Therefore, the total opportunity cost of time for an HR specialist to complete and file Form I-129 is \$198.05, for an in-house lawyer to complete and file is \$511.94, and for an outsourced lawyer to complete and file is \$876.63.<sup>40</sup> The total cost, including filing fee and opportunity costs of time, per petitioner to file Form I-129 is \$658.05 if HR specialists file, \$971.94 if an in-house lawyer files, and \$1,336.63 if an outsourced lawyer files the form.<sup>41</sup>

#### (a) Cost to Petitioners

As mentioned in *Section 3*, the population impacted by this rule is the 3,076 petitioners who may apply for up

<sup>36</sup> Calculation for the total wage of an HR specialist: \$31.84 × 1.46 = \$46.49 (rounded). Calculation for the total wage of an in-house lawyer: \$68.22 × 1.46 = \$99.60 (rounded).

<sup>37</sup> Calculation: Average hourly wage rate of lawyers × Benefits-to-wage multiplier for outsourced lawyer = \$68.22 × 2.5 = \$170.55.

<sup>38</sup> The DHS ICE "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, see page G-4 [Aug. 25, 2008] [<http://www.regulations.gov/#!documentDetail;D=ICEB-2006-0004-0922>].

<sup>39</sup> USCIS, *Filing Your Form G-28*, <https://www.uscis.gov/forms/filing-your-form-g-28>.

<sup>40</sup> Calculation if an HR specialist files: \$46.49 × (4.26 hours) = \$198.05 (rounded);

Calculation if an in-house lawyer files: \$99.60 × (4.26 hours to file Form I-129 H-2B + 0.88 hour to file Form G-28) = \$511.94 (rounded);

Calculation if an outsourced lawyer files: \$170.55 × (4.26 hours to file Form I-129 H-2B + 0.88 hour to file Form G-28) = \$876.63 (rounded).

<sup>41</sup> Calculation if an HR specialist files: \$198.05 + \$460 (filing fee) = \$658.05;

Calculation if an in-house lawyer files: \$511.94 + \$460 (filing fee) = \$971.94;

Calculation if outsourced lawyer files: \$876.63 + \$460 (filing fee) = \$1,336.63.

to 15,000 additional H-2B visas for the remainder of FY 2017. Based on the previously presented total filing costs per petitioner, DHS estimates the total cost to file Form I-129 is \$2,024,162 (rounded) if HR specialists file, \$2,989,687 (rounded) if in-house lawyers file, and \$4,111,474 (rounded) if outsourced lawyers file.<sup>42</sup> DHS recognizes that not all Form I-129 petitions are likely to be filed by only one type of filer and cannot predict how many petitions would be filed by each type of filer. Therefore, DHS estimates that the total cost to file Form I-129 could range from \$2,024,162 (rounded) to \$4,111,474 (rounded) depending on the combination of petitions filed by each type of filer.

(1) Form I-907

Employers may use Request for Premium Processing Service (Form I-907) to request faster processing of their Form I-129 petitions for H-2B visas. The filing fee for Form I-907 is \$1,225 and the time burden for completing the form is 0.5 hours. Using the wage rates established previously, the opportunity cost of time is \$23.25 for an HR specialist to file Form I-907, \$49.80 for an in-house lawyer to file, and \$85.28 for an outsourced lawyer to file.<sup>43</sup> Therefore, the total filing cost to complete and file Form I-907 per petitioner is \$1,248.25 if HR specialists file, \$1,274.80 if in-house lawyers file, and \$1,310.28 if outsourced lawyers file.<sup>44</sup> Due to the expedited nature of this rule, DHS was unable to obtain data on the average percentage of Form I-907

applications that were submitted with Form I-129 H-2B petitions. Table 2 (below) shows the range of percentages of the 3,076 petitioners who may also request their Form I-129 adjudications be premium processed as well as the estimated total cost of filing Form I-907. DHS anticipates that most, if not all, of the additional 3,076 Form I-129 petitions will be requesting premium processing due to the limited time between the publication of this rule and the end of the fiscal year. Further, as shown in table 2, the total estimated cost to complete and file a Form I-907 when submitted with Form I-129 on behalf of an H-2B worker is a maximum of \$3,839,617 if human resources specialists file, \$3,921,285 if in-house lawyers file, and \$4,030,421 if outsourced lawyers file.

TABLE 2—TOTAL COST OF FILING FORM I-907 UNDER THE H-2B VISA PROGRAM

Percent of filers requesting premium processing <sup>a</sup>	Number of filers requesting premium processing <sup>b</sup>	Total cost to filers <sup>c</sup>		
		Human resources specialist	In-house lawyer	Outsourced lawyer
25 .....	769	\$959,904	\$980,321	\$1,007,605
50 .....	1,538	1,919,809	1,960,642	2,015,211
75 .....	2,307	2,879,713	2,940,964	3,022,816
90 .....	2,768	3,455,655	3,529,156	3,627,379
95 .....	2,922	3,647,636	3,725,221	3,828,900
100 .....	3,076	3,839,617	3,921,285	4,030,421

Notes:

<sup>a</sup> Assumes that all 15,000 additional H-2B visas will be filled by 3,076 petitioners.

<sup>b</sup> Numbers and dollar amounts are rounded to the nearest whole number.

<sup>c</sup> Calculation:

(Total cost per filer of Form I-907) × Number of filers who request premium processing = Total cost to filer (rounded to the nearest dollar)

Source: USCIS analysis.

(2) Attestation Requirements

The attestation form includes recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hour, and 1 hour for retaining documents and records relating to recruitment. The petitioner must retain documents and records of a new job order for the job opportunity placed with the State Workforce Agency (SWA) and one newspaper advertisement. DOL estimates that it

would take up to one hour to file and retain documents and records relating to recruitment. Using the total per hour wage for an HR specialist (\$46.49), the opportunity cost of time for an HR specialist to complete the attestation form and to retain documents relating to recruitment is \$58.11.<sup>45</sup>

Additionally, the form requires that the petitioner assess and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent

occupation). Using the same methodology previously described for wages, the total per hour wage for a financial analyst is \$69.79.<sup>46</sup> DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records. Therefore, the total opportunity costs of time for a financial analyst to assess, document, and retain supporting evidence is \$348.95.<sup>47</sup>

As discussed previously, we believe that the estimated 3,076 remaining unfilled certifications for the latter half of FY 2018 would include all potential

<sup>42</sup> Calculation if HR specialist files: \$658.05 × 3,076 (population applying for H-2B visas) = \$2,024,161.80 = \$2,024,162 (rounded);

Calculation if an in-house lawyer files: \$971.94 × 3,076 (population applying for H-2B visas) = \$2,989,687.44 = \$2,989,687 (rounded);

Calculation if an outsourced lawyer files: \$1,336.63 × 3,076 (population applying for H-2B visas) = \$4,111,473.88 = \$4,111,474 (rounded).

<sup>43</sup> Calculation if an HR specialist files: \$46.49 × (0.5 hours) = \$23.25 (rounded);

Calculation if an in-house lawyer files: \$99.60 × (0.5 hours) = \$49.80 (rounded);

Calculation if an outsourced lawyer files: \$170.55 × (0.5 hours) = \$85.28 (rounded).

<sup>44</sup> Calculation if an HR specialist files: \$23.25 + \$1,225 = \$1,248.25;

Calculation if an in-house lawyer files: \$49.80 + \$1,225 = \$1,274.80;

Calculation if outsourced lawyer files: \$85.28 + \$1,225 = \$1,310.28.

<sup>45</sup> Calculation: \$46.49 (total per hour wage for an HR specialist) × 1.25 (time burden for the new attestation form and retaining recruitment documentation) = \$58.11.

<sup>46</sup> Calculation: \$47.80 (total per hour wage for a financial analyst, based on BLS wages) × 1.46 (benefits-to-wage multiplier) = \$69.79.

U.S. Department of Labor, Bureau of Labor Statistics, Occupational Employment Statistics *May 2017, Financial Analysts*: <https://www.bls.gov/oes/2017/may/oes132051.htm>.

<sup>47</sup> Calculation: \$69.79 (total per hour wage for a financial analyst) × 5 hours (time burden for assessing, documenting and retention of supporting evidence demonstrating the employer is likely to suffer irreparable harm) = \$348.95.

employers who might request to employ H-2B workers under this rule. This number of certifications is a reasonable proxy for the number of employers who may need to review and sign the attestation. Using this estimate for the total number of certifications, DOL estimates that the cost for HR specialists is \$178,754 and for financial analysts is \$1,073,370 (rounded).<sup>48</sup> The total cost is estimated to be \$1,252,124.<sup>49</sup>

Employers will place a new job order for the job opportunity with the SWA serving the area of intended employment for at least 5 days beginning no later than the next business day after submitting a petition for an H-2B worker and the attestation to USCIS. DOL estimates that an HR specialist (or another equivalent occupation) would spend 1 hour to prepare a new job order and submit it to the SWA.<sup>50</sup> DOL estimates the total cost of placing a new job order is \$143,003.<sup>51</sup>

Employers will also place one newspaper advertisement during the period of time the SWA is actively circulating the job order for intrastate clearance. DOL estimates that a standard job listing in an online edition of a newspaper is \$250.<sup>52</sup> The total cost if every employer placed at least one online newspaper job listing is \$769,000.<sup>53</sup>

Therefore, the total cost for the attestation form is estimated to be \$2,164,127.<sup>54</sup>

#### (b) Cost to the Federal Government

DHS anticipates some additional costs in adjudicating the additional petitions

##### <sup>48</sup> Calculations:

Cost for HR Specialists: \$46.49 (total per hour wage for an HR specialist) × 3,076 certifications × 1.25 hours = \$178,754.

Cost for Financial Analysts: \$69.79 (total per hour wage for a financial analyst) × 3,076 certifications × 5 hours = \$1,073,370.

<sup>49</sup> Calculation: \$178,754 (total cost for HR specialists) + \$1,073,370 (total cost for financial analysts) = \$1,252,124.

<sup>50</sup> The job order must address the content requirements at 20 CFR 655.18, consistent with new requirements contained in the 2016 Department of Labor Appropriations Act (Division H, Title I of Pub. L. 114-113) (2016 DOL Appropriations Act), which was enacted on December 18, 2015.

<sup>51</sup> Calculation: \$46.49 (total per hour wage for an HR specialist) × 3,076 certifications × 1 hour (time burden for placing a job order with the SWA) = \$143,003.

<sup>52</sup> Source: The Washington Post, Online Only Job Listings (35 days), page 4 available at: [https://www.washingtonpost.com/wp-stat/ad/public/static/media\\_kit/16-3729-01-jobs.pdf](https://www.washingtonpost.com/wp-stat/ad/public/static/media_kit/16-3729-01-jobs.pdf).

<sup>53</sup> Calculation: \$250 (cost of one online newspaper job listing) × 3,076 certifications = \$769,000.

<sup>54</sup> Calculation: \$1,252,124 (total cost for HR specialists and financial analysts) + \$143,003 (total cost to place job order with State Workforce Agency) + \$769,000 (total cost to place online newspaper job listings) = \$2,164,127.

submitted as a result of the increase in cap limitation for H-2B visas. However, DHS expects these costs to be covered by the fees associated with the forms.

#### (c) Benefits to Petitioners

The inability to access H-2B workers for these entities may cause their businesses to suffer irreparable harm. Temporarily increasing the number of available H-2B visas for this fiscal year may allow some businesses to hire the additional labor resources necessary to avoid such harm. Preventing such harm may ultimately rescue the jobs of any other employees (including U.S. employees) at that establishment.

#### F. Executive Order 13132 (Federalism)

This rule does 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 No. 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

#### G. 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 No. 12988, 61 FR 4729 (Feb. 5, 1996).

#### H. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act (NEPA) applies to them and if so what degree of analysis is required. DHS Directive (Dir) 023-01 Rev. 01 establishes the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508. The CEQ regulations allow federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. DHS Instruction 023-01 Rev. 01 establishes such Categorical Exclusions that DHS has found to have no such effect. Dir. 023-01 Rev. 01 Appendix A Table 1. For an action to be categorically

excluded, DHS Instruction 023-01 Rev. 01 requires the action to satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the Categorical Exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Inst. 023-01 Rev. 01 section V.B (1)-(3).

This rule temporarily amends the regulations implementing the H-2B nonimmigrant visa program to increase the numerical limitation on H-2B nonimmigrant visas for the remainder of FY 2018 based on the Secretary of Homeland Security’s determination, in consultation with the Secretary of Labor, consistent with the FY 2018 Omnibus. Generally, DHS believes that NEPA does not apply to a rule which changes the number of visas which can be issued because any attempt to analyze its impact would be largely, if not completely, speculative. The Departments cannot estimate with reasonable certainty which employers will successfully petition for employees in what locations and numbers. At most, it is reasonably foreseeable that an increase of up to 15,000 visas may be issued for temporary entry into the United States in diverse industries and locations. For purposes of the cost estimates contained in the economic analysis above, DHS bases its calculations on the assumption that all 15,000 will be issued. However, estimating the cost of document filings is qualitatively different from analyzing environmental impacts. Being able to estimate the costs per filing and number of filings at least allows a calculation. Even making that assumption, analyzing the environmental impacts of 15,000 visa recipients among a current U.S. population in excess of 323 million and across a U.S. land mass of 3.794 million square miles, would require a degree of speculation that causes DHS to conclude that NEPA does not apply to this action.

DHS has determined that even if NEPA were to apply to this action, this rule would fit within one categorical exclusion under Environmental Planning Program, DHS Instruction 023-01 Rev. 01, Appendix A, Table 1 and does not individually or cumulatively have a significant effect on the human environment. Specifically, the rule fits within Categorical Exclusion number A3(d) for rules that interpret or amend an existing regulation without changing its environmental effect.

This rule maintains the current human environment by helping to

prevent irreparable harm to certain U.S. businesses and to prevent a significant adverse effect on the human environment that would likely result from loss of jobs and income. With the exception of recordkeeping requirements, this rulemaking terminates after September 30, 2018; it is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. No further NEPA analysis is required.

#### *I. Paperwork Reduction Act*

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to OMB and obtained approval using emergency clearance procedures outlined at 5 CFR 1320.13. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information.

More specifically, this rule includes a new form, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, Form ETA-9142-B-CAA-2 that petitioners submit to DHS. Petitioners will use this form to make the irreparable harm attestation described above. The petitioner would file the attestation with DHS. In addition, the petitioner may need to advertise the positions. Finally, the petitioner will need to retain documents and records proving compliance with this implementing rule, and must provide the documents and records to DHS and DOL staff in the event of an audit or investigation. The information collection requirements associated with this rule are summarized as follows:

*Agency:* DOL-ETA.

*Type of Information Collection:* New Collection.

*Title of the Collection:* Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act.

*Agency Form Number:* Form ETA-9142-B-CAA-2.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 3,076.

*Average Responses per Year per Respondent:* 1.

*Total Estimated Number of Responses:* 3,076.

*Average Time per Response:* 6.25 hours per application.

*Total Estimated Annual Time Burden:* 19,225 hours.

*Total Estimated Other Costs Burden:* \$912,003.

#### **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.

##### *20 CFR Part 655*

Administrative practice and procedure, Employment, Employment and training, Enforcement, Foreign workers, Forest and forest products, Fraud, Health professions, Immigration, Labor, Longshore and harbor work, Migrant workers, Nonimmigrant workers, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

#### **Department of Homeland Security**

##### **8 CFR Chapter I**

For the reasons discussed in the joint preamble, part 214 of 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 continues to read as follows:

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305 and 1372; sec. 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; 48 U.S.C. 1806; 8 CFR part 2.

- 2. Effective May 31, 2018 through September 30, 2018, amend § 214.2 by adding paragraph (h)(6)(x) to read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(6) \* \* \*

(x) *Special requirements for additional cap allocations under the Consolidated Appropriations Act, 2018, Public Law 115–141.* (A) *Public Law 115–141.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2018 only, the Secretary has authorized up to an additional 15,000 aliens who may receive H-2B nonimmigrant visas pursuant to section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141. Notwithstanding section 248.2 of this part, an alien may not change status to H-2B nonimmigrant under this provision.

(B) *Eligibility.* In order to file a petition with USCIS under this paragraph (h)(6)(x), the petitioner must:

(1) Comply with all other statutory and regulatory requirements for H-2B classification, including but not limited to requirements in this section, under part 103 of this chapter, and under parts 655 of Title 20 and 503 of Title 29; and

(2) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with 20 CFR 655.64, evidencing that without the ability to employ all of the H-2B workers requested on the petition filed pursuant to this paragraph (h)(6)(x), its business is likely to suffer irreparable harm (that is, permanent and severe financial loss), and that the employer will provide documentary evidence of this fact to DHS or DOL upon request.

(C) *Processing.* USCIS will reject petitions filed pursuant to this paragraph (h)(6)(x) that are received after the numerical limitation has been reached or after September 14, 2018, whichever is sooner. USCIS will not approve a petition filed pursuant to this paragraph (h)(6)(x) on or after October 1, 2018.

(D) *Sunset.* This paragraph (h)(6)(x) expires on October 1, 2018.

(E) *Non-severability.* The requirement to file an attestation under paragraph (h)(6)(x)(B)(2) of this section is intended to be non-severable from the remainder of this paragraph (h)(6)(x); in the event that paragraph (h)(6)(x)(B)(2) of this section is enjoined or held to be invalid by any court of competent jurisdiction, this paragraph (h)(6)(x) is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

\* \* \* \* \*

**Department of Labor****Employment and Training  
Administration****20 CFR Chapter V**

Accordingly, for the reasons stated in the joint preamble, 20 CFR part 655 is amended as follows:

**PART 655—TEMPORARY  
EMPLOYMENT OF FOREIGN  
WORKERS IN THE UNITED STATES**

■ 3. The authority citation for part 655 continues to read as follows:

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n) and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(6)(iii).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C.

1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Public Law 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n) and (t), and 1184(g) and (j); sec. 303(a)(8), Public Law 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Public Law 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Public Law 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Public Law 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Public Law 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 4. Effective May 31, 2018 through September 30, 2018, add § 655.64 to read as follows:

**§ 655.64 Special eligibility provisions for Fiscal Year 2018 under the Consolidated Appropriations Act, 2018.**

An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(x) to employ H–2B workers from May 31, 2018 through September 14, 2018 must meet the following requirements:

(a) The employer must attest on Form ETA–9142–B–CAA–2 that without the ability to employ all of the H–2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(x), its business is likely to suffer irreparable harm (that is, permanent and severe financial loss), and that the employer

will provide documentary evidence of this fact to DHS or DOL upon request.

(b) An employer with a start date of work before April 15, 2018 on its approved Temporary Labor Certification must conduct additional recruitment of U.S. workers as follows:

(1) The employer must place a new job order for the job opportunity with the State Workforce Agency, serving the area of intended employment. The employer must follow all applicable State Workforce Agency instructions for posting job orders and receive applications in all forms allowed by the State Workforce Agency, including online applications (sometimes known as “self-referrals”). The job order must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 5 days beginning not later than the next business day after submitting a petition for H–2B worker(s); and

(2) The employer must place one newspaper advertisement using an online or print format on any day of the week meeting the advertising requirements of 20 CFR 655.41, during the period of time the State Workforce Agency is actively circulating the job order for intrastate clearance; and

(3) The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until 2 business days after the last date on which the job order is posted under paragraph (c)(1) of this section. Consistent with 20 CFR 655.40(a), applicants can be rejected only for lawful job-related reasons.

(c) This section expires on October 1, 2018.

(d) *Non-severability.* The requirement to file an attestation under paragraph (a) of this section is intended to be non-severable from the remainder of this section; in the event that paragraph (a) is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this section is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

■ 5. Effective May 31, 2018 through September 30, 2021, add § 655.66 to read as follows:

**§ 655.66 Special document retention provisions for Fiscal Years 2018 through 2021 under the Consolidated Appropriations Act, 2018, Public Law 115–141.**

(a) An employer that files a petition with USCIS to employ H–2B workers in fiscal year 2018 under authority of the

temporary increase in the numerical limitation under section 205 of Division M, Public Law 115–141 must maintain for a period of 3 years from the date of certification, consistent with 20 CFR 655.56 and 29 CFR 503.17, the following:

(1) A copy of the attestation filed pursuant to regulations governing that temporary increase;

(2) Evidence establishing that employer’s business is likely to suffer irreparable harm (that is, permanent and severe financial loss), if it cannot employ H–2B nonimmigrant workers in fiscal year 2018; and

(3) If applicable, evidence of additional recruitment and a recruitment report that meets the requirements set forth in 20 CFR 655.48(a)(1), (2), and (7).

DOL or DHS may inspect these documents upon request.

(b) This section expires on October 1, 2021.

**Kirstjen M. Nielsen,**

*Secretary of Homeland Security.*

**R. Alexander Acosta,**

*Secretary of Labor.*

**Note:** The following appendix will not appear in the Code of Federal Regulations.

**Appendix A—Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 205 of Division M of the Consolidated Appropriations Act, 2018 Public Law 115–141 (March 23, 2018)**

By virtue of my signature below, I *herby certify* that the following is true and correct:

(A) I am an employer with an approved labor certification from the Department of Labor seeking permission to employ H–2B nonimmigrant workers for temporary employment in the United States.

(B) I was granted temporary labor certification from the Department of Labor (DOL) for my business’s job opportunity, which required that the worker(s) *begin employment before October 1, 2018* and is currently valid.

(C) I attest that if my business cannot employ all the H–2B nonimmigrant workers requested on my Form I–129 petition before the end of this fiscal year (September 30, 2018) in the job opportunity certified by DOL, my business is likely to suffer irreparable harm (that is, permanent and severe financial loss).

(D) I attest that my business has a bona fide temporary need for all the H–2B nonimmigrant workers requested on the Form I–129 petition, consistent with 8 CFR 214.2(h)(6)(ii).

(E) If my current labor certification contains a start date of work before April 15, 2018, I will complete a new assessment of the United States labor market in advance of H–2B nonimmigrant workers coming to the United States to begin employment before October 1, 2018, as follows:

1. I will place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment that contains the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment for at least 5 days beginning not later than the next business day after submitting a petition for an H-2B nonimmigrant worker(s) and this accompanying attestation to U.S. Citizenship and Immigration Services;

2. I will place one newspaper advertisement, which may be published online or in print, on any day of the week, meeting the advertising requirements of 20 CFR 655.41, during the period of time the

SWA is actively circulating the job order for intrastate clearance; and

3. I will offer the job to any qualified and available U.S. worker who or is referred for the job opportunity until 2 business days after the last date on which the job order is posted. I understand that consistent with 20 CFR 655.40(a), applicants can be rejected only for lawful job-related reasons.

(F) I agree to retain a copy of this signed attestation form, the additional recruitment documentation, including a recruitment report that meets the requirements for recruitment reports set forth in 20 CFR 655.48(a)(1), (2) & (7), together with evidence establishing that my business meets the standard described in paragraph (C) of this

attestation, for a period of 3 years from the date of certification, consistent with the document retention requirements under 20 CFR 655.66, 20 CFR 655.56, and 29 CFR 503.17. Further, I agree to provide this documentation to a DHS or DOL official upon request.

(G) I agree to comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA-9142B and Appendix B) certified by the DOL for my business's job opportunity.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct:

1. Name of hiring or designated official of the employer ( <i>Last Name, First Name</i> ) * .....	2. *DOL Case Number *
3. Signature * .....	4. Date signed *

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**SMALL BUSINESS ADMINISTRATION**

**13 CFR Part 121**

**Class Waiver of the Nonmanufacturer Rule**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Notification of waiver of the Nonmanufacturer Rule for positive airway pressure devices.

**SUMMARY:** The U.S. Small Business Administration (SBA) is granting a class waiver of the Nonmanufacturer Rule (NMR) for Positive Airway Pressure Devices and Supplies Manufacturing. This U.S. industry comprises establishments primarily engaged in manufacturing Continuous Positive Airway Pressure (CPAP) devices, Bi-level Positive Airway Pressure (BiPAP) devices, and other products intended to treat sleep apnea by keeping a person's airways open during sleep.

**DATES:** This action is effective July 2, 2018.

**FOR FURTHER INFORMATION CONTACT:** Carol J. Hulme, Program Analyst, by telephone at 202-205-6347; or by email at [carol-ann.hulme@sba.gov](mailto:carol-ann.hulme@sba.gov).

**SUPPLEMENTARY INFORMATION:** Section 8(a)(17) and 46 of the Small Business Act (Act), 15 U.S.C. 637(a)(17) and 657, and SBA's implementing regulations require that recipients of Federal supply contracts (except those valued between \$10,000 and \$250,000) set aside for small business, service-disabled veteran-owned small business (SDVOSB), women-owned small

business (WOSB), economically disadvantaged women-owned small business (EDWOSB), historically underutilized business zones (HUBZones) or participants in the SBA's 8(a) Business Development (BD) program provide the product of a small business manufacturer or processor, if the recipient is other than the actual manufacturer or processor of the product. This requirement is commonly referred to as the Nonmanufacturer Rule (NMR). 13 CFR 121.406(b). Sections 8(a)(17)(B)(iv)(II) and 46(a)(4)(B) of the Act authorize SBA to waive the NMR for a "class of products" for which there are no small business manufacturers or processors available to participate in the Federal market.

As implemented in SBA's regulations at 13 CFR 121.1202(c), in order to be considered available to participate in the Federal market for a class of products, a small business manufacturer must have submitted a proposal for a contract solicitation or been awarded a contract to supply the class of products within the last 24 months. The SBA defines "class of products" based on a combination of (1) the six digit North American Industry Classification System (NAICS) code, (2) the four digit Product Service Code (PSC), and (3) a description of the class of products.

On February 27, 2017, SBA received a request to waive the NMR for Positive Airway Pressure Devices and Supplies under NAICS codes 339112 (surgical and medical instrument manufacturing) and 339113 (surgical appliance and supplies manufacturing), and PSC 6515 (medical and surgical instrument, equipment and supplies). According to that request, along with supporting documentation, there were no small

business manufacturers or processors of CPAP devices in the Federal market.

On September 18, 2017 (82 FR 43637), the U.S. Small Business Administration (SBA) issued a Notice of Intent to grant a class waiver for CPAP, BiPAP and other sleep apnea devices.

As revealed by the two comments submitted in response to the document, there are no small business manufacturers or processors of this product in the Federal market. The first comment, dated October 19, 2017, did not include domestic small business manufacturers capable of meeting the requirement. The second comment did not identify any manufacturers.

Therefore, in the absence of a small business manufacturer of these products, a class waiver is necessary to allow otherwise qualified regular dealers to supply the product of any manufacturer on a Federal contract set aside for small business, service-disabled veteran-owned small business (SDVOSB), women-owned small business (WOSB), economically disadvantaged women-owned small business (EDWOSB), historically underutilized business zones (HUBZones) or participants in the SBA's 8(a) Business Development (BD) program.

More information on the NMR and Class Waivers can be found at <https://www.sba.gov/contracting/contracting-officials/non-manufacturer-rule/non-manufacturer-waivers>.

**David Wm. Loines,**  
*Acting Director, Office of Government Contracting.*

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