DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 214 and 274a

[CIS No. 2788–25]

RIN 1615–AC95

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 655

[DOL Docket No. ETA–2024–0002]

RIN 1205–AC20

Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2025 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS), and Employment and Training Administration and Wage and Hour Division, U.S. Department of Labor (DOL).

ACTION: Temporary rule.

SUMMARY: DHS, in consultation with DOL, is exercising time-limited Fiscal Year (FY) 2025 authority and increasing the total number of noncitizens who may receive an H–2B nonimmigrant visa by up to 64,716 for the entirety of FY 2025. These supplemental visas will be distributed in four allocations throughout the fiscal year. This rule reserves 20,000 of these visas for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. All visas will be available only to businesses that are suffering or will suffer impending irreparable harm, as attested by the employer. In addition, DHS is again providing temporary portability flexibility.

DATES:

Effective dates: The amendments at instructions 1, 3, and 5 are effective December 2, 2024; instructions 2 and 4 amending 8 CFR 214.2 and 274a.12, respectively, are effective from December 2, 2024, through December 2, 2027; instruction 6, adding 20 CFR 655.64, is effective from December 2, 2024, through September 30, 2025; and instruction 7, adding 20 CFR 655.68, is effective from December 2, 2024, through September 30, 2028.

Petition dates: DHS will not accept any H–2B petitions under provisions related to the FY 2025 supplemental numerical allocations after September 15, 2025, and will not approve any such H–2B petitions after September 30, 2025. The provisions related to portability are only available to petitioners and H–2B nonimmigrant workers initiating employment through the end of January 24, 2026.

Comments on the Information Collection: The Office of Foreign Labor Certification within the U.S. Department of Labor will accept comments in connection with the new information collection Form ETA–9142B–CAA–9 associated with this rule until January 31, 2025. The electronic Federal Docket Management System will accept comments prior to midnight eastern time at the end of that day.

ADDRESSES: You may submit written comments on the new information collection Form ETA–9142B–CAA–9, identified by Regulatory Information Number (RIN) 1205–AC20, electronically by the following method:

Federal eRulemaking Portal: https://www.regulations.gov. Follow the instructions on the website for submitting comments.

Instructions: Include the agency's name and the RIN 1205–AC20 in your submission. All comments received will become a matter of public record and may be posted without change to *https://www.regulations.gov*. Comments submitted after the deadline for submission will not be considered. Please do not submit comments containing trade secrets, confidential or proprietary commercial or financial information, personal health information, sensitive personally identifiable information (for example, social security numbers, driver's license or state identification numbers, passport numbers, or financial account numbers), or other information that you do not want to be made available to the public. The agency reserves the right to redact or refrain from posting such information and libelous or otherwise inappropriate comments, including those that contain obscene, indecent, or profane language; that contain threats or defamatory statements; or that contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability. Please note that depending on how information is submitted through regulations.gov, the agency may not be able to redact the information and instead reserves the right to refrain from posting the information or comment in such situations.

FOR FURTHER INFORMATION CONTACT: Regarding 8 CFR parts 214 and 274a: Charles L. Nimick, Chief, Business and Foreign Workers Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 5900 Capital Gateway Drive, Camp Springs, MD 20746; telephone 240–721–3000 (this is not a toll-free number).

Regarding 20 CFR part 655 and Form ETA–9142B–CAA–9: Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Ave. NW, Room N–5311, Washington, DC 20210, telephone (202) 693–8200 (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. Executive Summary

FY 2025 H–2B Supplemental Cap

With this temporary final rule (TFR), the Secretary of Homeland Security, following consultation with the Secretary of Labor, is authorizing the release of an additional 64,716 H–2B visas for FY 2025, subject to certain conditions. The 64,716 visas are divided into the following allocations:

- For the first half of FY 2025: 20,716 immediately available visas limited to

returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. These petitions must request employment start dates on or before March 31, 2025;

• For the early second half of FY 2025 (April 1 to May 14): 19,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024 regardless of country of nationality. These early second half of FY 2025 petitions must request employment start dates from April 1, 2025, to May 14, 2025. Furthermore, employers must file these petitions no earlier than 15 days after the second half statutory cap [1] is reached;

• For the late second half of FY 2025 (May 15 to September 30): 5,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024 regardless of country of nationality. These late second half of FY 2025 petitions must request employment start dates from May 15, 2025, to September 30, 2025. Furthermore, employers must file these petitions no earlier than 45 days after the second half statutory cap is reached; and

• For the entirety of FY 2025: 20,000 visas reserved for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica (country-specific allocation) as attested by the petitioner (regardless of whether such nationals are returning workers). Employers requesting an employment start date in the first half of FY 2025 may file such petitions immediately after the publication of this TFR. Employers requesting an employment start date in the second half of FY 2025 must file such petitions no earlier than 15 days after the second half statutory cap is reached.

To qualify for the FY 2025 supplemental caps provided by this temporary final rule, eligible petitioners must:

• Meet all existing H–2B eligibility requirements, including obtaining an approved temporary labor certification (TLC) from DOL before filing the Form I–129, Petition for a Nonimmigrant Worker, with USCIS;

• Properly file the Form I–129, Petition for a Nonimmigrant Worker, with USCIS at the current filing location, on or before September 15, 2025;

• Submit an attestation affirming, under penalty of perjury, that the employer is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on the petition, and that they are seeking to employ returning workers only, unless the H–2B worker is a Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadorian, or Costa Rican national and is counted towards the 20,000 cap exempt from the returning worker requirement; and

• Prepare and retain a detailed written statement describing how the employer is suffering irreparable harm or will suffer impending irreparable harm and how evidence demonstrates irreparable harm and supports their application.

Employers filing an H–2B petition 30 or more days after the certified start date on the TLC, must attest to engaging in the following additional steps to recruit U.S. workers:

• No later than 1 business day after filing the petition, place a new job order with the relevant State Workforce Agency (SWA) for at least 15 calendar days;

• Contact the nearest American Job Center serving the geographic area where work will commence and request staff assistance in recruiting qualified U.S. workers;

• Contact the employer's former U.S. workers who left employment with the employer on or after January, 1, 2023, including those the employer furloughed or laid off, and until the date the H–2B petition is filed, disclose the terms of the job order and solicit their return to the job;

• Provide written notification of the job opportunity to the bargaining representative for the employer's employees in the occupation and area of employment, or post notice of the job opportunity at the anticipated worksite if there is no bargaining representative;

• Where the occupation is traditionally or customarily unionized, provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment, by providing a copy of the job order and requesting assistance in recruiting qualified U.S. workers for the job opportunity;

• Contact in writing and in a language understood by the worker, all U.S. workers currently employed at the place of employment, disclose the terms of the job order, and request assistance in recruiting qualified U.S. workers for the job;

• Where the employer maintains a website for its business operations, post the job opportunity in a conspicuous location on the employer's website; and

• Hire any qualified U.S. worker who applies or is referred for the job opportunity until the later of either (1) the date on which the last H–2B worker departs for the place of employment, or (2) 30 days after the last date of the SWA job order posting.

Petitioners filing H–2B petitions under this FY 2025 supplemental cap must retain documentation of compliance with the attestation requirements for 3 years from the date DOL approved the TLC and must provide the documents and records upon the request of DHS or DOL, as well as fully cooperate with any compliance reviews such as audits.

Through audits and investigations, both Departments have received evidence of employer non-compliance with the terms and conditions of the H–2B program, as well as violations of other labor and employment laws. DOL Office of Foreign Labor Certification (OFLC), DOL Wage and Hour Division (WHD), and USCIS Fraud Detection and National Security (FDNS) personnel have encountered non-compliance issues such as failure to pay the promised wage, failure to employ returning workers, failure to demonstrate irreparable harm, failure to conduct the additional recruitment steps, failure to cooperate with the audit or investigation process, and failure to accurately disclose the beneficiary's work location(s).

Such non-compliance can harm U.S. workers by undermining wages and working conditions. It also directly harms H–2B workers. Further, H–2B workers depend on ongoing employment with the petitioning employer to maintain status in the United States. This dependence creates a power imbalance between the employer and H–2B worker, making the H–2B worker particularly vulnerable to exploitation and violations. An employer's failure to cooperate with or respond to an audit or investigation severely hinders the Departments' ability to assess whether it has complied with the H–2B program requirements and to determine if any temporary foreign or U.S. workers were affected by program violations. In recognition of the substantial impact that non-compliance can have on both U.S. workers and H–2B workers, DHS and DOL intend to conduct a significant number of audits focusing on irreparable harm and other worker protection provisions. And as it

[1] The term ''statutory cap'' refers to the 66,000 cap set forth at INA section 214(g)(1)(B) or the 33,300 semiannual caps at INA section 214(g)(10).

did as part of the supplemental cap TFRs in recent years, DHS will again subject employers that have committed labor law violations in the H–2B program to additional scrutiny in the supplemental cap petition process.[2] DHS intends for this additional scrutiny to help ensure compliance with H–2B program requirements and obligations.

Specifically, falsifying information in H–2B program attestation(s) can result not only in penalties relating to perjury, but also in, among other things, a finding of fraud or willful misrepresentation; denial or revocation of the H–2B petition requesting supplemental workers; and debarment by DOL and DHS from the H–2B program and any other foreign labor programs administered by DOL. Falsifying information also may subject a petitioner/employer to other criminal and/or civil penalties.

DHS will not approve H–2B petitions filed in connection with the FY 2025 supplemental cap authority on or after October 1, 2025.

H–2B Portability

In addition to exercising its time-limited authority to make additional FY 2025 H–2B visas available, DHS is again providing additional flexibilities to H–2B petitioners under its general programmatic authority by allowing nonimmigrant workers in the United States [3] in valid H–2B status and who are beneficiaries of non-frivolous H–2B petitions received on or after January 25, 2025, or who are the beneficiaries of non-frivolous H–2B petitions that are pending as of January 25, 2025, to begin work with a new employer after an H–2B petition (supported by a valid TLC) is filed and before the petition is approved, generally for a period of up to 60 days. However, such employment authorization would end 15 days after USCIS denies the H–2B petition or such petition is withdrawn. This H–2B portability ends one year after the provision's effective date of January 25, 2025, in other words, at the end of January 24, 2026.[4]

II. Background

A. Legal Framework

The Immigration and Nationality Act (INA), as amended, 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 in such form and containing such information as the Secretary prescribes for classification of prospective temporary workers as H–2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). Generally, DHS must approve this petition before the beneficiary can be considered eligible for an H–2B visa. In addition, 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],[5] after consultation with appropriate agencies of the Government.'' INA section 214(c)(1), 8 U.S.C. 1184(c)(1). The INA generally charges the Secretary of Homeland Security with the administration and enforcement of the immigration laws, and provides that the Secretary ''shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority'' under the INA. *See* INA section 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 202(4) (charging the Secretary with ''[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States''). With respect to nonimmigrants in particular, the INA provides that ''[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe.'' INA section 214(a)(1), 8 U.S.C. 1184(a)(1); *see also* INA section 274A(a)(1) and (h)(3), 8 U.S.C. 1324a(a)(1) and (h)(3) (prohibiting employment of noncitizens [6] not authorized for employment). The Secretary may designate officers or employees to take and consider evidence concerning any matter that is material or relevant to the enforcement of the INA. INA sections 287(a)(1), (b), 8 U.S.C. 1357(a)(1), (b), and INA section 235(d)(3), 8 U.S.C. 1225(d)(3). INA section 291, 8 U.S.C. 1361, establishes that the petitioner or applicant for a visa or other immigration document bears the burden of proof with respect to eligibility and inadmissibility, including that the noncitizen is entitled to the immigration status being sought.

Finally, under section 101 of the HSA, 6 U.S.C. 111(b)(1)(F), a primary mission of DHS is to ''ensure that the overall economic security of the United States is not diminished by efforts, activities, and programs aimed at securing the homeland.''

DHS regulations provide that an approved TLC from the U.S. Department of Labor (DOL), issued pursuant to regulations established at 20 CFR part 655, or from the Guam Department of Labor if the workers will be employed on Guam, must accompany an H–2B petition for temporary employment in the United States. 8 CFR 214.2(h)(6)(iii)(A) and (C) through (E), (h)(6)(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 and 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).

[2] *See Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking to Change Employers,* 87 FR 30334, 30335 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816, 76818 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 88 FR 80394 (Nov. 17, 2023).

[3] The term ''United States'' includes the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands. INA section 101(a)(38), 8 U.S.C. 1101(a)(38).

[4] On September 20, 2023, DHS issued *Modernizing H–2 Program Requirements, Oversight, and Worker Protections,* Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066. In that NPRM, DHS proposed to extend portability to H–2A and H–2B workers on a permanent basis. The Department's proposal does not interfere with the portability provision of this rule. However, should DHS publish a final rule making H–2 portability permanent, any such provision would not expire on a specific date, unlike the portability provision made effective by this temporary final rule.

[5] 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, sec. 1517); 6 U.S.C. 542 note; 8 U.S.C. 1551 note.

[6] For purposes of this discussion, the Departments use the term ''noncitizen'' colloquially to be synonymous with the term ''alien'' as it is used in the Immigration and Nationality Act.

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

Once the petition is approved, under the INA and current DHS regulations, H–2B workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized, and the workers are limited to employment with the H–2B petitioner. *See* 8 U.S.C. 1184(c)(1), 8 CFR 274a.12(b)(9). An employer or U.S. agent generally may submit a new H–2B petition, with a new, approved TLC, to USCIS to request an extension of H–2B nonimmigrant status for the validity of the TLC or for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). Except as provided for in the preceding H–2B supplemental cap TFRs [7] and in this rule, and except for certain professional athletes being traded among organizations,[8] H–2B workers seeking to extend their status with a new employer may not begin employment with the new employer until the new H–2B petition is approved.

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 INA (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 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 maximum annual number (''statutory cap'') of noncitizens who may be issued H–2B visas or otherwise provided H–2B nonimmigrant status to perform temporary nonagricultural work is 66,000, distributed semiannually beginning in October and April. *See* INA sections 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). Accordingly, with certain exceptions as described below, up to 33,000 noncitizens 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, including any unused nonimmigrant H–2B visas from the first half of a fiscal year, are available for employers seeking to hire H–2B workers during the second half of the fiscal year.[9] If the number of petitions approved by DHS is insufficient to use all H–2B numbers in a given fiscal year, DHS cannot carry over the unused numbers for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

In FYs 2005, 2006, 2007, and 2016, Congress exempted H–2B workers identified as returning workers from the annual H–2B cap of 66,000.[10] A returning worker is an H–2B worker who was previously counted against the annual H–2B cap during a designated period of time.[11] For example, Congress designated that returning workers for FY 2016 needed to have been counted against the cap during FY 2013, 2014, or 2015 to qualify for the exemption.[12] DHS and the Department of State (DOS) worked together to confirm that all workers requested under the returning worker provision in fact were eligible for exemption from the annual cap (in other words, were issued an H–2B visa or provided H–2B status during one of the prior 3 fiscal years) and were otherwise eligible for H–2B classification.

Because of the strong demand for H–2B visas in recent years, the statutorily-limited semiannual visa allocation, the DOL regulatory requirement that employers apply for a TLC 75 to 90 days before the start date of work,[13] and the DHS regulatory requirement that an approved TLC accompany all H–2B petitions,[14] employers that wish to obtain visas for their workers under the semiannual allotment must act early to receive a TLC and file a petition with U.S. Citizenship and Immigration Services (USCIS). As a result, the date on which USCIS has reached sufficient H–2B petitions to reach the first half of the fiscal year statutory cap has generally trended earlier in recent years.[15] For FY 2022, for the first time in more than a decade, USCIS received sufficient H–2B petitions to reach the first half of the fiscal year statutory cap before the start of the fiscal year.[16] This

[7] For instance, the FY 2023 and FY 2024 H–2B supplemental cap TFRs both included a portability provision at 8 CFR 214.2(h)(29) and (31), respectively. Portability under 8 CFR 214.2(h)(31) remains in effect through January 24, 2025. *See e.g., Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 88 FR 80394 (Nov. 17, 2023).

[8] *See* 8 CFR 214.2(h)(6)(vii) and 8 CFR 274a.12(b)(9).

[9] The Federal Government's fiscal year runs from October 1 of the prior year through September 30 of the year being described. For example, fiscal year 2025 is from October 1, 2024, through September 30, 2025.

[10] *See* INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A), *see also* Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. V, sec 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109–364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, div. B, tit. IV, sec. 402.

[11] *See* INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A).

[12] *See* Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. V, sec 565.

[13] *See* 20 CFR 655.15(b).

[14] *See* 8 CFR 214.2(h)(6)(vi)(A).

[15] In fiscal years 2017 through 2021, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, and November 16, 2020, respectively. *See* USCIS, *USCIS Reaches the H–2B Cap for the First Half of Fiscal Year 2017, https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017* (Jan. 13, 2017); USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2018, https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018* (Dec. 21, 2017); USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2019, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019* (Dec. 12, 2018); USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2020, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020* (Nov. 20, 2019); USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2021, https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021* (Nov. 18, 2020).

[16] On October 12, 2021, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of fiscal year 2022, and that September 30, 2021, was the final receipt date for new cap-subject H–2B worker petitions requesting an employment start date before April 1, 2022. *See* USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2022, https://www.uscis.gov/newsroom/alerts/uscis-*

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occurred even earlier in FY 2023, when USCIS received enough H–2B petitions to reach the FY 2023 first-half statutory cap on September 12, 2022.[17] For FY 2024, USCIS received sufficient H–2B petitions to reach the first half of the fiscal year statutory cap on October 11, 2023.[18] For FY 2025, USCIS received sufficient H–2B petitions to reach the first half of the fiscal year statutory cap on September 18, 2024.[19] This trend in recent years of increased demand for H–2B workers is even more apparent in the second half of the fiscal year.[20]

Congress, in recognition of historical and current demand has, for the last several fiscal years, authorized supplemental caps.[21] The authorization for the current supplemental cap is under sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83 (Sept. 26, 2024) (FY 2025 authority), which extended the authorization previously provided in section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47 (Mar. 23, 2024) (''FY 2024 Omnibus''), as discussed below.

C. FY 2025 Public Law 118–83

On March 23, 2024, President Joseph Biden signed the FY 2024 Omnibus, which contains a provision, section 105 of Division G, Title I, 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 set forth in the INA.[22] Specifically, section 105 provides that ''the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon determining that the needs of American businesses cannot be satisfied in [FY] 2024 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor,'' may increase the total number of noncitizens who may receive an H–2B visa in FY 2024 by 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.

On September 25, 2024, Congress passed the FY 2025 authority, Public Law 118–83, which the President signed the next day. This law extends authorization under the same terms and conditions provided in section 105 of Division G, Title I of the FY 2024 Omnibus permitting the Secretary of Homeland Security to increase the number of H–2B visas available to U.S. employers in FY 2025, and expires on December 20, 2024.[23] In other words, Public Law 118–83 permits the Secretary of Homeland Security, after consultation with the Secretary of Labor, to provide up to 64,716 additional H–2B visas for FY 2025, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA, for eligible employers whose employment needs for FY 2025 cannot be met.[24] Under the Public Law 118–83 authority, DHS and DOL are jointly publishing this

reaches-h-2b-cap-for-first-half-of-fy-2022 (Oct 12, 2021).

[17] On September 14, 2022, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of fiscal year 2023, and that September 12, 2022, was the final receipt date for new cap-subject H–2B worker petitions requesting an employment start date before April 1, 2023. *See* USCIS, *USCIS Reaches H–2B Cap for the First Half of Fiscal Year 2023, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023* (Sept. 14, 2022).

[18] On October 13, 2023, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of fiscal year 2024, and that October 11, 2023, was the final receipt date for new cap-subject H–2B worker petitions requesting an employment start date before April 1, 2024. *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2024, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024* (October 13, 2023). While this date was slightly later than the prior two years, the Departments note that DOL received 2,157 applications for the first half of the FY 2024 statutory cap during the initial three-day filing window of July 3–5, 2023, covering 40,947 worker positions; a 59% increase in TLC workload when compared to the same time period in 2022. *See* DOL, *OFLC Publishes List of Randomized H–2B Applications Submitted July 3–5, 2023, for Employers Seeking H–2B Workers Starting October 1, 2023, https://www.dol.gov/agencies/eta/foreign-labor/news* (July 10, 2023).

[19] On September 19, 2024, USCIS announced that it had received sufficient petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of fiscal year 2025, and that September 18, 2024, was the final receipt date for new cap-subject H–2B worker petitions requesting an employment start date before April 1, 2025. *See* USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025* (Sept. 19, 2024). While this date was slightly later than in fiscal year 2023, the Departments note that DOL received 2,158 applications for the first half of the FY 2025 statutory cap during the initial three-day filing window of July 3–5, 2024, covering 44,238 worker positions; a 59% increase in TLC workload and 48% increase in requested worker positions when compared to the same time period for fiscal year 2023. *See* DOL, OFLC Publishes List of Randomized H–2B Applications Submitted July 3–5, 2024, for Employers Seeking H–2B Workers Starting October 1, 2024, *https://www.dol.gov/agencies/eta/foreign-labor/news* (July 9, 2024).

[20] In recent years, DOL has received an increasing number of TLC applications for an increasing number of H–2B workers with April 1 start dates: DOL received 4,500 applications on January 1, 2018, covering more than 81,600 worker positions; DOL received 5,276 applications by January 8, 2019, covering more than 96,400 worker positions; DOL received 5,677 applications during the initial three-day filing window in 2020 covering 99,362 worker positions; DOL received 5,377 applications during the initial three-day filing window in 2021 covering 96,641 worker positions; DOL received 7,875 applications by January 4, 2022, covering 136,555 worker positions; DOL received 8,693 applications during the initial three-day filing window in 2023, covering 142,796 worker positions; and DOL received 8,817 H–2B applications by January 8, 2024, covering 138,847 worker positions. *See* DOL, *Announcements, https://www.dol.gov/agencies/eta/foreign-labor/news.*

[21] *See* section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31 (FY 2017 Omnibus); section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141 (FY 2018 Omnibus); section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6 (FY 2019 Omnibus); section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94 (FY 2020 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus); section 105 of Division O of the Consolidated Appropriations Act, 2021, FY 2021 Omnibus, sections 101 and 106(3) of Division A of Public Law 117–43, Continuing Appropriations Act, 2022, and section 101 of Division A of Public Law 117–70, Further Continuing Appropriations Act, 2022 through February 18, 2022 (together, FY 2022 authority); section 204 of Division O of the Consolidated Appropriations Act, 2022, Public Law 117–103 (FY 2022 Omnibus); section 303 of Division O of the Consolidated Appropriations Act, 2023, Public Law 117–328 (FY 2023 Omnibus); Division A of Public Law 118–15, Continuing Appropriations Act, 2024 and Other Extensions Act, through November 17, 2023, as well as section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47 (FY 2024 Omnibus), signed into law on March 23, 2024, and the Continuing Appropriations and Extensions Act, 2025, sections 101(6) and 106 of Division A, Title I of Public Law 118–83 (Sept. 26, 2024).

[22] Further Consolidated Appropriations Act, 2024, Public Law 118–47 (Mar. 23, 2024).

[23] *See* secs. 101(6) and 106, Div. A, Title I, Pub. L. 118–83 (Sept. 26, 2024), and section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47 (Mar. 23, 2024) (FY 2024 Omnibus).

[24] Appropriations and authorities provided by the continuing resolutions are available for the needs of the entire fiscal year to which the continuing resolution applies, although DHS's ability to obligate funds or exercise such authorities may lapse at the sunset of such resolution. *See, e.g.,* Comments on Due Date and Amount of District of Columbia's Contributions to Special Employee Retirement Funds, B–271304 (Comp. Gen. Mar. 19, 1996) (explaining that ''a continuing resolution appropriates the full annual amount regardless of its period of duration. . . . Standard continuing resolution language makes it clear that the appropriations are available to the extent and in the manner which would be provided by the pertinent appropriations act that has yet to be enacted (unless otherwise provided in the continuing resolution).''). Consistent with this principle, DHS interprets the current continuing resolution to provide DHS with the ability to authorize additional H–2B visa numbers with respect to all of FY 2025 subject to the same terms and conditions as the FY 2024 authority at any time before the continuing resolution expires, notwithstanding the reference to FY 2024 in the FY 2024 Omnibus.

temporary final rule to authorize the issuance of no more than 64,716 additional visas for FY 2025 to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, as attested by the employer on a new attestation form. The authority to approve H–2B petitions under this FY 2025 supplemental cap expires at the end of that fiscal year. Therefore, USCIS will not approve H–2B petitions filed in connection with this FY 2025 supplemental cap authority on or after October 1, 2025.

As noted above, since FY 2017, Congress has enacted a series of public laws providing the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap beyond the annual numerical limitation set forth in section 214 of the INA. The previous statutory provisions were materially identical to section 105 of the FY 2024 Omnibus, which is the same authority provided for FY 2025 by the recent continuing resolution. During each fiscal year from FY 2017 through FY 2019, and FY 2021 through FY 2024, the Secretary of Homeland Security, after consulting with the Secretary of Labor, determined that some American businesses could not satisfy their needs in such year with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor. On the basis of these determinations, on July 19, 2017, and May 31, 2018, DHS and DOL jointly published temporary final rules for FY 2017 and FY 2018, respectively, each of which allowed an increase of up to 15,000 additional H–2B visas for those businesses that attested 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, in other words, suffer a permanent and severe financial loss.[25] USCIS approved a total of 12,294 workers for H–2B classification under petitions filed pursuant to the FY 2017 supplemental cap increase.[26] In FY 2018, USCIS received petitions for more than 15,000 beneficiaries during the first 5 business days of filing for the supplemental cap and held a lottery on June 7, 2018. The total number of H–2B workers approved toward the FY 2018 supplemental cap increase was 15,788.[27] The vast majority of the H–2B petitions received under the FY 2017 and FY 2018 supplemental caps requested premium processing (Form I–907) [28] and were adjudicated within 15 calendar days.

On May 8, 2019, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 30,000 additional H–2B visas for the remainder of FY 2019.[29] The additional visas were limited to returning workers who had been counted against the H–2B cap or were otherwise granted H–2B status in the previous three fiscal years, and for those businesses that attested to a level of need such that, if they did not receive all of the workers requested on the Form I–129, they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.[30] The Secretary determined that limiting returning workers to those who were issued an H–2B visa or granted H–2B status in the past 3 fiscal years was appropriate, as it mirrored the standard that Congress designated in previous returning worker provisions. On June 5, 2019, approximately 30 days after the supplemental visas became available, USCIS announced that it received sufficient petitions filed pursuant to the FY 2019 supplemental cap increase. USCIS did not conduct a lottery for the FY 2019 supplemental cap increase. The total number of H–2B workers approved towards the FY 2019 supplemental cap increase was 32,680.[31] The vast majority of these petitions requested premium processing and were adjudicated within 15 calendar days.

Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap in FY 2020, the Secretary did not exercise that authority. DHS initially intended to exercise its authority and, on March 4, 2020, announced that it would make available 35,000 supplemental H–2B visas for the second half of the fiscal year.[32] On March 13, 2020, then-President Trump declared a National Emergency concerning COVID–19, a communicable disease caused by the coronavirus SARS-CoV–2.[33] On April 2, 2020, DHS announced that the rule to increase the H–2B cap was on hold due to economic circumstances, and that DHS would not release additional H–2B visas until further notice.[34] DHS also noted that the Department of State had suspended routine visa services.[35]

In FY 2021, DHS in consultation with DOL determined it was appropriate to increase the H–2B cap for FY 2021 coupled with additional protections (for example, post-adjudication audits, investigations, and compliance checks), based on the demand for H–2B workers in the second half of FY 2021, continuing economic growth, the improving job market, and increased visa processing capacity by the Department of State. Accordingly, on May 25, 2021, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 22,000 additional H–2B visas for the remainder of FY 2021.[36] The supplemental visas were available only to employers that attested they were likely to suffer irreparable harm without the additional workers. The allocation of 22,000 additional H–2B visas under that rule consisted of 16,000 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2018, 2019, or 2020) and 6,000 visas that were initially reserved for nationals of the Northern Central American countries of El Salvador, Guatemala, and Honduras, who were exempt from the returning worker requirement. By August 13, 2021, USCIS had received enough petitions for returning workers to reach the additional 22,000 H–2B visas made

[25] *See 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 (July 19, 2017); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program,* 83 FR 24905, 24917 (May 31, 2018).

[26] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625.

[27] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625. The number of approved workers exceeded the number of additional visas authorized for FY 2018 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

[28] Premium processing allows for expedited processing for an additional fee. *See* INA 286(u), 8 U.S.C. 1356(u).

[29] *See Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program,* 84 FR 20005, 20021 (May 8, 2019).

[30] *See* 84 FR at 20021.

[31] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2022, TRK 10625. The number of approved workers exceeded the number of additional visas authorized for FY 2019 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

[32] *See* DHS, *DHS to Improve Integrity of Visa Program for Foreign Workers* (March 5, 2020), *https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers.*

[33] *See Proclamation 9994 of Mar. 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak,* 85 FR 15337 (Mar. 18, 2020).

[34] *See https://twitter.com/DHSgov/status/1245745115458568192?s=20.*

[35] *See https://twitter.com/DHSgov/status/1245745116528156673.*

[36] *See Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 86 FR 28198 (May 25, 2021).

available under the FY 2021 H–2B supplemental visa temporary final rule.[37] The total number of H–2B workers approved towards the FY 2021 supplemental cap increase was 30,707.[38] This total number included approved H–2B petitions for 23,937 returning workers, as well as 6,805 beneficiaries from the Northern Central American countries.[39]

On January 28, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 20,000 additional H–2B visas for FY 2022 positions with start dates on or before March 31, 2022.[40] These supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 20,000 additional H–2B visas under that rule consisted of 13,500 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 6,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. USCIS data show that the total number of H–2B workers approved towards the first half FY 2022 supplemental cap increase was 17,381, including 14,150 workers under the returning worker allocation, as well as 3,231 workers approved towards the Haitian/Northern Central American allocation.[41]

For the second half of FY 2022, DHS in consultation with DOL determined it was appropriate to increase the H–2B cap for FY 2022 positions with start dates beginning on April 1, 2022 through September 30, 2022, based on the continued demand for H–2B workers for the remainder of FY 2022, continuing economic growth, increased labor demand, and increased visa processing capacity by the Department of State. Accordingly, on May 18, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of no more than 35,000 additional H–2B visas for the second half of FY 2022.[42] As in the January 2022 TFR, the supplemental visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The allocation of 35,000 additional H–2B visas under the rule applicable to the second half of FY 2022 consisted of 23,500 visas available only to H–2B returning workers from one of the last three fiscal years (FY 2019, 2020, or 2021) and 11,500 visas reserved for Salvadoran, Guatemalan, Honduran, and Haitian nationals, who were exempted from the returning worker requirement. By May 25, 2022, USCIS had received enough petitions for returning workers to reach the additional 23,500 H–2B visas made available under the second half FY 2022 H–2B supplemental visa temporary final rule.[43] USCIS data show that the total number of H–2B workers approved towards the second half FY 2022 supplemental cap increase was 43,798, including 31,480 workers under the returning worker allocation, as well as 12,318 workers approved towards the Haitian/Northern Central American allocation.[44]

On December 15, 2022, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 64,716 additional H–2B visas for the entirety of FY 2023.[45] As in the FY 2022 TFRs, the additional visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The 64,716 additional visas included 44,716 reserved for returning workers from one of the last three fiscal years (FY 2020, 2021, or 2022), which were distributed in several allocations based on date of employer need: 18,216 for employers with requested employment start dates on or before March 31, 2023; 16,500 for employers with requested employment start dates from April 1, 2023, to May 14, 2023 (early second half allocation); and 10,000 for employers with requested employment start dates from May 15, 2023, to Sept. 30, 2023 (late second half allocation). The remaining 20,000 visas were available for the entirety of FY 2023, and were set aside for nationals of El Salvador, Guatemala, Honduras, and Haiti, who were exempt from the returning worker requirement. By January 30, 2023, USCIS received enough petitions to reach the cap for the additional 18,216 H–2B visas made available for returning workers for the first half of fiscal year, and by March 30, 2023, USCIS received enough petitions to reach the cap for the additional 16,500 H–2B visas made available for returning workers for the early second half of fiscal year.[46] USCIS data show that the total number of H–2B workers approved towards the FY 2023 supplemental cap increase was 78,302, including 54,470 workers under the returning worker allocation, as well as 23,832 workers approved towards the Haitian/Northern Central American allocation.[47]

On November 17, 2023, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 64,716 additional H–2B visas for the entirety of

[37] *See* USCIS, *Cap Reached for Remaining H–2B Visas for Returning Workers for FY 2021, https://www.uscis.gov/news/alerts/cap-reached-for-remaining-h-2b-visas-for-returning-workers-for-fy-2021* (Aug. 19, 2021).

[38] The number of approved workers exceeded the number of additional visas authorized for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

[39] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

[40] *See Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 4722 (Jan. 28, 2022); 87 FR 6017 (Feb. 3, 2022) (correction).

[41] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

[42] *See Temporary Final Rule, Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 30334 (May 18, 2022).

[43] *See* USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for Second Half of FY 2022, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022* (May 31, 2022).

[44] The number of approved workers exceeded the number of additional visas authorized for the second half of FY 2022 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

[45] *See Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022); 87 FR 77979 (Dec. 21, 2022) (correction).

[46] *See* USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the First Half of FY 2023, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2023* (Jan. 31, 2023); USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the Early Second Half of FY 2023, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2023* (Mar. 31, 2023).

[47] The number of approved workers exceeded the number of additional visas authorized for FY 2023 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

FY 2024.[48] As in the FY 2023 TFR, the additional visas were available only to employers that attested they were suffering or would suffer impending irreparable harm without the additional workers. The 64,716 additional visas included 44,716 reserved for returning workers from one of the last three fiscal years (FY 2021, 2022, or 2023), which were distributed in several allocations based on date of employer need: 20,716 for employers with requested employment start dates on or before March 31, 2024; 19,000 for employers with requested employment start dates from April 1, 2024, to May 14, 2024 (early second half allocation); and 5,000 for employers with requested employment start dates from May 15, 2024, to September 30, 2024 (late second half allocation). The remaining 20,000 visas were available for the entirety of FY 2024, and were set aside for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, who were exempt from the returning worker requirement. By January 9, 2024, USCIS received enough petitions to reach the cap for the additional 20,716 H–2B visas made available for returning workers for the first half of fiscal year, and by April 17, 2024, USCIS received enough petitions to reach the cap for the additional 19,000 H–2B visas made available for returning workers for the early second half of fiscal year.[49] USCIS data show that the total number of H–2B workers approved towards the FY 2024 supplemental cap increase was 85,577, including 61,102 workers under the returning worker allocation, as well as 24,475 workers approved towards the country-specific allocation.[50]

Once again, DHS, in consultation with DOL, believes that it is appropriate to increase the H–2B cap for FY 2025 based on the demand for H–2B workers in the first half of FY 2025, anticipated demand for the second half of FY 2025, recent economic growth, and strong labor demand.[51] Similar to the preceding temporary rule, DHS and DOL also believe that it is appropriate and important to couple this cap increase with additional worker protections, as described below.

D. Joint Issuance of the Final Rule

As in prior years, DHS and DOL (the Departments) have determined that it is appropriate to jointly issue this temporary final rule.[52] The determination to issue the temporary final rule jointly follows 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.[53] Although DHS and DOL each have authority to independently issue rules implementing their respective duties under the H–2B program,[54] the Departments are implementing the numerical increase 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 INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and delegated functions under INA sections 103(a)(6) and 214(c)(14)(B), 8 U.S.C. 1103(a)(6), 1184(c)(14)(B).[55]

III. Discussion

A. Statutory Determination

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that some U.S. employers cannot satisfy their needs in FY 2025 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with the FY 2025 continuing resolution extending the authority provided in section 105 of the FY 2024 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 through the end of FY 2025 by up to 64,716 additional visas for those American businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm, in other words, a permanent and severe financial loss, without the ability to employ all of the H–2B workers requested on their petition. These businesses must retain documentation, as described below, supporting this attestation.

As in connection with H–2B supplemental visa temporary final rules in recent years, and consistent with existing authority, DHS and DOL intend to conduct a significant number of audits with respect to petitions filed under this TFR requesting supplemental H–2B visas during the period of temporary need. The Departments will use their discretion to select which petitions to audit, and the Departments will use the audits to verify compliance with H–2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. If the Departments find that an employer's documentation does not meet the irreparable harm standard, or that the employer fails to provide

[48] *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 88 FR 80394 (Nov. 17, 2023).

[49] *See* USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the First Half of FY 2024, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2024* (Jan. 12, 2024); USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the Early Second Half of FY 2024, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2024* (Apr. 18, 2024).

[50] The number of approved workers exceeded the number of additional visas authorized for FY 2024 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. *See* DHS, USCIS, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

[51] The term ''strong labor demand'' in this context relies on the most recently released figure from a Bureau of Labor Statistics (BLS) survey at the time this TFR was written. The BLS Job Openings and Labor Turnover Survey (JOLTS) reports 9.6 million job openings in August 2023. *See* DOL, BLS, Job Openings and Labor Turnover—August 2023, *https://www.bls.gov/news.release/archives/jolts_10032023.htm.*

[52] *See Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program,* 82 FR 32987 (Jul. 19, 2017); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program,* 83 FR 24905 (May 31, 2018); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program,* 84 FR 20005 (May 8, 2019); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 86 FR 28198 (May 25, 2021); *Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 4722 (Jan. 28, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for Second Half of FY 2022 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 30334 (May 18, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 88 FR 80394 (Nov. 17, 2023).

[53] *See Outdoor Amusement Bus. Ass'n* v. *Dep't of Homeland Sec.,* 983 F.3d 671 (4th Cir. 2020), cert. denied, 142 S. Ct. 425 (2021); *see also Temporary Non-Agricultural Employment of H–2B Aliens in the United States,* 80 FR 24041, 24045 (Apr. 29, 2015).

[54] *See Outdoor Amusement Bus. Ass'n,* 983 F.3d at 684–89.

[55] *See* 8 CFR 214.2(h)(6)(iii)(A) and (C), (h)(6)(iv)(A).

evidence demonstrating irreparable harm or comply with the audit process, the Departments may consider it to be a willful violation resulting in an adverse agency action against the employer, including revocation of the TLC or program debarment. Of the audits completed so far, some audits conducted of employers that received visas under past supplemental caps revealed concerns surrounding payment of the promised wage, employment of returning workers, documentation of irreparable harm, need for all requested workers, employment for the reported number of hours and employment at the listed location, recruitment of U.S. workers, and cooperation with the audit process, which may warrant further review and action.

Based on the insufficient responses and evidence generally provided in response to these audits, which indicate a lack of compliance with the audit process and program requirements, DOL has added clarifying language to the regulatory text at 20 CFR 655.64(a)(1) and (a)(5) to provide more information on how employers can provide sufficient evidence to establish irreparable harm in response to an audit or investigation and further explain how failing to respond to audits or failing to establish compliance with H–2B program requirements can result in debarment from the program and all programs administered by OFLC, consistent with the Department's regulations at 20 CFR 655.70 and 20 CFR 655.73. While the requirements remain the same, DOL believes adding these clarifications would benefit the public and regulated community at large.

As he did in recent years, the Secretary of Homeland Security has also again determined, following consultation with the Secretary of Labor, that for certain employers, additional recruitment steps are necessary to confirm that there are no qualified U.S. workers available for the positions. In addition, the Secretary of Homeland Security has determined, following consultation with the Secretary of Labor, that the supplemental visas will be limited to returning workers, with the exception that up to 20,000 of the 64,716 visas will be exempt from the returning worker requirement and, similar to FY 2024, will be reserved for H–2B workers who are nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica.[56] DHS is reserving these 20,000 H–2B visas for nationals of these countries to further the United States' objectives in the Western Hemisphere to manage irregular migration through various lines of efforts including increasing and expanding access to lawful pathways for nationals of countries that have extensively collaborated with the United States on migration issues, such as through endorsing the Los Angeles Declaration on Migration and Protection (L.A. Declaration),[57] joining the United States to ramp up efforts to address the irregular migration flows through the Darien,[58] and hosting Safe Mobility Offices (SMOs) so that migrants do not trek north to the U.S. Southwest Border.[59] The 20,000 set-aside will also deliver on the objectives of E.O. 14010, which, among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for nationals of the Northern Central American countries.[60] DHS is also allocating these visas to specific countries to further promote development and economic stability of these countries to reduce irregular migration throughout the Western Hemisphere.[61]

DHS observed robust employer interest in response to the FY 2021 H–2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 and FY 2023 supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, with USCIS approving petitions on behalf of 6,805 beneficiaries under the FY 2021 allocation,[62] 3,231 beneficiaries under

[56] These conditions and limitations are not inconsistent with sections 214(g)(3) (''first in, first out'' H–2B processing) and (g)(10) (fiscal year H–2B allocations) because noncitizens covered by the special allocation under section 105 of the FY 2024 Omnibus are not ''subject to the numerical limitations of [section 214(g)(1)].'' *See, e.g.,* INA section 214(g)(3); INA section 214(g)(10); Continuing Appropriations Act, 2025, div. A, sec. 101(6) (extending the authority provided in FY 2024 Omnibus div. G, sec. 3105 (''Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the [INA] . . . .'')).

[57] The White House, Los Angeles Declaration on Migration and Protection, June 10, 2022, *https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/los-angeles-declaration-on-migration-and-protection/.* On May 7, 2024, Guatemala hosted the third Los Angeles Declaration Ministerial with foreign ministers and senior representatives from 21 endorsing countries, including U.S. Secretary of State Antony Blinken. The White House, *Fact Sheet: Third Ministerial Meeting on the Los Angeles Declaration Migration and Protection in Guatemala* (May 7, 2024), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/07/fact-sheet-third-ministerial-meeting-on-the-los-angeles-declarationon-migration-and-protection-in-guatemala/.* On September 25, the United States hosted the fourth Los Angeles Declaration Ministerial with foreign ministers and senior representatives from the other 21 endorsing countries. The White House, *Fact Sheet: Fourth Ministerial Meeting on the Los Angeles Declaration Migration and Protection* (September 26, 2024), available at *https://www.whitehouse.gov/briefing-room/statements-releases/2024/09/26/fact-sheet-fourth-ministerial-meeting-on-the-los-angeles-declaration-on-migration-and-protection/.*

[58] *Trilateral Joint Statement,* April 11, 2023, *https://www.dhs.gov/news/2023/04/11/trilateral-joint-statement.*

[59] The White House, *Joint Statement from the United States and Guatemala on Migration* (June 1, 2023), *https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/;* United States Department of State, *U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 4, 2023), *https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/;* The White House, *Readout of Principal Deputy National Security Advisor Jon Finer's Meeting with Colombian Foreign Minister Alvaro Leyva* (June 11, 2023), *https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finers-meeting-with-colombian-foreign-minister-alvaro-leyva/;* United States Department of State, *U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 12, 2023), *https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/; United States Department of State, Announcement of Safe Mobility Office in Ecuador (October 19, 2023), https://www.state.gov/announcement-of-safe-mobility-office-in-ecuador/#:~:text=The%20United%20States%20is%20pleased,authorized%20channels%20of%20lawful%20migration.*

[60] *See* Section 3(c) of E.O. 14010, Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, signed February 2, 2021, *https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf.* E.O. 14010 referred to the three countries of El Salvador, Guatemala, and Honduras as the ''Northern Triangle,'' but this rule refers to these countries collectively as the Northern Central American countries.

[61] *See https://twitter.com/DHSgov/status/1580310211931144194?ref_src=twsrc%5Etfw* (this supplemental allocation to workers from Haiti, Honduras, Guatemala, and El Salvador ''advances the Biden Administration's pledge, under the L.A. Declaration to expand legal pathways as an alternative to irregular migration''); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S, Government and Foreign Partner Deliverables, https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/* (addressing several measures, including the H–2B allocation for nationals of Haiti, as part of ''the President's commitment to support the people of Haiti.''). We also note Congress' statement, in a provision within the FY 2022 Omnibus, that it is the policy of the United States to support the sustainable rebuilding and development of Haiti. *See* Section 102 of Division V of the Consolidated Appropriations Act, 2022, Public Law 117–103. *See also* DHS, *Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 86 FR 62562 (Nov. 10, 2021) (sustainable development and the stability of Haiti is vital to the interests of the United States as a close partner and neighbor).

[62] While USCIS approved a greater number of beneficiaries from the Northern Central American

the FY 2022 first half supplemental allocation,[63] 12,318 beneficiaries for the second half of the fiscal year FY 2022, and 23,832 beneficiaries under the FY 2023 allocation.[64] DHS also observed robust employer interest in response to the FY 2024 H–2B supplemental visa allocation for Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadoran, and Costa Rican nationals. For FY 2024, USCIS approved 24,475 beneficiaries under the country-specific allocation.[65] In addition, the Biden-Harris administration has conducted outreach efforts to ensure U.S. businesses are able to address their labor needs by utilizing this country specific allocation for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica while at the same time promoting the availability of this lawful pathway for nationals of these countries seeking economic opportunity in the United States.[66]

DHS will not accept and will reject petitions submitted for the country-specific allocation with a date of need on or after April 1, 2025, that are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2025 is met or are received after the applicable numerical limitation has been reached or after September 15, 2025. Requiring petitioners to wait to submit H–2B supplemental cap petitions with start dates of need on or after April 1, 2025, is consistent with the supplemental cap authority in section 105 of the FY 2024 Omnibus, as extended to FY 2025 by Public Law 118–83 (September 26, 2024), and will facilitate the orderly intake and processing of supplemental cap petitions for the country-specific allocation. As discussed above, similar limitations apply to the intake and processing of returning worker petitions with start dates of need on or after April 1, 2025.

Similar to previous temporary final rules, the Secretary of Homeland Security has also determined to limit the supplemental visas to H–2B returning workers,[67] unless the employer indicates on the new attestation form that it is requesting workers who are nationals of one of the specified countries and who are therefore counted towards the 20,000 country-specific allocation regardless of whether they are new or returning workers. If the 20,000 country-specific allocation is reached and visas remain available under the returning worker cap, USCIS would reject a petition seeking workers under the 20,000 allocation and return any fees submitted to the petitioner. In such a case, a petitioner may continue to request workers who are nationals of one of these countries, but the petitioner must file a new Form I–129 petition, with fee, and attest that these noncitizens will be returning workers, in other words, workers who were issued H–2B visas or were otherwise granted H–2B status in FY 2022, 2023, or 2024.[68] Like the temporary final rules in recent years, if the 20,000 returning worker exemption cap for specific nationals remains unfilled, DHS will *not* make unfilled visas reserved for these nationals available to the general returning worker cap. The DHS decision not to make available unfilled visas from the country-specific allocation to the general supplemental cap for returning workers is consistent with the administration's goal of providing a lawful pathway for such nationals to temporarily work in the United States. To that end, not permitting rollover into the returning worker allocation provides employers with more time to petition for, and bring in, workers from these countries and encourages full use of the 20,000 country-specific allocation to meet employer needs. This, in turn, contributes to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States.

The Secretary of Homeland Security's determination to increase the numerical limitation is based, in part, on the conclusion that some businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on their petition. As stated in prior TFRs, in the past, members of Congress have informed the Secretaries of Homeland Security and Labor about the needs of some U.S. businesses for H–2B workers (after the statutory cap for the relevant half of the fiscal year has been reached) and about the potentially negative impact on state and local economies if the cap is not increased.[69] U.S. businesses, chambers of commerce, employer organizations, and state and local elected officials have also previously expressed concerns to the DHS and Labor Secretaries regarding the unavailability of H–2B visas after the statutory cap was reached.[70] In addition, while DHS did not request comments for the FY 2024 TFR, several commenters on the FY 2023 TFR supported the Departments' decision to publish one rule covering the entire

countries than the 6,000 visas allocated under the FY 2021 supplemental cap for those countries, the Department of State issued 3,079 visas to nationals from those countries. *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023. This discrepancy can be attributed to adverse impacts on consular processing caused by the COVID–19 pandemic, travel restrictions, as well as lack of readily available processes to efficiently match workers from Northern Central American countries with U.S. recruiters/employers on an expedited timeline.

[63] *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

[64] *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023. While USCIS approved a greater number of beneficiaries from the Northern Central American countries and Haiti than the 11,500 visas allocated under the FY 2022 second half supplemental cap for those countries, the Department of State issued approximately 7,405 visas to nationals from those countries. Similarly, while USCIS approved a greater number of beneficiaries from the Northern Central American countries and Haiti than the 20,000 visas allocated under the FY 2023 supplemental cap for those countries, the Department of State issued approximately 16,713 visas to nationals from those countries.

[65] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221. While USCIS approved a greater number of beneficiaries under the country-specific allocation than the 20,000 visas allocated, the Department of State issued approximately 17,695 visas under this allocation. *Id.*

[66] *See, e.g.,* USAID, *Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H–2 Visa Side Event, https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa* (June 9, 2022) (''Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a record number of H–2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H–2B visas issued across all three countries.''); USCIS, *H–2B Visa Program: Overview and Country Specific Allocations Recruitment Webinar, https://www.uscis.gov/outreach/upcoming-national-engagements/h-2b-visa-program-overview-and-country-specific-allocations-recruitment-webinar (March 7, 2024).*

[67] For purposes of this rule, these returning workers could have been H–2B cap exempt or extended H–2B status in FY 2022, 2023, or 2024. Additionally, they may have been previously counted against the annual H–2B cap of 66,000 visas during FY 2022, 2023, or 2024, or the supplemental caps in FY 2022, 2023, or 2024.

[68] The returning worker allocations are for workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. Therefore, a petitioner may choose to petition for Salvadoran, Guatemalan, Honduran, Haitian, Colombian, Ecuadorian, or Costa Rican nationals who meet this requirement under an available returning worker allocation, regardless of whether the separate 20,000 allocation for these nationals has been reached.

[69] *See, e.g., Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022).

[70] These letters were retained in the administrative record for those rules.

fiscal year for 2023, and urged the Departments to once again publish one rule covering the entire fiscal year for 2024 in order to save time in the second half of the fiscal year, conserve limited agency resources, and reduce uncertainty for employers.[71]

After considering the full range of evidence and diverse points of view, the Secretary of Homeland Security has deemed it appropriate to take action to prevent further severe and permanent financial loss for those employers currently suffering irreparable harm and to avoid impending irreparable harm for other employers unable to obtain H–2B workers under the statutory cap, including potential wage and job losses by their U.S. workers, as well as other adverse downstream economic effects.[72] At the same time, the Secretary of Homeland Security believes it is appropriate to condition receipt of supplemental visas on adherence to additional worker protections, as discussed below.

The decision to afford the benefits of this temporary cap increase to U.S. businesses that need H–2B workers because they are suffering irreparable harm already or will suffer impending irreparable harm, and that will comply with additional worker protections, rather than applying the cap increase to any and all businesses seeking temporary workers, is consistent with DHS's time-limited authority to increase the cap, as explained below. The Secretary of Homeland Security, in implementing section 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, and determining the scope of any such increase, has broad discretion, following consultation with the Secretary of Labor, to identify the business needs that are most relevant, while bearing in mind the need to protect U.S. workers.[73] Within that context, for the below reasons, the Secretary of Homeland Security has determined to allow an overall increase of up to 64,716 additional visas solely for the businesses facing permanent, severe financial loss or those who will face such loss in the near future.[74]

First, as explained in earlier TFRs, DHS has long interpreted the reference to ''the needs of American businesses'' reiterated in section 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, as describing a need different from the need ordinarily required of employers in petitioning for an H–2B worker. Under the generally applicable H–2B program, each individual H–2B 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. The use of the phrase ''needs of American businesses,'' which is not found in INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), or the regulations governing the standard H–2B cap, authorizes the Secretary of Homeland Security in allocating additional H–2B visas under section 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, to require that employers establish a need above and beyond the normal standard under the H–2B program, that is, an inability to find sufficient qualified U.S. workers willing and available to perform temporary services or labor and that the employment of the H–2B worker will not adversely affect the wages and working conditions of U.S. workers, *see* 8 CFR 214.2(h)(6)(i)(A). DOL concurs with this interpretation. Accordingly, the Secretaries have determined that it is appropriate, within the limits discussed below, to tailor the availability of this temporary cap increase to those businesses that are suffering irreparable harm or will suffer impending irreparable harm, in other words, those facing permanent and severe financial loss.

Second, the approach set forth in this rule, which is similar to the implementation of the supplemental caps in previous fiscal years, provides protections against adverse effects on U.S. workers that may result from a cap increase, including, as in previous rules, requiring employers seeking H–2B workers under the supplemental cap to engage in additional recruitment efforts for U.S. workers.

In sum, this rule increases the numerical limitation by up to 64,716 additional H–2B visas for the entirety of FY 2025, but also restricts the availability of those additional visas by prioritizing only the most significant business needs, and limiting eligibility to H–2B returning workers, unless the worker is a national of one of the countries included in the 20,000 country-specific allocation that is exempt from the returning worker limitation. This rule also distributes the supplemental visas in several allocations to assist U.S. businesses that need workers to begin work on different start dates. These provisions are each described in turn below.

B. Numerical Increase and Allocations for Fiscal Year 2025

Making the Maximum Number of Visas Available

The increase of up to 64,716 visas will help address the urgent needs of eligible employers for additional H–2B workers for those employers with employment needs in fiscal year 2025.[75] The

[71] See the docket for *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022) for access to these comments.

[72] *See, e.g., Impacts of the H–2B Visa Program for Seasonal Workers on Maryland's Seafood Industry and Economy,* Maryland Department of Agriculture Seafood Marketing Program and Chesapeake Bay Seafood Industry Association (March 2, 2020), *https://mda.maryland.gov/documents/2020-H2B-Impact-Study.pdf* (last visited Sept. 29, 2023); *Hospitality Employment Rose in May, But Hoteliers Report Lingering Labor Woes,* Hotel Dive (Jun. 7, 2023), *https://www.hoteldive.com/news/hotel-employment-labor-shortage-increased-wage/652308/* (last visited Oct. 2, 2023); *Feds Double Seasonal Worker Visas Ahead of 2024 Crab Season,* Chesapeake Bay Magazine (Nov. 7, 2023, *https://www.chesapeakebaymagazine.com/feds-double-seasonal-worker-visas-ahead-of-2024-crab-season/;* Senator Chris Van Hollen, *Van Hollen Meets with Eastern Shore Crab Houses, Highlights Efforts to Support Seafood Industry's Employment Needs* (March 21, 2024), *https://www.vanhollen.senate.gov/news/press-releases/van-hollen-meets-with-eastern-shore-crab-houses-highlights-efforts-to-support-seafood-industrys-employment-needs;* HotelDive, *Hotel Employment Rose in May, But Owners' Labor Woes Remained* (June 11, 2024), *https://www.hoteldive.com/news/hotel-employment-labor-challenges/718560/.*

[73] Congress has delegated to DHS the broad authority to administer and enforce the immigration laws in title 8 of the U.S.C. as well as other immigration and naturalization laws. *See, e.g.,* INA sec. 103(a)(1), 214(a)(1), (c)(1); 8 U.S.C. 1103(a)(1), 1184(a)(1), (c)(1); *see Loper Bright Enterprises* v. *Raimondo,* 144 S. Ct. 2244, 2263 (2024) (''In a case involving an agency, of course, the statute's meaning may well be that the agency is authorized to exercise a degree of discretion. Congress has often enacted such statutes. For example, some statutes 'expressly delegate' to an agency the authority to give meaning to a particular statutory term. Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.' '') (cleaned up and internal citations omitted).

[74] The statute explicitly provides that the Secretary of Homeland Security, after consulting with the Secretary of Labor, and upon the determination that the needs of United States businesses cannot be satisfied during fiscal year 2025 with U.S. workers to perform temporary nonagricultural labor, may determine the appropriate number of H–2B supplemental visas to be issued in fiscal year 2025, limited to the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program. Consistent with the discretion afforded thereunder by Congress, and commensurate with authorities including those afforded under section 103 and 214 of the INA, 8 U.S.C. 1103 and1184, DHS, in consultation with DOL, is making available additional H–2B temporary nonagricultural worker visas for fiscal year 2025, as in past years, to employers who are suffering irreparable harm or will suffer impending irreparable harm. *See Loper Bright Enterprises* v. *Raimondo,* 144 S. Ct. at 2263 (2024).

[75] 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* (emphasis added), and section 214(g)(10) of the INA, 8 U.S.C.

determination to make available up to 64,716 additional H–2B visas reflects a balancing of a number of factors including: the demand for H–2B visas during the first half of FY 2025 and expected demand for the second half of FY 2025; current labor market conditions; the general trend of increased demand for H–2B visas from FY 2017 to FY 2024; H–2B returning worker data; the amount of time for employers to hire and obtain H–2B workers in this fiscal year; and the objectives of the Biden-Harris Administration to address the root causes of irregular migration as outlined in E.O. 14010 and the L.A. Declaration. DHS believes the numerical increase both addresses the needs of U.S. businesses and, as explained in more detail below, furthers the foreign policy interests of the United States.

Section 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, sets the highest number of H–2B returning workers who were exempt from the cap in certain previous years as the maximum limit for any increase in the H–2B numerical limitation for FY 2025.[76] 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 such 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 statutory 66,000 cap. The highest number of H–2B returning workers approved was 64,716 in FY 2007. In setting the number of additional H–2B visas to be made available for FY 2025, DHS considered this number, overall indications of increased need, and the availability of U.S. workers, as discussed below. On the basis of these considerations, DHS determined that it is appropriate to make available up to 64,716 additional visas, which is the maximum allowed, under the FY 2025 supplemental cap authority. The Secretary further considered the objectives the Biden-Harris Administration to address the root causes of irregular migration consistent with the E.O. 14010 and the L.A. Declaration, and managing migration through expansion of lawful pathways while increasing the consequences for those who do not use these pathways and unlawfully enter the United States.[77] Accordingly, the Secretary determined that it is appropriate to reserve up to 20,000 of the up to 64,716 additional visas and exempt this number from the returning worker requirement for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.

In past years, the number of beneficiaries covered by H–2B petitions filed exceeded the number of additional visas allocated under recent supplemental caps. In FY 2018, USCIS received petitions for approximately 29,000 beneficiaries during the first 5 business days of filing for the 15,000 supplemental cap. USCIS therefore conducted a lottery on June 7, 2018, to randomly select petitions that it would accept under the supplemental cap. Of the selected petitions, USCIS issued approvals for 15,672 beneficiaries.[78] In FY 2019, USCIS received sufficient petitions for the 30,000 supplemental cap on June 5, 2019, but did not conduct a lottery to randomly select petitions that it would accept under the supplemental cap. Of the petitions received, USCIS issued approvals for 32,717 beneficiaries. In FY 2021, USCIS received a sufficient number of petitions for the 22,000 supplemental cap on August 13, 2021, including a significant number for workers from Northern Central American countries.[79] Of the petitions received, USCIS issued approvals for 30,707 beneficiaries, including approvals for 6,805 beneficiaries under the allocation for the nationals of the Northern Central American countries.[80]

In FY 2022, DHS made the supplemental cap available twice, once in January 2022 and again in May 2022. Under the earlier FY 2022 supplemental cap for petitions with start dates in the first half of FY 2022, USCIS had issued approvals for 17,381 beneficiaries, including approvals for 3,231 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.[81] For the second half of FY 2022, within the first five business days of filing, USCIS received petitions for more beneficiaries than the additional 23,500 supplemental visas made available for returning workers, thus necessitating a random selection of petitions to meet the returning worker allotment.[82] Of the

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 105 of the FY 2024 Omnibus 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 105 of the FY 2024 Omnibus to change to H–2B status from another nonimmigrant status. *See* INA section 248, 8 U.S.C. 1258; *see also* 8 CFR part 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 noncitizen 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.

[76] 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).

[77] *See Circumvention of Lawful Pathways,* 88 FR 31314 (May 16, 2023); *Securing the Border,* 89 FR 81156, (Oct. 7, 2025).

[78] USCIS recognizes it may have received petitions for more than 29,000 supplemental H–2B workers if the cap had not been exceeded within the first 5 days of opening. However, DHS estimates that not all of the 29,000 workers requested under the FY 2018 supplemental cap would have been approved and/or issued visas. For instance, although DHS approved petitions for 15,672 beneficiaries under the FY 2018 cap increase, the Department of State data shows that as of January 15, 2019, it issued only 12,243 visas under that cap increase. Similarly, DHS approved petitions for 12,294 beneficiaries under the FY 2017 cap increase, but the Department of State data shows that it issued only 9,160 visas.

[79] On June 3, 2021, USCIS announced that it had received enough petitions to reach the cap for the additional 16,000 H–2B visas made available for returning workers only, but that it would continue accepting petitions for the additional 6,000 visas allotted for nationals of the Northern Central American countries. *See* USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for FY 2021, https://www.uscis.gov/news/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-fy-2021* (Jun. 3, 2021). On July 23, 2021, USCIS announced that, because it did not receive enough petitions to reach the allocation for the Northern Central American countries by the July 8 filing deadline, the remaining visas were available to H–2B returning workers regardless of their country of origin. *See* USCIS, *Employers May File H–2B Petitions for Returning Workers for FY 2021, https://www.uscis.gov/news/alerts/employers-may-file-h-2b-petitions-for-returning-workers-for-fy-2021* (Jul. 23, 2021).

[80] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122. The number of approved workers exceeded the number of additional visas authorized for FY 2018, FY 2019, as well as for FY 2021 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. Unlike these past supplemental cap TFRs, petitions filed under the first half FY 2022 TFR did not exceed the additional allocation of 20,000 H–2B visas provided by that rule.

[81] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2023, TRK 13122.

[82] *See* USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for Second Half of FY*

Continued

petitions received for the second half of FY 2022, USCIS issued approvals for 43,798 beneficiaries, including approvals for 12,318 beneficiaries under the allocation for nationals of the Northern Central American countries and Haiti.[83]

In FY 2023, USCIS received enough petitions to reach the cap for the additional 18,216 H–2B visas made available for returning workers for the first half of fiscal year by January 30, 2023, and USCIS received enough petitions to reach the cap for the additional 16,500 H–2B visas made available for returning workers for the early second half of fiscal year by March 30, 2023.[84] Of the petitions for supplemental H–2B visas in FY 2023, USCIS issued approvals for 78,302 beneficiaries, including 7,157 beneficiaries under the allocation of 10,000 visas made available for returning workers for the late second half of the fiscal year and 23,832 beneficiaries under the allocation of 20,000 visas reserved for nationals of the Northern Central American countries and Haiti.[85]

In FY 2024, USCIS received a sufficient number of H–2B petitions to reach the first half of the FY 2024 fiscal year statutory cap on October 11, 2023.[86] USCIS received enough petitions to reach the cap for the additional 20,716 H–2B visas made available for returning workers for the first half of fiscal year by January 9, 2024, and USCIS received enough petitions to reach the cap for the additional 19,000 H–2B visas made available for returning workers for the early second half of fiscal year by April 17, 2024.[87] Of the petitions for supplemental H–2B visas in FY 2024, USCIS issued approvals for 85,577 beneficiaries, including 6,314 beneficiaries under the allocation of 5,000 visas made available for returning workers for the late second half of the fiscal year and 24,475 beneficiaries under the allocation of 20,000 visas reserved for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.[88]

Data for the first half of FY 2025 clearly indicate an immediate need for additional supplemental H–2B visas for employers with start dates on or before March 31, 2025. USCIS received a sufficient number of H–2B petitions to reach the first half of the FY 2025 fiscal year statutory cap on September 18, 2024.[89] Further, the date on which USCIS received sufficient H–2B petitions to reach the first half semiannual statutory cap has generally trended earlier in recent years. In fiscal years 2017 through 2025, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, September 12, 2022, October 11, 2023, and September 18, 2024, respectively.[90]

Through the third quarter of FY 2024, approximately 90 percent of H–2B filings were for positions within just six sectors.[91] NAICS 56 (Administrative and Support and Waste Management and Remediation Services) accounted for 38.57% of filings, NAICS 71 (Arts, Entertainment, and Recreation) accounted for 11.73%, NAICS 72 (Accommodation and Food Services) accounted for 23.14%, NAICS 23, (Construction) accounted for 11.91%, NAICS 31 (Animal Food Manufacturing) accounted for 2.01% of filings, and NAICS 11 (Agriculture, Forestry, Fishing and Hunting) accounted for 2.39% of filings.

Relevant unemployment data also supports the need for additional supplemental H–2B visas. Within these industries, DOL data show higher labor demand relative to recent history. More specifically, industry unemployment data from the Bureau of Labor Statistics (BLS) show that the industry unemployment rate for most of these industries (except for NAICS 11, which accounts for the lowest percentage of filings among these industries) is lower than the long term (10-year) average.[92]

2022, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-second-half-of-fy-2022 (May 31, 2022).

[83] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, queried 10/2023, TRK 13122, FY 2023 H–2B Northern Central American Cap Approvals by Validity Start Date Month. The number of approved workers exceeded the number of additional visas authorized for the second half of FY 2022 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

[84] *See* USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the First Half of FY 2023, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2023* (Jan. 31, 2023); USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the Early Second Half of FY 2023, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2023* (Mar. 31, 2023).

[85] *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023. The number of approved workers exceeded the number of additional visas authorized for FY 2023 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

[86] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2024, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024* (Oct. 13, 2023).

[87] *See* USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the First Half of FY 2024, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2024* (Jan. 12, 2024); USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the Early Second Half of FY 2024, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2024* (Apr. 18, 2023).

[88] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221. The number of approved workers exceeded the number of additional visas authorized for FY 2024 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.

[89] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025* (Sept. 19, 2024).

[90] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2017, https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017* (Jan. 13, 2017); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2018, https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018* (Dec. 21, 2017); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2019, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019* (Dec. 12, 2018); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2020, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020* (Nov. 20, 2019); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2021, https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021* (Nov. 18, 2020); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2022, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022* (Oct. 12, 2021); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2023, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023* (Sept. 14, 2022); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2024, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024;* USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025* (Sept. 19, 2024).

[91] USCIS analysis of DOL OLFC Performance data.

[92] USCIS has elected to use a long-term average as a reference point so as to minimize the impact that the Covid-19 pandemic has on the comparison of the industry employment rate. All data are taken from the respective BLS ''Industry at a Glance'' pages. See *https://www.bls.gov/iag/tgs/iag11.htm, https://www.bls.gov/iag/tgs/iag23.htm, https://www.bls.gov/iag/tgs/iag60.htm, https://www.bls.gov/iag/tgs/iag71.htm, https://www.bls.gov/iag/tgs/iag72.htm, https://www.bls.gov/iag/tgs/iag311.htm.* All data accessed September 23, 2024.

10-YEAR AVERAGE OF INDUSTRY UNEMPLOYMENT RATE

NAICS 11	NAICS 23	NAICS 56*	NAICS 71	NAICS 72	NAICS 31
7.61	6.13	4.82	7.96	7.90	5.22

*Supersector is used as a proxy, see footnote 94.

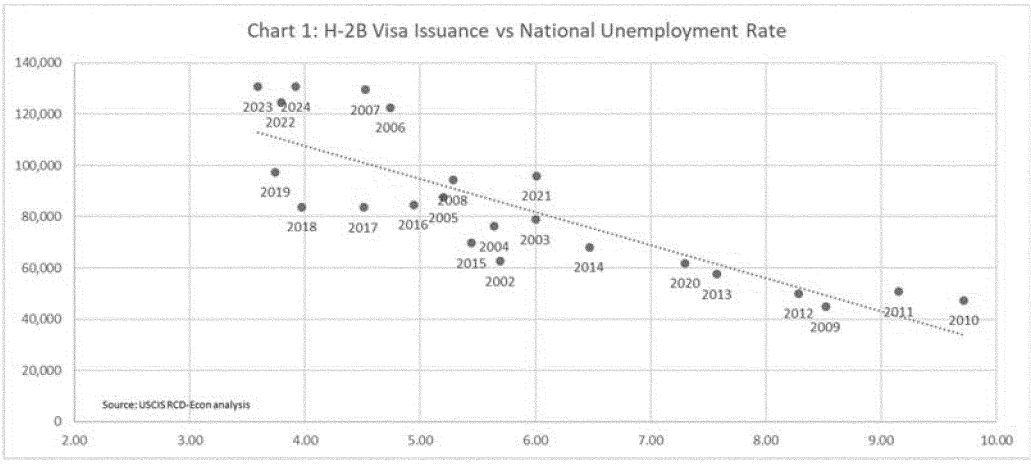
AUGUST 2024 INDUSTRY UNEMPLOYMENT RATE

NAICS 11	NAICS 23	NAICS 56*	NAICS 71	NAICS 72	NAICS 31
11.3	3.2	4.2	4.1	5.9	3.7

*Supersector is used as a proxy, see footnote 94.

In August 2024, the industry unemployment for NAICS 56[93] was 4.2 percent, which is 0.62 points lower than its 10-year average of 4.82 percent, while the industry unemployment rate for NAICS 71 was 4.1 percent which is 3.86 points lower than its 10-year average of 7.96 percent. The August 2024 industry unemployment rate for NAICS 72 (5.9 percent) was 2 points lower than its 10-year average of 7.9 percent while the rate for NAICS 23 (3.2 percent) was 2.93 points lower than its 10-year average of 6.13 percent. The industry unemployment rate for NAICS 11 (11.3 percent) was 3.69 points higher than its 10-year average of 7.61 percent, making it the only industry among the top 5 H–2B industries that has a higher industry unemployment rate relative to its historical average. The relatively low unemployment rate across most of these industries is a clear indication of a strong labor demand within these industries. The Departments believe that the supplemental allocation of H–2B visas described in this temporary final rule will help to meet demand in these industries.

Economy-wide data also indicate that labor-market tightness continues to exist. The most recent Employment Situation released by the Bureau of Labor Statistics (BLS) stated that the unemployment rate was 4.2 percent in August 2024.[94] Historically, the availability of H–2B visas addressed a need in the labor market during periods of lower unemployment. Chart 1[95] shows that the H–2B visa allocations for Fiscal Year 2024[96] made by this rule are slightly higher than the historical trend but are generally consistent with what the current unemployment rate alone would predict. Additionally, when the unemployment rate is below 6 percent, there is greater variance in the total number of H–2B visas issued in a given year; for example, in years 2022, 2007 and 2006, when the unemployment rate ranged from approximately 3.5 percent to 4.6 percent, the total number of H–2B visas issued were comparable to what is planned for 2024. The data presented in chart 1 is meant to provide additional context and to demonstrate that the total allocation of H–2B visas is reasonable given labor market conditions.



Given the level of demand for H–2B workers, the continued economic recovery, and continued job growth, DHS believes it is appropriate to release the maximum amount of additional visas at this time.

[93] Data presented here are for the Professional and Business Services Supersector, which is comprised of NAICS 54, NAICS 55 and NAICS 56. *See https://www.bls.gov/iag/tgs/iag60.htm.* As such, the data presented here should be understood to be the best possible proxy for changes in NAICS 56 and not a direct measurement of any specific change in the actual underlying sectors. The latest data available, for July 2023 from the Department of Labor's Current Employment Statistics program indicates that NAICS 56 accounted for just under 42% of employment in Professional Business Services. All data accessed September 23, 2024.

[94] *See* DOL, BLS, *The Employment Situation—August 2024, https://www.bls.gov/news.release/archives/empsit_10042024.pdf* (Sept. 6, 2024).

[95] Annual data presented here is on a fiscal year basis. Fiscal year averages were calculated by taking the average of the monthly unemployment rate for the months in each respective fiscal year (October–September). Data for fiscal year 2024 are for October 2023–August 2024. Unemployment rate for 2024 is based on median Federal Reserve projections. *See https://www.federalreserve.gov/monetarypolicy/files/fomcprojtabl20240918.pdf* (accessed September 23, 2024).

[96] The number of estimated visas issued for Fiscal Year 2024 is based on the sum of the fiscal year statutory cap for H–2B workers (66,000) and the supplemental allocation for this rule (64,716), for a total H–2B visa allocation of 130,716.

Making allocations for all of FY 2025 in a single rule.

As in FY 2023 and FY 2024, DHS believes that it is appropriate to issue a single rule for the entire fiscal year for multiple reasons.[97] First, DHS expects that there is demand for supplemental visas in the first half of FY 2025. As previously discussed, USCIS already received enough petitions to reach the congressionally mandated cap on H–2B visas for temporary nonagricultural workers for the first half of FY 2025.[98] Further, the date on which USCIS received sufficient H–2B petitions to reach the first half semiannual statutory caps has generally trended earlier in recent years. In fiscal years 2017 through 2025, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant first half statutory cap on January 10, 2017, December 15, 2017, December 6, 2018, November 15, 2019, November 16, 2020, September 30, 2021, September 12, 2022, October 11, 2023, and September 18, 2024, respectively.[99]

Second, based on relevant data, DHS expects that USCIS will reach the statutory cap for the second half of FY 2025 and that there will accordingly be demand for supplemental visas in the second half of FY 2025. For example, in fiscal years 2017 through 2023, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant second half statutory cap on March 13, 2017, February 27, 2018, February 19, 2019, February 18, 2020, February 12, 2021, February 25, 2022, February 27, 2023, and March 7, 2024.[100] In addition, DOL data shows consistently high demand in recent years, particularly during the second half of the fiscal year. In recent years, DOL has received an increasing number of TLC applications for an increasing number of H–2B workers with April 1 start dates: DOL received 4,500 applications on January 1, 2018, covering more than 81,600 worker positions; DOL received 5,276 applications by January 8, 2019, covering more than 96,400 worker positions; DOL received 5,677 applications during the initial three-day filing window in 2020 covering 99,362 worker positions; DOL received 5,377 applications during the initial three-day filing window in 2021 covering 96,641 worker positions; DOL received 7,875 applications by January 4, 2022, covering 136,555 worker positions; DOL received 8,693 applications during the initial three-day filing window in 2023, covering 142,796 worker positions; and DOL received 8,817 H–2B applications by January 8, 2024, covering 138,847 worker positions.[101]

Finally, publishing one rule that addresses all the visas available for FY 2025 benefits the regulated public by giving more notice and certainty of what will become available for the second half. As noted in comments received in response to the FY 2023 TFR, this approach allows businesses to better plan ahead for their seasonal workforce needs.[102]

Filing Deadline of September 15, 2025 for All Petitions

The authority to approve H–2B petitions under this FY 2025 supplemental cap expires at the end of the fiscal year, *i.e.,* the end of September 30, 2025. Therefore, DHS is requiring employers requesting any supplemental visas under this TFR, regardless of the employment start date(s), to properly file their H–2B petition with USCIS no later than September 15, 2025. USCIS will reject any cases that are received after September 15, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C). Because DHS believes that 15 days from the end of the fiscal year is generally the minimum time needed for petitions to be adjudicated, DHS has set September 15, 2025 as the last day to file in order to provide USCIS with adequate time for petition processing before the expiration of the authority at the end of the fiscal year, although USCIS cannot guarantee the time period will be sufficient for adjudication of petitions in all cases.

In addition, the filing deadline will be earlier than September 15, 2025 if the applicable numerical limit for the relevant supplemental visa allocation is reached before that date. *See* new 8 CFR 214.2(h)(6)(xv)(C). In such a case, USCIS will also reject any cases that are received after the applicable numerical limitation has been reached.

Returning Worker Allocation for the First Half of FY 2025 (October 1, 2024 Through March 31, 2025)

For the first half of FY 2025, DHS will make 20,716 visas immediately available upon publication of this TFR that are limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. These petitions must request a date of need starting on or before March 31, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C).

DHS anticipates that employers will use all of the first half allocation for returning workers, given how quickly USCIS reached the FY 2025 first half statutory cap and the first half supplemental allocation for FY 2024. As noted previously, USCIS received enough H–2B petitions to reach the FY 2025 first half statutory cap on

[97] Further, DHS believes that 64,716 is an appropriate number of supplemental visas to make available, as this rule will cover both the first and second half of FY 2025.

[98] USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025* (Sept. 19, 2024).

[99] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2017, https://www.uscis.gov/archive/uscis-reaches-the-h-2b-cap-for-the-first-half-of-fiscal-year-2017* (Jan. 13, 2017); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2018, https://www.uscis.gov/archive/uscis-reaches-h-2b-cap-for-first-half-of-fy-2018* (Dec. 21, 2017); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2019, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2019* (Dec. 12, 2018); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2020, https://www.uscis.gov/news/news-releases/uscis-reaches-h-2b-cap-for-first-half-of-fy-2020* (Nov. 20, 2019); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2021, https://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2021* (Nov. 18, 2020); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2022, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2022* (Oct. 12, 2021); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2023, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2023* (Sept. 14, 2022); USCIS, *USCIS Reaches H–2B Cap for First Half of FY 2024, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fy-2024* (Oct. 13, 2023); USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025* (Sept. 19, 2024).

[100] *See* USCIS, *USCIS Reaches the H–2B Cap for Fiscal Year 2017, https://www.uscis.gov/archive-alerts/uscis-reaches-the-h-2b-cap-for-fiscal-year-2017* (Mar. 16, 2017); USCIS, *USCIS Completes Random Selection Process for H–2B Visa Cap for Second Half of FY 2018, https://www.uscis.gov/archive/uscis-completes-random-selection-process-for-h-2b-visa-cap-for-second-half-of-fy-2018* (Mar. 1, 2018); USCIS, *H–2B Cap Reached for FY 2019, https://www.uscis.gov/archive/h-2b-cap-reached-for-fy-2019* (Feb. 22, 2019); USCIS, *H–2B Cap Reached for Second Half of FY 2020, https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy2020* (Feb. 26, 2020); USCIS, *H–2B Cap Reached for Second Half of FY 2021, https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy-2021* (Feb. 24, 2021); USCIS, *H–2B Cap Reached for Second Half of FY 2022, https://www.uscis.gov/newsroom/alerts/h-2b-cap-reached-for-second-half-of-fy-2022* (Mar. 1, 2022); USCIS, *USCIS Reaches H–2B Cap for Second Half of FY 2023 and Announces Filing Dates for the Second Half of FY 2023 Supplemental Visas, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2023-and-announces-filing-dates-for-the-second-half-of* (Mar. 2, 2023); USCIS, *USCIS Reaches H–2B Cap for Second Half of FY 2024 and Announces Filing Dates for the Second Half of FY 2024 Supplemental Visas, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2024-and-announces-filing-dates-for-the-second-half-of* (Mar. 8, 2024).

[101] *See* DOL, *Announcements, https://www.dol.gov/agencies/eta/foreign-labor/news.*

[102] See the docket for *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022) for access to these comments.

September 18, 2024.[103] Under the FY 2024 TFR, which published on November 17, 2023, USCIS received enough petitions to reach the 20,716 first half allocation by January 9, 2024.[104] Similarly, as with the FY 2024 TFR, the relatively early publication of this rule will provide interested employers more time to prepare their petitions, increasing the likelihood that the first half allocation for returning workers will be used.[105] To the extent that the first half allocation for returning workers is used, this TFR may provide affected employers with some relief by making available a separate allocation of visas for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, which will be available for the entirety of FY 2025.

As in previous years, in the event that USCIS approves insufficient petitions to use all 20,716 visas, the unused numbers will not carry over for the second half allocation because DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. As explained in the FY 2024 TFR, in order to make any unused first half visas available for employers with second half start dates, DHS would need to set a filing cutoff date prior to September 15, 2025 for the first half allocation, upon which it would stop accepting such petitions and make a calculation of how many visas should be re-released for second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which would significantly increase operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation (and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a filing cutoff date prior to September 15, 2025 will maximize employers' opportunity to avail themselves of the first half allocation. While DHS acknowledges that this approach could potentially result in some employers with a demonstrated business need in the second half of the fiscal year losing the opportunity to receive a supplemental visa, it is DHS's expectation that, as occurred in FY 2024, there will be sufficient demand from employers with first half start dates to use the entire allocation.

Initial Returning Worker Allocation for the Early Second Half (April 1, 2025, Through May 14, 2025)

For the second half of FY 2025, DHS will initially make available 19,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. These petitions must request a date of need starting on or after April 1, 2025, through and including May 14, 2025. Limiting this allocation to employers with employment start dates on or before May 14, 2025 reflects DHS's intentions to give employers with needs later in the season a better opportunity to access the H–2B program, and to prevent employers from petitioning under both of the second-half allocations to fill the same need.

To mitigate complications from concurrent administration of the statutory second half cap, these petitions must be filed no earlier than 15 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.[106] When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (15 days after the second half statutory cap) for this allocation. Concurrent administration of the second half statutory cap with the second half supplemental cap would pose significant operational challenges, particularly considering the volume of H–2B petitions USCIS would have to process at the same time. A cushion of 15 days after the second half statutory cap is reached should provide USCIS with sufficient time to process H–2B petitions filed under the second half statutory cap and prepare to process petitions under this supplemental cap, and should also provide petitioners not selected under the statutory cap with enough time to refile under this supplemental cap. Furthermore, making this allocation available *after* the second half statutory cap has been reached builds in flexibility to account for variations in the timing of that cap being reached. DHS cannot predict with certainty when the FY 2025 second half statutory cap will be reached (or if it will be reached), and therefore, did not specify a date for when to first allow petitioners to file for FY 2025 second half supplemental visas. In the event that the statutory second half FY 2025 cap is not reached, the supplemental allocation for returning workers for the second half of FY 2025 will not become available.

Based on historical data showing increasingly high demand for H–2B workers with April 1 start dates, DHS expects all 19,000 visas to be used quickly once the supplemental allocation becomes available as occurred in FY 2024 on April 17, 2024. However, in the event that USCIS approves insufficient petitions to use all 19,000 visas, the unused numbers will not carry over for petition approvals for employment start dates beginning on or after May 15, 2025. DHS chose to limit these 19,000 visas to start dates on or before May 14, 2025, without the ability for these visas to be carried over into the next allocation. As previously stated, DHS believes that the operational burdens of calculating and administering a process to carry over unused visas, combined with the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations, would outweigh the benefits. In order to make any unused visas from this allocation available for late second half of FY 2025 petitions, DHS would need to set a filing cutoff date that would be after the cutoff for the first half allocation but prior to any cutoff for late second half of FY 2025 petitions and prior to September 15, 2025, upon which it would stop accepting petitions and make a calculation of how many visas should be re-released for late second half employers. Calculating visas to be re-released could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which would significantly increase operational burdens. In addition to increasing operational burdens, DHS believes that the opening, closing, and potential re-opening of this allocation

[103] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025* (Sept. 19, 2024).

[104] USCIS, *Cap Reached for Additional Returning Worker H–2B Visas for the First Half of FY 2024, https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-first-half-of-fy-2024* (Jan. 12, 2023).

[105] Compare the publication dates of the FY 2024 TFR and this rule with December 15, 2022, the date the FY 2023 TFR was first published, and January 28, 2022, the date the temporary final rule making available additional H–2B visas for the first half of FY 2022 was first published.

[106] Pursuant to new 8 CFR 214.2(h)(6)(xv)(C)(*2*), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(*1*)(*ii*) of this section requesting employment start dates from April 1, 2025 to May 14, 2025 that are received earlier than 15 days after the INA section 214(g) cap for the second half FY 2025 has been met.

(and/or other cap allocations) could cause confusion for the public and adjudicators. Furthermore, not setting a filing cutoff date prior to September 15, 2025, will maximize employers' opportunity to avail themselves of the early second half allocation. While DHS acknowledges that this approach could result in employers in the late second half losing the opportunity to receive a supplemental visa, it is DHS's expectation that there will be sufficient demand from employers to use this entire allocation. As anticipated in the FY 2024 TFR, employers did, in fact, use the entire early second half of FY 2024 allocation.[107]

Additional Returning Worker Allocation for the Late Second Half (on or After May 15, 2025, Through September 30, 2025)

For the late second half of FY 2025, DHS will make available an additional allocation of 5,000 visas limited to returning workers, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2022, 2023, or 2024, regardless of country of nationality. To assist employers needing workers to begin work during the late spring and summer seasons in the fiscal year (also referred to as ''late season employers''), these petitions must request a date of need starting on or after May 15, 2025. These petitions must be filed no sooner than 45 days after the second half statutory cap is reached, a date that USCIS will identify in a public announcement.[108] When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (45 days after the second half statutory cap is reached) for this allocation. The cushion of 45 days after the second half statutory cap is reached is intended to provide USCIS with sufficient time to process H–2B petitions filed under the second half statutory cap that remain pending, as well as to process the expected influx of petitions under the early second half supplemental cap that will begin 15 days after the second half statutory cap is reached.[109] By allowing USCIS to manage its workload in this way, the 45-day period will help USCIS prepare to process petitions under the late second half supplemental cap and mitigate the complications from concurrent administration of these various caps.

This is the third supplemental cap reserved for late season employers that need workers to begin work during the late spring and summer seasons in the fiscal year.[110] By regulation, employers may only apply for a TLC 75 to 90 days before the start date of need,[111] and, as such, employers needing workers to begin work on or after May 15 are not eligible to file TLC applications until on or after February 15. As noted in the FY 2023 and FY 2024 TFRs, in past years, because of this requirement and the strong demand for H–2B workers in recent years to begin work on the earliest employment start date (*i.e.,* April 1), late season employers were unable to receive cap-subject H–2B workers because they did not have an opportunity to file visa petitions for cap-subject H–2B workers before the second semiannual statutory cap was reached. Since, based on recent years' data,[112] USCIS has typically received sufficient H–2B petitions to meet the statutory cap for the second half of the fiscal year around mid-February to early March, many of these late season employers may have decided to not file a TLC application.

DHS, in consultation with DOL, has again determined that it is appropriate to make a separate allocation available for late season employers whose late season labor needs may have put them at a disadvantage in accessing H–2B workers in recent years. While there was significant demand for the late second half allocation in FY 2024, the full allocation of 5,000 visas was not reached. As of September 30, 2024, DOS has issued 3,906 towards the late second half allocation, while USCIS approved 6,314 beneficiaries towards the late second half allocation.[113] Therefore, in order to meet the employer demand in the late second half of FY 2025, while still maximizing the overall usage of supplemental visas, DHS has determined it is appropriate to again limit the late second half allocation for FY 2025 to up to 5,000 visas. DHS, in consultation with DOL, has determined that authorizing two allocations for the second half of FY 2025 based on an employer's start date of need, in addition to requiring that the employer's start date of need on the Form I–129 match the start date of need on the approved TLC,[114] will provide employers with late season needs a better opportunity to receive H–2B workers to avoid irreparable harm. Specifically, employers with early season needs that need work to begin on or after April 1 will have the opportunity to file H–2B petitions under both the statutory cap and the first allocation of the supplemental cap, while employers with late season needs do not have that opportunity.

To mitigate complications from concurrent administration of the additional returning worker allocation for the second half of the fiscal year for late season employers and either the statutory second half cap or the initial supplemental allocation for returning workers for the second half of the fiscal year (or both), these petitions must be filed no earlier than 45 days after the second half statutory cap is reached. When USCIS announces that it has received a sufficient number of petitions to reach the second half statutory cap, it will also announce the earliest possible filing date (45 days after the second half statutory cap is reached) for this allocation. In the event that the statutory second half FY 2025 cap is not reached, this supplemental allocation for late season filers workers will not become available. Furthermore, in the event that USCIS does not approve sufficient petitions to use all 5,000 visas for late season employers, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused

[107] USCIS, *Temporary Increase in H–2B Nonimmigrant Visas for FY 2024, https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2b-non-agricultural-workers/temporary-increase-in-h-2b-nonimmigrant-visas-for-fy-2024* (last visited Aug. 20, 2024).

[108] Pursuant to new 8 CFR 214.2(h)(6)(xv)(C)(*3*), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(*1*)(*iii*) of this section requesting employment start dates from May 15, 2025 to September 30, 2025, that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2025 has been met.

[109] While petitioners may continue to submit petitions under the early second half supplemental cap through September 15, DHS expects the heaviest filing to occur soon after the visas become available. This expectation is based on historical filing patterns, as well as an assumption that employers will try act quickly to secure workers consistent with their dates of need.

[110] *See Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2023 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 76816 (Dec. 15, 2022); *Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 88 FR 2023 (Nov. 17, 2023).

[111] *See* 20 CFR 655.15(b).

[112] As noted above, in fiscal years 2017 through 2024, USCIS received a sufficient number of H–2B petitions to reach or exceed the relevant second half statutory cap on March 13, 2017, February 27, 2018, February 19, 2019, February 18, 2020, February 12, 2021, February 25, 2022, February 27, 2023, and March 7, 2024, respectively.

[113] Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

[114] *See* 8 CFR 214.2(h)(6)(iv)(D) (''an H–2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification'').

numbers would not carry over to petitions under the country-specific allocation. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations. A process to carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators.

Allocation for Nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica

As in FY 2024, DHS will make available 20,000 additional visas that are reserved for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica, as attested by the petitioner (regardless of whether such nationals are returning workers). These 20,000 visas will be available for petitioners requesting an employment start date before the end of FY 2025, up to and including September 30, 2025. As discussed in the Legal Framework section as well as in the section addressing the irreparable harm standard, DHS has a broad delegation from Congress to administer and enforce U.S. immigration laws and issue regulations regarding the same, as well as broad discretion over the admission of nonimmigrants, and the adjudication of nonimmigrant petitions, after consultation with other agencies, including DOL. *See* INA sec. 103(a)(1), 214(a)(1), (c)(1); 8 U.S.C. 1103(a)(1), 1184(a)(1), (c)(1). In addition, through the temporary enactment authorizing the Secretary of DHS to increase the number of H–2B visas,[115] Congress delegated to the Secretary of DHS, after consultation with the Secretary of Labor, the discretion to establish a framework for determining that the needs of American businesses cannot be satisfied with the existing workforce and the conditions under which to authorize additional visas to further the purpose of the enactment. In the most recent, as well as each prior annual enactment, Congress consistently used the word ''may'' when describing the Secretary's authority, and the use of the word ''may'' indicates a grant of discretion, absent contrary legislative intent, structure and purpose of the statute.[116] As in prior years, the Departments have determined that the temporary enactment together with DHS's broad authority over immigration provide the Secretary of DHS with discretion to implement the temporary enactment in a manner that addresses two complimentary policy objectives: the need to provide access to H–2B workers to American businesses, and the objective to provide lawful pathways for able, willing, and qualified workers from designated countries to come temporarily to the United States and perform nonagricultural labor. In issuing this TFR, and as in prior years, the Departments are implementing appropriate policy choices in exercising the discretionary authority provided by Congress.[117] This policy choice was previously ratified by Congress [118]— legislative history of the FY2023 Omnibus indicates that Congress was aware of and approved of the country-specific allocations.[119] While prior fiscal years' country-specific allocations have not been reached, the number has been trending upwards, and DHS anticipates a higher likelihood that the 20,000 visas allocated for certain nationals by this rule will be reached by the end of this fiscal year. As discussed above, DHS observed robust employer interest in response to the FY 2021 H–2B supplemental visa allocation for Salvadoran, Guatemalan, and Honduran nationals and the FY 2022 and FY 2023 supplemental visa allocations for Salvadoran, Guatemalan, Honduran, and Haitian nationals, and the data show a trend of increased participation by Haitian, Salvadoran, Guatemalan, and Honduran workers in the H–2B program [120] In FY 2024, the inclusion of nationals from the additional countries of Colombia, Ecuador, and Costa Rica increased the likelihood that the 20,000 visas would be used and the data show a continued trend of increased usage of the country-specific allocation.[121]

Employers requesting workers under the country-specific allocation with an employment start date in the first half of FY 2025 may file their petitions immediately after the publication of this TFR. Employers requesting workers under the country-specific allocation with an employment start date in the second half of FY 2025 must file their petitions no earlier than 15 days after the second half statutory cap is reached. The requirement to file the petition no earlier than 15 days after the second half statutory cap is reached is consistent with the approach taken for the initial returning worker allocation for the early second half of the fiscal year, and is in line with the Departments' longstanding interpretation of their authority to make available supplemental (or in other words, additional) visas contingent upon the exhaustion of visas under the statutory cap.[122]

As in FY 2023 and FY 2024, the Departments have decided not to further divide the 20,000 visas for workers from specific countries into separate allocations for the first and second half of the fiscal year. The Departments intend for this additional flexibility of allowing any employment start date within FY 2025 to encourage U.S. employers that are suffering irreparable harm or will suffer impending

[115] Public Law 118–47, Division G, Title I, sec. 105 states: ''Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)(B)), the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of United States businesses cannot be satisfied during fiscal year 2024 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor, may increase the total number of aliens who may receive a visa under section 101(a)(15)(H)(ii)(b) of such Act (8 U.S.C. 1101(a)(15)(H)(ii)(b)) in such fiscal year 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 such numerical limitation.''

[116] *See generally U.S.* v. *Rodgers,* 461 U.S. 677, 706 (1983) (The word ''may,'' when used in a statute, usually implies some degree of discretion unless there is indication of contrary legislative intent, or an obvious contrary inference from the structure and purpose of the statute.).

[117] *See Loper Bright Enterprises,* 144 S. Ct. at 2263 (2024).

[118] *Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978) (''Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.'').

[119] *See* S. Rep. No. 118–85, at p. 104 (Jul. 27, 2023) (''Further, the Committee supports the Departments efforts to set aside visas for certain nationalities, including nationals from El Salvador, Guatemala, Honduras, and Haiti, regardless of whether they are returning workers.'').

[120] As previously noted, USCIS approved petitions on behalf of 6,805 beneficiaries under the FY 2021 country-specific allocation, 3,231 beneficiaries under the FY 2022 first half country-specific supplemental allocation, 12,318 beneficiaries for the second half country-specific allocation of the fiscal year FY 2022, and 23,832 beneficiaries under the FY 2023 country-specific allocation. *See* DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, H–2B Visa Issuance Report September 30, 2023.

[121] As of October 28, 2024, USCIS approved petitions on behalf of 24,475 beneficiaries under the FY 2024 country-specific allocation. *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

[122] Pursuant to new 8 CFR 214.2(h)(6)(xv)(C)(*4*), USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(*2*) of this section that have a date of need on or after April 1, 2025 and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2025 is met.

irreparable harm to seek out workers from such countries, and, at the same time, increase interest among nationals of the Northern Central American countries, Haiti, Colombia, Ecuador, and Costa Rica seeking a legal pathway for temporary employment in the United States. While this approach could potentially result in employers with start dates in the first half of FY 2025 using all 20,000 visas for nationals of the specified countries, and consequently, employers with start dates in the second half of FY 2025 losing the opportunity to utilize this particular allocation, DHS believes that the benefits of increasing the flexibility of this allocation outweighs the potential risk. Moreover, employers with start dates in the second half of FY 2025 seeking to employ nationals under the country-specific allocation may request a visa under one of the two second half supplemental allocations which are available for returning workers regardless of country of nationality.

In the event that USCIS does not approve sufficient petitions to use all 20,000 visas under the country-specific allocation by the end of FY 2025, DHS will not carry over the unused numbers for petition approvals for any other allocation. For example, any unused numbers would not carry over to petitions for returning workers with employment start dates in the second half of FY 2025. As noted above, DHS believes the operational burdens of calculating and administering a process to carry over unused visas would outweigh the benefits because of the potential confusion for the public and adjudicators that could result from having different filing cutoff dates for the different allocations. A process to carry over unused visas could also entail an additional cap allocation, additional announcements to the public, and potentially an additional lottery, all of which significantly increase operational burdens and may add further confusion to the public and adjudicators. Further, this single filing cutoff approach provides employers with incentive and more time to petition for, and bring in, workers from El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica to meet employer needs, consistent with the administration's efforts and outreach to promote and improve safety, security, and economic stability in these countries.

Process if Cap Allocations Are Reached

Finally, recognizing the high demand for H–2B visas, it is plausible that the additional H–2B supplemental allocations provided in this rule will be reached prior to September 15, 2025. Specifically, the following scenarios may still occur:

- The 20,716 supplemental cap visas limited to returning workers that will be immediately available for employers with dates of need on or after October 1, 2024, through March 31, 2025, will be reached before September 15, 2025;
- The 19,000 supplemental cap visas limited to returning workers that will be available for employers with dates of need starting on or after April 1, 2025, through May 14, 2025, will be reached before September 15, 2025;
- The 5,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2025, through September 30, 2025, will be reached before September 15, 2025; or
- The 20,000 supplemental cap visas limited to nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica will be reached before September 15, 2025.

Under this rule, new 8 CFR 214.2(h)(6)(xv)(D) reaffirms the existing processes that are in place when H–2B numerical limitations under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10), are reached,[123] as applicable to each of the scenarios described above that involve numerical limitations of the supplemental cap. Specifically, for each of the scenarios mentioned above, DHS will monitor petitions received, and make projections of the number of petitions necessary to achieve the projected numerical limit of approvals. USCIS will also notify the public of the dates that USCIS has received the necessary number of petitions (the ''final receipt dates'') for each of these scenarios. The day the public is notified will not control the final receipt dates. Moreover, USCIS may randomly select, via computer-generated selection, from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals for each of the scenarios involving numerical limitations to the supplemental cap. USCIS may, but will not necessarily, conduct a lottery if: the 20,716 supplemental cap visas limited to returning workers that will be immediately available for employers with dates of need on or after October 1, 2024, through March 31, 2025, is reached before September 15, 2025; the 19,000 supplemental cap visas limited to returning workers that will be available for employers with dates of need on or after April 1, 2025, through May 14, 2025, is reached before September 15, 2025; the 5,000 supplemental cap visas limited to returning workers that will be available for late season employers with dates of need on or after May 15, 2025, through September 30, 2025, is reached before September 15, 2025; or the 20,000 visas limited to certain nationals is reached before September 15, 2025. Similar to the processes applicable to the H–2B semiannual statutory cap, if the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limit may be received (in other words, if the numerical limit is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

C. Returning Workers

As noted above, to address the increased and, in some cases, impending need for H–2B workers in this fiscal year, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has determined that employers may petition for supplemental visas on behalf of up to 44,716 workers who were issued an H–2B visa or were otherwise granted H–2B status in FY 2022, 2023, or 2024. This temporal limitation mirrors prior fiscal years' temporal limitation in the returning worker definition [124] and the temporal limitation Congress imposed in previous returning worker statutes.[125] Such workers (in other words, those who recently participated in the H–2B program and who now seek a new H–2B visa from DOS) may obtain their new visas through DOS and begin work more expeditiously because they have previously obtained H–2B visas and therefore have been vetted by DOS and would have departed the United States as generally required by the terms of their nonimmigrant admission.[126] DOS

[123] *See* 8 CFR 214.2(h)(8)(vii).

[124] *See e.g., Exercise of Time-Limited Authority To Increase the Numerical Limitation for FY 2024 for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 88 FR 80394 (Nov. 17, 2023) (defining ''returning workers'' as those who were issued H–2B visas or held H–2B status in fiscal years 2021, 2022, or 2023).

[125] *See* INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A); Consolidated Appropriations Act, 2016, Public Law 114–113, div. F, tit. V, sec 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109–364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law 109–13, div. B, tit. IV, sec. 402.

[126] The previous review of an applicant's qualifications and current evidence of lawful travel

has informed DHS that, in general, H–2B visa applicants who are able to demonstrate clearly that they have previously abided by the terms of their status granted by DHS have a higher visa issuance rate when applying to renew their H–2B visas, as compared with the overall visa applicant pool from a given country. Furthermore, consular officers are authorized to waive the in-person interview requirement for certain nonimmigrant visa applicants, including certain H–2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration, who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h).[127] Limiting the supplemental cap to returning workers is beneficial because these workers have generally followed immigration law in good faith and demonstrated their willingness to return home when they have completed their temporary labor or services or their period of authorized stay, which is a condition of H–2B status. The returning worker condition therefore provides a basis to believe that H–2B workers under this cap increase will again abide by the terms and conditions of their visa or nonimmigrant status.

The returning worker condition also benefits employers that seek to re-hire known and trusted workers who have a proven positive employment track record while previously employed as workers in this country. While the Departments recognize that the returning worker requirement may limit to an extent the flexibility of employers that might wish to hire non-returning workers, the requirement provides an important safeguard against H–2B abuse, which DHS considers to be a significant consideration.

To ensure compliance with the requirement that additional visas only be made available to returning workers, DHS will require petitioners seeking H–2B workers under the supplemental cap to attest that each employee requested or instructed to apply for a visa under the FY 2025 supplemental cap was issued an H–2B visa or otherwise granted H–2B status in FY 2022, 2023, or 2024, unless the H–2B worker is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap. This attestation will serve as prima facie initial evidence to DHS that each worker, unless a national of one of these countries who is counted against the 20,000 country-specific cap, meets the returning worker requirement. DHS and DOS retain the right to review and verify that each beneficiary is in fact a returning worker any time before and after approval of the petition or visa. DHS has authority to review and verify this attestation during the course of an audit or investigation, as otherwise discussed in this rule.

With respect to satisfying the returning worker requirement, employers must maintain evidence that the employer requested and/or instructed that each of the workers petitioned by the employer in connection with this temporary rule were issued H–2B visas or otherwise granted H–2B status in FY 2022, 2023, or 2024, unless the H–2B worker is a national of one of the specific countries counted towards the 20,000 cap. Such evidence would include, but is not limited to, a date-stamped written communication from the employer to its agent(s) and/or recruiter(s) that instructs the agent(s) and/or recruiter(s) to only recruit and provide instruction regarding an application for an H–2B visa to those foreign workers who were previously issued an H–2B visa or granted H–2B status in FY 2022, 2023, or 2024.

D. 20,000 Allocation for Nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica

As described above, the Secretary of Homeland Security has determined that up to 20,000 additional H–2B visas will be limited to workers who are nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. These 20,000 visas will be exempt from the returning worker requirement. Because the returning worker allocations have no restrictions related to a worker's country of nationality, if the 20,000 visa limit has been reached and the 44,716 returning worker cap has not, petitioners may continue to request workers who are nationals of one of these countries, but the workers must be specifically requested as returning workers who were issued H–2B visas or were otherwise granted H–2B status in FY 2022, 2023, or 2024.

While DHS reiterates the benefits of allocating visas under the supplemental cap to returning workers, the Secretary of Homeland Security has determined that the 20,000 country-specific allocation which is exempted from the returning worker requirement is beneficial for following reasons. First, this country-specific allocation furthers the U.S. foreign policy objective of managing irregular migration with partner countries through expanding access to lawful pathways to nationals of these countries seeking economic opportunity in the United States. Several of these countries have extensively collaborated with the United States on migration issues such as through endorsing the L.A. Declaration, joining the United States to ramp up efforts to address the irregular migration flows through the Darien and participating in the Safe Mobility Initiative to increase migrant integration in host countries and, where appropriate, facilitate access to lawful pathways to the United States and other countries, including expedited refugee processing. After a series of negotiations, on June 1, 2023, the United States and Guatemala issued a joint statement to commit to take a series of critical steps to humanely reduce irregular migration and expand lawful pathways under the L.A. Declaration.[128] For example, as part of a comprehensive program to manage irregular migration, Guatemala agreed to participate in the Safe Mobility Initiative, hosting SMOs since June 12, 2023.[129] On June 4, 2023, the United States and Colombia announced the impending establishment of SMOs that would provide information about the wide range of existing services and support available for refugees and other migrants in Colombia, with the goal of reaching migrants on the move, or even before they begin irregular migration journey.[130] The Safe Mobility initiative launched in Colombia on June 28, 2023, with SMOs currently operational in three cities. Furthermore, on June 12,

to the United States will generally lead to a shorter processing time of a renewal application.

[127] The interview waiver authority for certain H–2B applicants renewing visas in the same classification within 48 months of the prior visa's expiration has no sunset date. Currently, certain first-time H–2B visa applicants or certain H–2B visa applicants previously issued any type of visa within the last 48 months may be eligible for an interview waiver; the authority for these interview waivers is in place until further notice. *See* DOS, *Important Update on Waivers of the Interview Requirement for Certain Nonimmigrant Visa Applicants, https://travel.state.gov/content/travel/en/News/visas-news/important-update-on-waivers-of-the-interview-requirement-for-certaing-nonimmigrant-visa-applicants.html* (last updated Dec. 21, 2023).

[128] *See* The White House, *Joint Statement from the United States and Guatemala on Migration* (June 1, 2023), *https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/01/joint-statement-from-the-united-states-and-guatemala-on-migration/*.

[129] *Id.*

[130] *See* United States Department of State, *U.S.-Colombia Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 4, 2023), *https://www.state.gov/u-s-colombia-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/*. *See also* The White House, *Readout of Principal Deputy National Security Advisor Jon Finer's Meeting with Colombian Foreign Minister Alvaro Leyva* (June 11, 2023), *https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/11/readout-of-principal-deputy-national-security-advisor-jon-finers-meeting-with-colombian-foreign-minister-alvaro-leyva/*.

2023, the United States and the Government of Costa Rica launched SMOs in Costa Rica, in furtherance of bilateral partnership and addressing hemispheric challenge of irregular migration.[131] On October 19, 2023, the United States and Ecuador announced their partnership in establishing SMOs in Ecuador.[132] This allocation for nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, and Costa Rica will promote safe, orderly and lawful migration to the United States, as well as help provide U.S. employers with additional labor from these countries with whom the United States Government has engaged in outreach efforts to promote the H–2B program.[133]

Second, in addition to the allocation for returning workers, the country-specific allocation will also address the needs of certain H–2B employers that are suffering irreparable harm or will suffer impending irreparable harm.

Third, the 20,000 set-aside will deliver on the objectives of E.O. 14010, which, among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access for nationals of the Northern Central American countries of El Salvador, Guatemala, and Honduras to visa programs, as appropriate and consistent with applicable law. E.O. 14010 also directs relevant government agencies to create a comprehensive regional framework to address the causes of migration, and to manage migration throughout North and Central America.[134]

Fourth, DHS is allocating these visas to specific countries to further promote development and economic stability of these countries to reduce irregular migration throughout the Western Hemisphere, including from Haiti.[135]

As in prior years, DOS will work with the relevant countries to facilitate consular interviews, if required,[136] and channels for reporting incidents of fraud and abuse within the H–2 programs. Further, each country's own consular networks will maintain contact with the workers while in the United States and ensure the workers know their rights and responsibilities under the U.S. immigration laws, which are all valuable protections to the immigration system, U.S. employers, U.S. workers, and workers entering the country on H–2 visas. DHS has determined that reserving 20,000 supplemental H–2B visas towards the country-specific allocation and continuing to include these countries is reasonable given the progressively increasing use of H–2B visas among the Northern Central American countries of Guatemala, Honduras and El Salvador, and the other three countries—Colombia, Costa Rica and Ecuador—added to this allocation in fiscal year 2024. DHS believes these aspects will encourage U.S. employers that are suffering irreparable harm or will suffer impending irreparable harm to seek out workers from such countries, while, at the same time, increase interest among such nationals seeking a legal pathway for temporary employment in the United States. DHS also believes its outreach efforts with the governments of these countries, along with efforts in some of these countries by USAID to increase access to the H–2B program, support the decision to provide this allocation of 20,000 visas. USAID has worked to build capacity in Northern Central America to facilitate access to temporary worker visas under the H–2 program. Collaborating closely with the governments of El Salvador, Guatemala, and Honduras, USAID has strengthened the capacity of relevant government ministries to transparently and efficiently match qualified workers to temporary labor opportunities in the United States. In fiscal years 2021, 2022, and 2023 USAID increased funding to expand capacity building activities in El Salvador, Guatemala, and Honduras in response to the increased demand generated by the supplemental allocations of H–2B visas for Northern Central American nationals included in the FY 2021, FY 2022, and FY 2023 TFRs. The acceleration of USAID's activities likely helped increase uptake of H–2B visas issuance under the FY 2021, FY 2022, and FY 2023 TFRs, as H–2B visa issuances to Salvadorans, Guatemalans and Hondurans increased significantly over prior years,[137] and USAID's assistance helped reduce the average period of time to match qualified workers from these three countries to requests from U.S. employers—from 42 days to 14 days in El Salvador, 55 days to 17 days in Guatemala, and 24 days to 8 days in Honduras.[138] USAID's programs also strengthen worker protections by helping crowd out unethical recruiters and providing labor rights education and resources to seasonal workers.

DOS issued a combined total of approximately 26,630 H–2B visas to nationals of the Northern Central American countries and Haiti from FY 2015 through FY 2020, an average of approximately 4,400 per year.[139] In FY

[131] *See* United States Department of State, *U.S.-Costa Rica Joint Commitment to Address the Hemispheric Challenge of Irregular Migration* (June 12, 2023), *https://www.state.gov/u-s-costa-rica-joint-commitment-to-address-the-hemispheric-challenge-of-irregular-migration/.*

[132] *See* United States Department of State, *Announcement of Safe Mobility Office in Ecuador* (Oct. 19, 2023), *https://www.state.gov/announcement-of-safe-mobility-office-in-ecuador/.*

[133] *See, e.g.,* USAID, *Administrator Samantha Power at the Summit of the Americas Fair Recruitment and H–2 Visa Side Event, https://www.usaid.gov/news-information/speeches/jun-9-2022-administrator-samantha-power-summit-americas-fair-recruitment-and-h-2-visa* (Jun. 9, 2022) (''Our combined efforts [with the labor ministries in Honduras and Guatemala, and the Foreign Ministry in El Salvador] . . . resulted in a record number of H–2 visas issued in 2021, including a nearly forty percent increase over the pre-pandemic levels in H–2B visas issued across all three countries.'').

[134] *See also* National Security Council, *Collaborative Migration Management Strategy, https://www.whitehouse.gov/wp-content/uploads/2021/07/Collaborative-Migration-Management-Strategy.pdf* (July 2021) (stating that ''The United States has strong national security, economic, and humanitarian interests in reducing irregular migration and promoting safe, orderly, and humane migration'' within North and Central America).

[135] *See, e.g., https://twitter.com/DHSgov/status/1580310211931144194?ref_src=twsrc%5Etfw* (this supplemental allocation to workers from Haiti, Honduras, Guatemala, and El Salvador ''advances the Biden Administration's pledge, under the L.A. Declaration to expand legal pathways as an alternative to irregular migration''); The White House, *Fact Sheet: The Los Angeles Declaration on Migration and Protection U.S, Government and Foreign Partner Deliverables, https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/10/fact-sheet-the-los-angeles-declaration-on-migration-and-protection-u-s-government-and-foreign-partner-deliverables/* (addressing several measures, including the H–2B allocation for nationals of Haiti, as part of ''the President's commitment to support the people of Haiti'').

[136] As noted previously, some consular officers may waive the in-person interview requirement for H–2B applicants whose prior visa expired within a specific timeframe and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). The authority allowing for waiver of interview of certain H–2 (temporary agricultural and non-agricultural workers) applicants is in place until further notice and is reviewed annually. Certain applicants renewing a visa in the same classification within 48 months of the prior visa's expiration are also eligible for interview waiver. DOS, *Important Update on Waivers of the Interview Requirement for Certain Nonimmigrant Visa Applicants, https://travel.state.gov/content/travel/en/News/visas-news/important-update-on-waivers-of-the-interview-requirement-for-certaing-nonimmigrant-visa-applicants.html* (last updated Dec. 21, 2023).

[137] *See* DOS, *Nonimmigrant Visa Issuance Statistics, Nonimmigrant Visa Issuances by Visa Class and by Nationality, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html* (last visited Sept. 26, 2023); U.S. Dep't of Homeland Security, U.S. Citizenship and Immigr. Servs., Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, Issuances for FY 2023 H–2Bs By Requested Nationality Code.

[138] *See* USAID, *H–2 Visa Opportunities in Guatemala, Honduras, and El Salvador, https://www.usaid.gov/sites/default/files/2024-06/USAID%20H-2%20Fact%20Sheet%20%283_7_24%29.pdf* (Mar. 7, 2024).

[139] The ''combined total'' includes all H–2B visas and are not limited to visas issued under

2021, the first year in which supplemental H–2B visas were reserved for nationals of Northern Central American countries, DOS issued a combined total of 6,277 H–2B visas to nationals of those countries.[140] In FY 2022, DOS issued a combined total of 15,058 H–2B visas to nationals of Haiti and the Northern Central American countries.[141] In FY 2023, DOS issued a combined total of 23,816 H–2B visas to nationals of Haiti and the Northern Central American countries.[142] This increase is likely due in part to the additional H–2B visas made available to nationals of these countries by the FY 2021, FY 2022, and FY 2023 H–2B supplemental visa temporary final rules. In addition, based in part on the vital U.S. interest of promoting sustainable development and the stability of Haiti, in November 2021, DHS added Haiti to the list of countries whose nationals are eligible to participate in the H–2A and H–2B programs.[143] In FY 2024, DOS issued a combined total of 17,879 H–2B supplemental visas to nationals of Haiti, the North Central American countries, and Colombia, Ecuador, and Costa Rica.[144] Therefore, as previously stated, DHS has determined that the additional increase in FY 2025 will not only provide U.S. businesses that have been unable to find qualified and available U.S. workers with potential workers, but also promote further expansion of lawful immigration and lawful employment authorization for nationals of the specified countries.

The exemption from the returning worker requirement recognizes the small, albeit increasing, number of individuals from the three Northern Central American countries and Haiti, and the small number of individuals from Colombia, Ecuador, and Costa Rica,[145] who were previously granted H–2B visas in recent years. Absent this exemption, there may be an insufficient number of qualifying workers from these countries to use the allocated visas. Exempting this population from the returning worker requirement will increase the ability of workers from these countries to pursue lawful temporary work in the U.S., encourage employers to seek out individuals from these countries, and maximize the chance of meeting the goal of reaching the full allocation.

USCIS will stop accepting petitions received under the country-specific allocation after September 15, 2025. This end date should provide H–2B employers ample time, should they choose, to petition for, and bring in, workers under the country-specific allocation. This, in turn, provides an opportunity for employers to contribute to our country's efforts to promote and improve safety, security and economic stability in these countries to help stem the flow of irregular migration to the United States. Nothing in this rule will limit the authority of DHS or DOS to deny, revoke, or take any other lawful action with respect to an H–2B petition or visa application at any time before or after approval of the H–2B petition or visa application.

E. Business Need Standard—Irreparable Harm and FY 2025 Attestation

To file any H–2B petition under this rule, petitioners must meet all existing H–2B eligibility requirements, including having an approved, valid, and unexpired TLC. *See* 8 CFR 214.2(h)(6) and 20 CFR part 655, subpart A. The TLC process focuses on establishing whether a petitioner has a temporary need for workers and whether there are U.S. workers who are able, willing, qualified, and available to perform the temporary service or labor, and does not address the harm a petitioner is facing or will face in the absence of such workers; the attestation addresses this question. In addition, under this rule, the petitioner must submit an attestation to USCIS in which the petitioner affirms, under penalty of perjury, that it meets the business need standard—that they are suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on their petition.[146] In addition to asserting that it meets the business need standard, the employer must attest that, by the time of submission of the petition to USCIS, they have prepared and retained a detailed written statement describing how the evidence gathered in support of their petition demonstrates that irreparable harm is occurring or impending. The employer must also attest that, upon request, it will provide to DHS and/or DOL all of the types of documentary evidence it selected in the attestation form that support its claim of irreparable harm, along with the detailed written statement it prepared by the time of submitting the petition to USCIS describing how such evidence demonstrates irreparable harm. The petitioner must submit the attestation directly to USCIS, together with Form I–129, the approved and valid TLC,[147] and any other necessary documentation. As in the rules implementing prior years' temporary cap increases, employers will be required to complete the new attestation form which can be found at: *https://www.foreignlaborcert.doleta.gov/form.cfm.*[148]

The irreparable harm standard is the same as in the temporary final rule for recent years. The irreparable harm standard requires employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on the petition filed under this rule.

As noted above, Congress authorized the Secretary of Homeland Security, in consultation with the Secretary of

supplemental caps. *See* DOS, *Nonimmigrant Visa Issuance Statistics, Nonimmigrant Visa Issuances by Visa Class and by Nationality, https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html.*

[140] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, DOS Issuance Data, queried 10/2022, TRK #10698.

[141] *See* Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, C3 Consolidated, DOS Issuance Data, queried 10/2022, TRK #10698.

[142] DHS, USCIS, Office of Performance and Quality, CLAIMS3, VIBE, DOS Visa Issuance Data, queried 10/2023, TRK 13122, Issuances for FY 2023 H–2Bs By Requested Nationality Code.

[143] *See Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs,* 86 FR 62559, 62562, *https://www.govinfo.gov/content/pkg/FR-2021-11-10/pdf/2021-24534.pdf* (Nov. 10, 2021).

[144] *See* DHS, USCIS, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

[145] During fiscal years 2021 and 2022, the Department of State issued 74 and 247 H–2B visas respectively to Colombian nationals, 35 and 115 H–2B visas respectively to Ecuadorian nationals, and 204 and 283 H–2B visas respectively to Costa Rican nationals. *See Characteristics of H–2B Nonagricultural Temporary Workers Fiscal Year 2021 Report to Congress, https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY21-Characteristics-Report.pdf* (Mar. 10, 2022); *Characteristics of H–2B Nonagricultural Temporary Workers Fiscal Year 2022 Report to Congress, https://www.uscis.gov/sites/default/files/document/data/USCIS_H2B_FY22_Characteristics_Report.pdf* (Feb. 14, 2023).

[146] An employer may request fewer workers on the H–2B petition than the number of workers listed on the TLC. *See* Instructions for Petition for Nonimmigrant Worker, providing that ''The total number of workers you request on an H–2B petition must not exceed the number of workers approved by the Department of Labor on the temporary labor certification.''

[147] Since July 26, 2019, USCIS has been accepting a printed copy of the electronic one-page ETA–9142B, Final Determination: H–2B Temporary Labor Certification Approval, as an original, approved TLC. *See Notice of DHS's Requirement of the Temporary Labor Certification Final Determination Under the H–2B Temporary Worker Program,* 85 FR 13178, 13179 (Mar. 6, 2020).

[148] The attestation requirement does not apply to workers who have already been counted under the H–2B statutory caps for fiscal year 2025. Further, the attestation requirement does not apply to noncitizens who are exempt from the fiscal year 2025 H–2B statutory cap, including those who are extending their stay in H–2B status. Accordingly, petitioners that are filing only on behalf of such workers are not subject to the attestation requirement.

Labor, to increase the total number of H–2B visas available ''upon the determination that the needs of American businesses cannot be satisfied'' with U.S. workers.[149] The irreparable harm standard in this rule aligns with this determination that Congress requires DHS to make before increasing the number of H–2B visas available to U.S. employers. In particular, requiring employers to attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the requested H–2B workers is directly relevant to the needs of the business—if an employer is suffering or will suffer irreparable harm, then their needs are not being satisfied. Because the authority to increase the statutory cap is tied to the needs of businesses, as in prior years, the Departments think, as a policy matter, that it is reasonable to require employers to attest that they are suffering irreparable harm or that they will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on their petition. If such employers are unable to attest to such harm and retain and produce (upon request) documentation of that harm, it calls into question whether the need set forth in this rule cannot in fact be satisfied without the ability to employ H–2B workers. This requirement falls within the broad discretion Congress gave to the Secretary to, in consultation with the Secretary of Labor, increase the number of H–2B workers in order to meet the needs of American businesses.[150] As discussed in the Legal Framework section as well as in the section addressing the country-specific allocation, DHS has broad delegation to administer and enforce U.S. immigration laws and issue regulations regarding the same, as well as broad discretion to establish conditions on the admission of nonimmigrants, and over the adjudication of nonimmigrant petitions, after consultation with other agencies, including DOL. See INA sec. 103(a)(1), 214(a)(1), (c)(1); 8 U.S.C. 1103(a)(1), 1184(a)(1), (c)(1). In addition, through the temporary enactment authorizing the Secretary of DHS to increase the number of H–2B visas,[151] Congress delegated to the Secretary of DHS, after consultation with the Secretary of Labor, the discretion to establish a framework for determining that the needs of American businesses cannot be satisfied with the existing workforce and the conditions under which to authorize additional visas to further the purpose of the enactment. In the most recent, as well as each prior annual enactment,[152] Congress has consistently used the word ''may'' when describing the Secretary's authority, and the use of the word ''may'' indicates a grant of discretion, absent contrary legislative intent, structure and purpose of the statute.[153] As in prior years, the Departments have determined that the irreparable harm standard falls within the discretionary authority of the Secretary of DHS and furthers the legislative purpose behind the temporary enactment by making visas available to those American businesses that are most likely to be severely impacted by a lack of an able, willing, and qualified workforce.

This rule also requires an employer to attest that it has prepared a detailed written statement describing (i) how the employer's business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all H–2B workers requested on the I–129 petition, and (ii) how each type of evidence selected in the attestation form and relied upon by the employer demonstrates the applicable irreparable harm. The employer will not submit this detailed written statement to DHS with its petition for supplemental visas, but will attest on the attestation form to having prepared a detailed written statement. The detailed written statement must be provided to DHS and/or DOL upon request in the event of an audit or during the course of an investigation. This requirement was first introduced in the FY 2023 TFR to provide additional clarity informed by the Departments' experiences in assessing the irreparable harm standard in previous years.

The attestation that irreparable harm is occurring or is impending cannot be based on a speculative analysis that permanent or severe financial loss ''may occur'' or ''is likely to occur.'' Rather, as of the time of submission to DHS, employers must have concrete evidence establishing that severe and permanent financial loss is occurring, with the scope and severity of harm clearly articulable, or that severe and permanent financial loss will occur in the near future without access to the supplemental visas. Even if no irreparable harm ultimately occurs because the employer is approved for supplemental visas under this rule, the employer must be able to articulate how permanent and severe financial loss was impending at the time of filing. Additionally, in DOL's experience, employers sometimes do not retain the documentation they specifically attested they would retain, or will not or cannot explain how this documentation demonstrates the relevant irreparable harm to which they attested, which indicates that some of the employers seeking to benefit from hiring H–2B workers are not thoughtfully considering, or considering at all, whether their business needs qualify them for supplemental H–2B visas under these rules.

Additionally, the Departments continue to believe that the written statement is necessary in the case of an audit or investigation to explain, in detail, the employer's reasoning as to why irreparable harm was occurring or impending without the ability to employ H–2B workers, and how the evidence supports the employer's reasoning. In audits and investigations, some employers have provided hundreds of pages of evidence without any explanation as to how this evidence demonstrates irreparable harm, leaving DOL or DHS to determine how a voluminous compilation of complex and, sometimes, seemingly unrelated documents demonstrates irreparable harm without any understanding of the employer's intent when providing the documents. A detailed, thoughtful explanation from the employer will clarify the purpose of these documents and allow the employer to clearly make their case that the business was experiencing irreparable harm or would experience impending irreparable harm at the time of petitioning for supplemental visas.

As such, the Departments believe that it is prudent to require employers to identify how they are suffering

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[149] *See* section 105 of Pub. L. 118–47, as extended by Public Law 118–83.

[150] *See Loper Bright Enterprises* v. *Raimondo,* 144 S. Ct. 2244, 2263 (2024).

[151] Public Law 118–47, Division G, Title I, sec. 105, states: ''Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the Immigration and Nationality Act (8 U.S.C. 1184(g)(1)(B)), the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of United States businesses cannot be satisfied during fiscal year 2024 with United States workers who are willing, qualified, and able to perform temporary nonagricultural labor, may increase the total number of aliens who may receive a visa under section 101(a)(15)(H)(ii)(b) of such Act (8 U.S.C. 1101(a)(15)(H)(ii)(b)) in such fiscal year 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 such numerical limitation.''

[152] *Lorillard* v. *Pons,* 434 U.S. 575, 581 (1978). (''Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.'').

[153] *See generally U.S.* v. *Rodgers,* 461 U.S. 677, 706 (1983) (The word ''may,'' when used in a statute, usually implies some degree of discretion unless there is indication of contrary legislative intent, or an obvious inference from the structure and purpose of the statute.).

irreparable harm (that is, permanent or severe financial loss), or will suffer impending irreparable harm, and how the evidence they will maintain shows that harm was occurring or impending, at the time they petition for H–2B visas under this rule. The written statement should identify, in detail, the severe and permanent financial loss that is occurring or will occur in the near future without access to the supplemental visas and should describe how the information contained in the documentary evidence demonstrates this severe and permanent financial loss. A written statement explaining that no irreparable harm occurred because the employer was approved for supplemental H–2B visas is insufficient; if no irreparable harm actually occurred, the employer must be able to show that irreparable harm was impending at the time of the petition's filing. Supporting evidence of the employer's irreparable harm (either occurring or impending) maintained and discussed in the detailed written statement may include, but is not limited to, the following types of documentation:

(1) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss due to the inability to meet financial or existing contractual obligations because they were unable to employ H–2B workers, including evidence of executed contracts, reservations, orders, or other business arrangements that have been or would be cancelled, and evidence demonstrating an inability to pay debts/bills;

(2) Evidence that the business is suffering or will suffer in the near future permanent and severe financial loss, as compared to prior years, such as financial statements (including profit/loss statements) comparing the employer's period of need 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 the current year;

(3) Evidence showing the number of workers needed in the previous three seasons (FY 2022, 2023, and 2024) to meet the employer's need as compared to those currently employed or expected to be employed at the beginning of the start date of need. Such evidence must indicate the dates of their employment, and their hours worked (for example, payroll records) and evidence showing the number of H–2B workers it claims are needed, and the workers' actual dates of employment and hours worked; and/or

(4) Evidence that the petitioner is reliant on obtaining a certain number of workers to operate, based on the nature and size of the business, such as documentation showing the number of workers it has needed to maintain its operations in the past, or will in the near future need, including but not limited to: a detailed business plan, copies of purchase orders or other requests for good and services, or other reliable forecast of an impending need for workers.

These examples are not exhaustive, nor will they necessarily establish that the business meets the irreparable harm standard; petitioners may retain other types of evidence they believe will satisfy these standards. Such evidence must be maintained and provided, with the written statement, to DOL and/or DHS upon request. It has been DOL's experience when reviewing documentation submitted to establish irreparable harm that employers commonly provide unexecuted contracts or letters of intent; contracts with redacted financial terms or dates of performance; or written statements memorializing verbal agreements that are not signed by all parties and thus may be insufficient evidence of the terms of such agreements and may call into question their credibility. In addition, DOL has encountered contracts among related entities that are owned, operated, or otherwise controlled by the employer or an individual with ownership interest in the employer. Such contracts may lack credibility as evidence of irreparable harm because the employer and related parties may share the same interest in obtaining H–2B workers even in situations where the employer is not suffering irreparable harm or will not suffer impending irreparable harm. In those instances, DOL may request that an employer provide additional credible evidence to demonstrate that it has met the legal standard. In other situations, the only documentation offered by the employer is a declaration, without any supporting documentary evidence. Given that the employer must establish that they are suffering irreparable harm or will suffer impending irreparable harm, in other words, a permanent and severe financial loss without the ability to employ all of the H–2B workers requested on their petition, an employer's irreparable harm cannot be properly assessed without evidence of its financial business needs. As such, DOL is clarifying that merely asserting irreparable harm, or providing documentation that lacks sufficient facts or indicia of validity (*e.g.,* signatures) for DOL to determine that the employer was suffering or would suffer impending irreparable harm without the ability to employ all of the H–2B workers requested under the supplemental cap at the time of filing their petition, will be insufficient to make an irreparable harm determination. In such instances where the evidence is insufficient or the petitioner merely submits a declaration without supporting documentation, DOL may require the employer to provide additional credible evidence. This is because mere assertions or the absence of key financial terms or dates of performance in a contract due to redaction, for example, hinder the Department's ability to evaluate whether the employer was in fact suffering irreparable harm or would have suffered impending irreparable harm without the ability to employ all of the H–2B workers it requested for a given period. Factors that can demonstrate the credibility of a contract or similar commitment or obligation may include evidence of an agreement, preferably in writing, that includes the financial terms, dates of performance, and evidence it was signed and/or agreed upon before the petition was filed.

While the employer will not submit the detailed written statement nor the supporting evidence to DHS at the time of filing a petition for H–2B visas under this rule, the Departments emphasize that the employer must prepare the detailed written statement and compile the evidence at the time of filing. The employer must complete the analysis as to whether the employer is experiencing irreparable harm or will experience impending irreparable harm at the time the employer petitions for supplemental visas using evidence available at this time. In the interest of efficiency, the Departments do not require the submission of this statement to DHS at the time of filing the petition. Instead, the employer must attest that it has prepared the detailed written statement and that it will keep it as part of its records, to be provided to the Departments, upon request.

As the burden rests with the petitioner to prove eligibility for supplemental H–2B visas under the time-limited authority implemented with this temporary final rule by a preponderance of the evidence, it is the petitioner's burden to establish that it meets the irreparable harm standard. INA sec. 291, 8 U.S.C. 1361; *Matter of Chawathe,* 25 I&N Dec. 369, 375–76 (AAO 2010). The attestation form will serve as prima facie initial evidence to DHS that the petitioner's business is

suffering irreparable harm or will suffer impending irreparable harm. USCIS will reject in accordance with 8 CFR 103.2(a)(7)(ii) or may deny in accordance with 8 CFR 103.2(b)(8)(ii), as applicable, any petition requesting H–2B workers under this FY 2025 supplemental cap that is lacking the requisite attestation form. Although this rule does not require submission of the evidence selected in the attestation and/or a detailed written statement at the time of filing of the petition, other than an attestation, the employer must have the evidence selected in the attestation and the accompanying detailed written statement on hand and ready to present to DHS and/or DOL at any time starting with the date of filing the I–129 petition, through the prescribed document retention period discussed below.

As with petitions filed under the supplemental TFRs in recent years, the Departments intend to select a significant number of petitions for audit examination to verify compliance with program requirements, including the irreparable harm standard and recruitment provisions implemented through this rule. The Departments may consider failure to provide evidence demonstrating irreparable harm, to prepare or provide the detailed written statement explaining irreparable harm, or to comply with the audit process to be a willful violation resulting in an adverse agency action on the employer, including revocation of the TLC or program debarment. Similarly, failure to cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS and/or DOL as required by 8 CFR 214.2(h)(6)(xv)(B)(*2*)(*v*) and (*vi*) may constitute a violation of the terms and conditions of an approved petition and lead to petition revocation under 8 CFR 214.2(h)(11)(iii)(A)(*3*).

The attestation submitted to USCIS will also state that the employer:

(1) meets all other eligibility criteria for the available visas, including the returning worker requirement, unless exempt because the H–2B worker is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who is counted against the 20,000 visas reserved for such workers;

(2) will comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA 9142B and appendices) certified by DOL for the job opportunity (which serves as the TLC);

(3) will conduct additional recruitment of U.S. workers in accordance with the requirements of this rule and discussed further below; and

(4) will document and retain evidence of such compliance.

Because petitioners will submit the attestation to USCIS as initial evidence with Form I–129, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, USCIS may deny or revoke, as applicable, a petition based on or related to statements made in the attestation, including but not limited to the following grounds: (1) the employer failed to demonstrate employment of all of the requested workers is necessary under the appropriate business need standard; or (2) the employer failed to demonstrate that it requested and/or instructed that each worker petitioned for is a returning worker, or a national of one of the specified countries, as required by this rule. The petitioner may appeal any denial or revocation on such basis, however, under 8 CFR part 103, consistent with DHS regulations and existing USCIS procedures.

It is the view of the Secretaries of Homeland Security and Labor that requiring a post-TLC attestation to USCIS is the most practical approach to applying the eligibility requirements of this rule without causing undue delays in the filing or adjudication processes for those employers with start dates in the first half of the fiscal year, many of whom will have already begun or completed the TLC application process. The Departments have determined that, if such employers were required to submit the attestation form to DOL before filing a petition with DHS, the attendant delays would negatively impact the ability of American businesses to timely get the help that they need given TLC processing timeframes. For consistency and to avoid confusion, the Departments will also maintain the post-TLC attestation process for employers with start dates in the second half of the fiscal year that seek supplemental H–2B visas under this rule. This approach, in conjunction with additional integrity safeguards, has been used consistently in prior supplemental H–2B temporary final rules, and the Departments will continue to monitor its effectiveness and sufficiency.

As in prior years, all employers under this rule are required to retain documentation, which the employer must provide upon request by DHS and/or DOL, supporting the new attestations regarding (1) the irreparable harm standard; (2) the returning worker requirement, or, alternatively, documentation supporting that the H–2B worker(s) requested is a national of one of the specified countries who is counted against the 20,000 country-specific allocation (which may be satisfied by the separate Form I–129 that employers are required to file for such workers in accordance with this rule); and (3) a recruitment report for any additional recruitment required under this rule for a period of 3 years from the date of certification. *See* 20 CFR 655.68. Although the employer must have such documentation on hand at the time it files the petition, the Departments do not believe it is necessary or efficient for all employers to submit such documentation to USCIS at the time of filing the petition. However, as noted above, the Departments will employ program integrity measures, including additional scrutiny by DHS of employers that have committed labor law violations in the H–2B program, and continue to conduct audits, investigations, and/or post-adjudication compliance reviews on a significant number of H–2B petitions. As part of that process, USCIS may issue a request for additional evidence, a notice of intent to revoke, or a revocation notice, based on the review of such documentation, *see* 8 CFR 103.2(b) and 8 CFR 214.2(h)(11), 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.

In accordance with the attestation requirements, under which petitioners attest that they meet the irreparable harm standard, that they are seeking to employ only returning workers (unless exempt as described above), and that they meet the document retention requirements at 20 CFR 655.68, petitioners must retain documents and records fulfilling their responsibility to demonstrate compliance with this rule for 3 years from the date the TLC was approved, and must provide the documents and records upon the request of DHS and/or DOL. As mentioned above, the employer bears the burden of establishing that they are suffering or will suffer impending irreparable harm. With regard to the irreparable harm standard, employers attesting that they are suffering irreparable harm must be able to provide concrete evidence establishing severe and permanent financial loss that is occurring; the scope and severity of the harm must be clearly articulable. Employers attesting that they will suffer impending irreparable harm must be able to demonstrate that severe and permanent financial loss will occur in

the near future without access to the supplemental visas. It will not be enough to provide evidence suggesting that such harm may or is likely to occur; rather, the documentary evidence must show that impending harm is occurring or will occur and document the form of such harm. Examples of possible types of evidence to be maintained are listed earlier in this section.

When a petition is selected for audit examination, or investigation, DHS and/or DOL will review all evidence available to it to confirm that the petitioner properly attested to DHS, at the time of filing the petition, that their business was suffering irreparable harm or would suffer impending irreparable harm, and that they petitioned for and employed only returning workers, unless the H–2B worker is a national of one of the specific countries counted towards the 20,000 country-specific allocation, among other attestations. If DHS subsequently finds that the evidence does not support the employer's attestations, DHS may deny or, if the petition has already been approved, revoke the petition at any time consistent with existing regulatory authorities. DHS may also, or alternatively, refer the petitioner to DOL for further investigation. In addition, DOL may independently take enforcement action, including by, among other things, debarring the petitioner from the H–2B program for not less than one year or more than five years from the date of the final agency decision, which also disqualifies 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.[154]

Evidence reflecting a preference for hiring H–2B workers over U.S. workers may warrant an investigation by additional agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division. *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 DOL may refer potential discrimination to IER pursuant to applicable interagency agreements. *See* IER, Partnerships, *https://www.justice.gov/crt/partnerships* (last visited Aug. 20, 2024). In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify U.S. Immigration and Customs Enforcement (ICE) by completing the online ICE Tip Form, *https://www.ice.gov/webform/ice-tip-form* (last visited Aug. 20, 2024), or alternately, via the toll-free ICE Tip Line, (866) 347–2423.[155]

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 105 of the FY 2024 Omnibus, as extended by Public Law 118–83, 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. *Matter of Chawathe,* 25 I&N Dec. 369, 375–76 (AAO 2010). Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed attestation, USCIS will, as applicable, reject the petition in accordance with 8 CFR 103.2(a)(7)(ii) or 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 the underlying TLC, USCIS 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 2024 Omnibus, as extended by Public Law 118–83, 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 and other requirements of this rule play a vital role in achieving the purposes of this rule, DHS and DOL intend that the attestation requirement, DOL procedures, and other aspects of this rule be non-severable from the remainder of the rule, including the increase in the numerical allocations.[156] Thus, if the attestation requirement or any other part of this rule is enjoined or held invalid, the Departments intend for the remainder of the rule, with the exception of the retention requirements being codified in 20 CFR 655.68, to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

F. Portability

As an additional option for employers that cannot find U.S. workers, and as an additional flexibility for H–2B employees seeking to begin work with a new H–2B employer, this rule allows petitioners to immediately employ certain H–2B workers who are present in the United States in H–2B status without waiting for approval of the H–2B petition, generally for a period of up to 60 days. Such workers must be beneficiaries of a timely, non-frivolous H–2B petition requesting an extension of stay received on or after January 25, 2025,[157] but no later than 1 year after that date.[158] In addition, such workers must have been lawfully admitted to the United States and have not worked without authorization subsequent to such lawful admission. Additionally, petitioners may immediately employ individuals who are beneficiaries of a non-frivolous H–2B petition requesting an extension of the worker's stay that is pending as of January 25, 2025 without waiting for approval of the H–2B petition. To be eligible for portability, employers must have received an approved TLC demonstrating that they have completed a test of the U.S. labor market, and that DOL determined that there were no qualified U.S. workers available to fill these temporary positions. DHS is making this portability available for an additional one-year period in order to provide

[154] 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 for purposes of DOL enforcement actions in 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.,* INA section 214(c)(14)(D), 8 U.S.C. 1184(c)(14)(D); *see also* 29 CFR 503.19.

[155] DHS may publicly disclose information regarding the H–2B program consistent with applicable law and regulations. For information about DHS disclosure of information contained in a system of records, see *https://www.dhs.gov/system-records-notices-sorns.* Additional general information about DHS privacy policy can be accessed at *https://www.dhs.gov/policy.*

[156] The Departments' intentions with respect to non-severability extend to all features of this rule other than the portability provision, which is described in the section below.

[157] This rule uses January 25, 2025 as the starting date because the similar provision in the FY 2024 TFR expires January 24, 2025. As January 25, 2025 is a Saturday, however, the earliest a petition might be received after the expiration of 8 CFR 214.2(h)(31) is January 27, 2025. *See* 8 CFR 1.2 (definition of day) (explaining that when the last day of a period computed falls on a Saturday, Sunday, or a legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday).

[158] Individuals who are the beneficiaries of petitions filed on the basis of 8 CFR 214.1(c)(4) are not eligible to port to a new employer under 8 CFR 214.2(h)(32).

greater certainty for H–2B employers and workers.[159]

The portability provision at new 8 CFR 214.2(h)(32) is substantively the same as the portability provision offered in the FY 2023 and FY 2024 H–2B supplemental visa temporary final rules, which were codified at 8 CFR 214.2(h)(29) and (h)(31), respectively, and will begin upon the expiration of 8 CFR 214.2(h)(31). *See* new 8 CFR 214.2(h)(32). Additionally, the provision is similar to temporary flexibilities that DHS has used previously to improve employer access to noncitizen workers during the COVID–19 pandemic.[160]

The employment authorization provided under this provision would end 15 days after USCIS denies the H–2B petition or such petition is withdrawn. This 15-day period of employment following an H–2B petition denial or withdrawal is consistent with prior H–2B supplemental cap temporary final rules, as well as the 15-day period of employment following petition denial under existing DHS regulations at 8 CFR 274a.12(b)(21) for certain E-Verify participants to employ H–2A workers. As in the prior temporary final rules, the 15-day period is intended to account for the passage of time between USCIS denial of the H–2B petition and the petitioner receiving notice of such denial.[161]

DHS is strongly committed not only to protecting U.S. workers and helping U.S. businesses receive the documented workers authorized to perform temporary nonagricultural services or labor that they need, but also to protecting the rights and interests of H–2B workers (consistent with Executive Order 13563 and in particular its reference to ''equity,'' ''fairness,'' and ''human dignity''). In the FY 2020 DHS Further Consolidated Appropriations Act (Public Law 116–94), Congress directed DHS to provide options to improve the H–2A and H–2B visa programs, to include options that would protect worker rights.[162] DHS has determined that providing H–2B nonimmigrant workers with the flexibility of being able to begin work with a new H–2B petitioner immediately and avoid a potential job loss or loss of income while the new H–2B petition is pending, provides some certainty to H–2B workers who may have found themselves in situations that warrant a change in employers.[163] This flexibility also provides an alternative to H–2B petitioners who have not been able to find U.S. workers and who have not been able to obtain H–2B workers subject to the statutory or supplemental caps who have the skills to perform the job duties. In that sense as well, it is equitable and fair.

G. DHS Petition Procedures

To petition for H–2B workers under the supplemental allocations in this rule, the petitioner must file a Form I–129 at the current filing location in accordance with applicable regulations and form instructions, along with an unexpired TLC and the attestation Form ETA–9142–B–CAA–9. Petitions filed for supplemental allocations under this rule at any location other than the current filing location will be rejected and the filing fees will be returned. For all petitions filed under this rule and the H–2B program, generally, employers must establish, among other 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 of protection for U.S. workers and, in order to be eligible for additional visas under this rule, employers must have applied for and received a valid TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D) and 20 CFR part 655, subpart A. Under DOL's H–2B regulations, TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment. 20 CFR 655.55(a).

In order to have a valid TLC, the employment start date on the employer's H–2B petition must not be different from the employment start date certified by DOL on the TLC. *See* 8 CFR 214.2(h)(6)(iv)(D). Under generally applicable DHS regulations, the only exception to this requirement applies when an employer files an amended H–2B petition, accompanied by a copy of the previously approved TLC and a copy of the initial visa petition approval notice, at a later date to substitute workers as set forth under 8 CFR 214.2(h)(6)(viii)(B). This rule also requires additional recruitment for certain petitioners, as discussed below.

All H–2B petitions must state the nationality of all the requested H–2B workers, whether named or unnamed, even if there are beneficiaries from more than one country. *See* 8 CFR 214.2(h)(2)(iii). If filing multiple Forms I–129 based on the same TLC (for

[159] On September 20, 2023, DHS issued *Modernizing H–2 Program Requirements, Oversight, and Worker Protections,* Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066. In that NPRM, DHS proposed to extend portability to H–2A and H–2B workers on a permanent basis. The Department's proposal does not interfere with the portability provision of this rule, however, should DHS publish a final rule making H–2 portability permanent, any such provision will not expire on a specific date, unlike the portability provision made effective by this temporary final rule.

[160] *See Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers* 86 FR 28198 (May 25, 2021). On May 14, 2020, DHS published a temporary final rule in the **Federal Register** to amend certain H–2B requirements to help H–2B petitioners seeking workers to perform temporary nonagricultural services or labor essential to the U.S. food supply chain. *Temporary Changes to Requirements Affecting H–2B Nonimmigrants Due to the COVID–19 National Emergency,* 85 FR 28843 (May 14, 2020). In addition, on April 20, 2020, DHS issued a temporary final rule which, among other flexibilities, allowed H–2A workers to change employers and begin work before USCIS approved the new H–2A petition for the new employer. *Temporary Changes to Requirements Affecting H–2A Nonimmigrants Due to the COVID–19 National Emergency,* 85 FR 21739 (April 20, 2020). DHS has subsequently extended that portability provision for H–2A workers through two additional temporary final rules, on August 20, 2020, and December 18, 2020, which have been effective for H–2A petitions that were received on or after August 19, 2020 through December 17, 2020, and on or after December 18, 2020 through June 16, 2021, respectively. *Temporary Changes to Requirements Affecting H–2A Nonimmigrants Due To the COVID–19 National Emergency: Partial Extension of Certain Flexibilities,* 85 FR 51304 (August 20, 2020) and *Temporary Changes to Requirements Affecting H–2A Nonimmigrants due to the COVID–19 National Emergency: Extension of Certain Flexibilities,* 85 FR 82291 (December 18, 2020).

[161] A similar portability provision exists in DHS regulations related to H–1B nonimmigrant workers, but does not include a 15-day period. *See* 8 CFR 214.2(h)(2)(i)(H)(*2*).

[162] The Joint Explanatory Statement accompanying the *Fiscal Year* (FY) *2020 Department of Homeland Security* (DHS) *Further Consolidated Appropriations Act* (Public Law 116–94) states, ''Not later than 120 days after the date of enactment of this Act, DHS, the Department of Labor, the Department of State, and the United States Digital Service are directed to report on options to improve the execution of the H–2A and H–2B visa programs, including: processing efficiencies; combatting human trafficking; protecting worker rights; and reducing employer burden, to include the disadvantages imposed on such employers due to the current semiannual distribution of H–2B visas on October 1 and April 1 of each fiscal year. USCIS is encouraged to leverage prior year materials relating to the issuance of additional H–2B visas, to include previous temporary final rules, to improve processing efficiencies.''

[163] The White House, The National Action Plan to Combat Human Trafficking, Priority Action 1.5.3, at p. 25 (Dec 2021); The White House, The National Action Plan to Combat Human Trafficking, Priority Action 1.6.3, at p. 20–21 (2020) (Stating that ''[w]orkers sometimes find themselves in abusive work situations, but because their immigration status is dependent on continued employment with the employer in whose name the visa has been issued, workers may be left with few options to leave that situation.''). By providing the option of changing employers without risking job loss or a loss of income through the publication of this rule, DHS believes that H–2B workers may be more likely to leave abusive work situations, and thereby are afforded greater worker protections.

instance, one requesting returning workers and another requesting workers under the country-specific allocation), each H–2B petition must include a copy of the TLC and reference all previously-filed or concurrently-filed petitions associated with the same TLC. The total number of requested workers may not exceed the total number of workers indicated on the approved TLC. In addition, the USCIS Fee Schedule Final Rule, 89 FR 6194 (January 31, 2024), which took effect on April 1, 2024, imposed a limit of 25 named beneficiaries per petition.[164]

Petitioners seeking H–2B classification for nationals under the 20,000 country-specific visa allocation that are exempt from the returning worker provision must file a separate Form I–129 for those nationals only. *See* new 8 CFR 214.2(h)(6)(xv). In this regard, a petition must be filed with a single Form ETA–9142–B–CAA–9 that clearly indicates that the petitioner is only requesting nationals from El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who are exempt from the returning worker requirement. Specifically, if the petitioner checks the first box of Form ETA–9142–B–CAA–9, then the petition accompanying that form *must* be filed only on behalf of nationals of one or more of these and not other countries. In such a case, if the Form I–129 petition is requesting beneficiaries from countries other than one of these countries, then USCIS may reject it or issue a request for evidence, notice of intent to deny, or denial, or, in the case of a non-frivolous petition, a partial approval limiting the petition to the number of beneficiaries who are from Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. Requiring the filing of separate petitions to request returning workers and to request workers who are nationals of the specified countries is necessary to ensure the operational capability to properly calculate and manage the respective additional cap allocations and to ensure that all corresponding visa issuances are limited to qualifying applicants, particularly when such petitions request unnamed beneficiaries or are relied upon for subsequent requests to substitute beneficiaries in accordance with 8 CFR 214.2(h)(6)(viii).

The attestations must be filed on Form ETA–9142–B–CAA–9, Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83. *See* 20 CFR 655.64. Petitioners are required to retain a copy of such attestations 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* 20 CFR 655.68. Petitions submitted to DHS pursuant to Public Law 118–83, which extended the FY 2024 Omnibus, will be processed in the order in which they were received within the relevant supplemental allocation, and pursuant to processes parallel to those in place for when numerical limitations are reached under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10).

USCIS will reject petitions filed under the supplemental allocations in this rule at any location other than the current filing location and will return the filing fees for any such petition.

Immediately upon publication of the rule, but no earlier than that date, USCIS will begin accepting returning worker H–2B petitions requesting dates of need starting on or before March 31, 2025, as well as H–2B petitions for workers under the country-specific allocation with dates of need in the first half of FY 2025. Beginning no earlier than 15 days after the second half statutory cap is reached, USCIS will begin accepting returning worker H–2B petitions requesting work to begin on or after April 1, 2025, through May 14, 2025, as well as H–2B petitions for workers under the country-specific allocation with dates of need on or after April 1, 2025, through September 30, 2025. Finally, beginning no earlier than 45 days after the second half statutory cap is reached, USCIS will begin accepting returning worker H–2B petitions requesting work to begin on or after May 15 through September 30, 2025.

USCIS will reject any returning worker petition that is received after September 15, 2025, or after the applicable numerical limitation has been reached. 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, even if the country-specific allocation and second half supplemental allocations provided in this rule have not yet been reached, USCIS will stop accepting petitions under those allocations that are received after September 15, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C). Such petitions will be rejected and the filing fees will be returned. Petitioners may choose to request premium processing of their petitions under 8 CFR 106.4, which allows for expedited processing for an additional fee.

Based on the time-limited authority granted to DHS by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, on the same terms as section 105 of the FY 2024 Omnibus, DHS is notifying the public that USCIS cannot approve petitions seeking H–2B workers under this rule on or after October 1, 2025. *See* new 8 CFR 214.2(h)(6)(xv)(C). Petitions pending with USCIS that are not approved before October 1, 2025 will be denied and any fees will not be refunded. *See* new 8 CFR 214.2(h)(6)(xv)(C).

H. DOL Procedures

As noted above, all employers are required to have an approved and valid TLC from DOL in order to file a Form I–129 petition with DHS. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D). The standards and procedures governing the submission and processing of Applications for Temporary Employment Certification for employers seeking to hire H–2B workers are set forth in 20 CFR part 655, subpart A. An employer that seeks to hire H–2B workers must request a TLC in compliance with the application filing requirements set forth in 20 CFR 655.15 and meet all the requirements of 20 CFR part 655, subpart A, to obtain a valid TLC, including the criteria for certification set forth in 20 CFR 655.51. *See* 20 CFR 655.64(a) and 655.50(b). Employers with an approved TLC have conducted recruitment, as set forth in 20 CFR 655.40 through 655.48, to determine whether U.S. workers are qualified and available to perform the work for which employers sought H–2B workers.

The H–2B regulations require that, among other things, an employer seeking to hire H–2B workers in a non-emergency situation must file a completed Application for Temporary Employment Certification with the National Processing Center (NPC) designated by the OFLC Administrator no more than 90 calendar days and no fewer than 75 calendar days before the employer's date of need (*i.e.,* start date for the work). *See* 20 CFR 655.15.

Emergency Procedures

Under 20 CFR 655.17, an employer may request a waiver of the time period(s) for filing an Application for Temporary Employment Certification based on ''good and substantial'' cause, provided that the employer has

[164] *See* 8 CFR 214.2(h)(2)(ii).

sufficient time to thoroughly test the domestic labor market on an expedited basis and the OFLC certifying officer (CO) has sufficient time to make a final determination as required by the regulation. To rely on this provision, as the Departments explained in the 2015 H–2B Interim Final Rule, the employer must provide the OFLC CO with detailed information describing the ''good and substantial cause'' necessitating the waiver. Such cause may include the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable human-made catastrophic event that is wholly outside the employer's control, unforeseeable changes in market conditions, or pandemic health issues. Thus, to ensure an adequate test of the domestic labor market and to protect the integrity of the H–2B program, the Departments clearly intended that use of emergency procedures must be narrowly construed and permitted in extraordinary and unforeseeable catastrophic circumstances that have a direct impact on the employer's need for the specific services or labor to be performed. Even under the existing H–2B statutory visa cap structure, DOL considers USCIS' announcement(s) that the statutory cap(s) on H–2B visas has been reached, which may occur with regularity every six months depending on H–2B visa need, as foreseeable, and therefore not within the meaning of ''good and substantial cause'' that would justify a request for emergency procedures. Accordingly, employers cannot rely solely on the supplemental H–2B visas made available through this rule as good and substantial cause to use emergency procedures under 20 CFR 655.17.

Additional Recruitment

In addition to the recruitment already conducted in connection with a valid TLC, to ensure the recruitment has not become stale, employers that wish to obtain visas for their workers under 8 CFR 214.2(h)(6)(xv), and who file an I–129 petition 30 or more days after the certified start date of work on the TLC must conduct additional recruitment for U.S. workers. As noted in the 2015 H–2B Interim Final Rule, U.S. workers seeking employment in temporary nonagricultural 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 start date. *See* 80 FR 24041, 24061, 24071. Given that the temporary labor certification process generally begins 75 to 90 days in advance of the employer's start date of work, employer recruitment efforts typically occur between 40 and 60 days before that date with an obligation to provide employment to any qualified U.S. worker who applies until 21 days before the date of need. Therefore, employers with TLCs containing a start date of work on October 1, 2024, for example, likely conducted their positive recruitment beginning around late-July and ending around mid-August 2024 and continued to consider U.S. worker applicants and referrals only until September 10, 2024.

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 if employers file an I–129 petition 30 or more days after their certified start dates of work, as shown on its approved Form ETA–9142B, *Final Determination: H–2B Temporary Labor Certification Approval,* they have not conducted recruitment recently enough for the DOL to reasonably conclude that there are currently an insufficient number of U.S. workers who are qualified, willing, and available to perform the work absent taking additional, positive recruitment steps. As noted in the FY 2022 second half H–2B supplemental cap TFR, the Departments determined that this 30-day requirement is consistent with provisions contained in previous TFRs and better aligns with the goal of affording workers an adequate opportunity to apply for jobs closer to when they tend to search for temporary employment. As explained in the 2015 H–2B Interim Final Rule, U.S. applicants applying for temporary positions typically offered by H–2B employers are often not seeking job opportunities, or making informed decisions about such work, several months in advance. *See* 80 FR 24041, 24071; 87 FR 30334, 30353–54. The Departments continued to use this 30-day requirement in the FY 2023 and FY 2024 H–2B supplemental cap TFRs based on the rationale provided in the FY 2022 second half H–2B supplemental cap TFR. *See* 87 FR 76816, 76842–76843; 88 FR 80394, 80426. The Departments have determined that this requirement is necessary to provide U.S. workers an opportunity to pursue jobs for which employers are seeking supplemental visas.

An employer that files an I–129 petition under 8 CFR 214.2(h)(6)(xv) fewer than 30 days after the certified start date of work on the TLC must submit the TLC and a completed Form ETA–9142B–CAA–9 but is not required to conduct additional recruitment for U.S. workers beyond the recruitment already conducted as a condition of certification. Only those employers with still-valid TLCs with a certified start date of work that is 30 or more days before the date they file a petition will be required to conduct recruitment in addition to that conducted prior to being granted a TLC and attest that the recruitment will be conducted, as follows.

Placement of New Job Orders With State Workforce Agencies

Employers that are required to engage in additional recruitment must place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment no later than the next business day after submitting an I–129 petition for H–2B workers to USCIS, and inform the SWA that the job order is being placed in connection with a previously submitted and certified Application for Temporary Employment Certification for H–2B workers by providing the SWA with the unique OFLC TLC case number. Under this rule, employers must also provide the OFLC NPC with the unique TLC case number concurrently with their placement of new job orders with the SWAs. This notification will allow OFLC to cross reference and repost information about the job opportunities that are provided on the employers' certified Applications for Temporary Labor Certification and posted by OFLC on *SeasonalJobs.dol.gov,* which is DOL's electronic job registry authorized under 20 CFR 655.34. Once posted by OFLC, information about the employer's certified job opportunity will remain posted for a period of at least 15 calendar days, which is consistent with the period of time SWAs post job orders for intrastate and interstate clearance to recruit U.S. workers, as discussed below. The Departments continue to believe this additional notification is a reasonable and cost-efficient method of disseminating available job opportunities to a wider audience and those U.S. workers who may be interested in applying. While not meant to recreate it, this action will serve the same functional purpose as the posting on *Seasonal Jobs.* To help employers who must conduct this notification requirement, DOL encourages employers to notify the OFLC NPC, at the same time notification is sent to the SWA, by sending an email to *H-2Bsupplementalvisas@dol.gov,* and including the words ''H–2B TFR 2025 Recruitment'' followed by the unique TLC case number in the subject line of the email.

The new job order placed with the SWA 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 15 calendar days. 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. The Departments have concluded that keeping the job order posted for a period of at least 15 calendar days, during the period the employer is conducting the additional recruitment steps explained below and OFLC reposts the job opportunity information, will effectively ensure U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The minimum 15 calendar day period also is consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

Once the SWA places the new job order on its public labor exchange system, the SWA will perform its normal employment service activities by circulating the job order for intrastate clearance, and in interstate clearance by providing a copy of the job order to other SWAs with jurisdiction over listed worksites as well as those States the OFLC CO designated in the original Notice of Acceptance issued under 20 CFR 655.33. Where the occupation or industry is traditionally or customarily unionized, the SWA will also circulate a copy of the new job order to the central office of the State Federation of Labor in the State(s) in which work will be performed, and the office(s) of local union(s) representing workers in the same or substantially equivalent job classification in the area(s) in which work will be performed, consistent with its current obligation under 20 CFR 655.33(b)(5). To facilitate an effective dissemination of these job opportunities, DOL encourages union(s) or hiring halls representing workers in occupations typically used in the H–2B program to proactively contact and establish partnerships with SWAs in order to obtain timely information on available temporary job opportunities. This will aid the SWAs' prompt and effective outreach under the rule. DOL's OFLC maintains a comprehensive directory of contact information for each SWA at *https://www.dol.gov/agencies/eta/foreign-labor/contact.*

Contact With American Job Centers

The employer also must conduct additional recruitment steps during the period of time the SWA is actively circulating the job order for intrastate clearance. First, the employer must contact, by email or other electronic means, the nearest American Job Center(s) (AJC) serving the area of intended employment where work will commence to request staff assistance to advertise and recruit U.S. workers for the job opportunity. AJCs bring together a variety of programs providing a wide range of employment and training services for U.S. workers, including job search services and assistance for prospective workers and recruitment services for employers through the Wagner-Peyser Program. Therefore, AJCs can offer assistance to employers with recruitment of U.S. workers, and contact with local AJCs will facilitate contemporaneous and effective recruitment activities that can broaden dissemination of the employer's job opportunity through connections with other partner programs within the One-Stop System to locate qualified U.S. workers to fill the employer's labor need. For example, the local AJC, working in concert with the SWA, can coordinate efforts to contact community-based organizations in the geographic area that serve potentially qualified workers or, when a job opportunity is in an occupation or industry that is traditionally or customarily unionized, the local AJC may be better positioned to identify and circulate the job order to appropriate local union(s) or hiring hall(s), consistent with 20 CFR 655.33(b)(5). In addition, as a partner program in the One-Stop System, AJCs are connected with the State's unemployment insurance program, thus an employer's connection with the AJC will help facilitate knowledge of the job opportunity to U.S. workers actively seeking employment. When contacting the AJC(s), the employer must provide staff with the job order number or, if the job order number is unavailable, a copy of the job order.

To increase navigability and to make the process as convenient as possible, DOL offers an online service for employers to locate the nearest local AJC at *https://www.careeronestop.org/* and by selecting the ''Find Local Help'' feature on the main homepage. This feature will navigate the employer to a search function called ''Find an American Job Center'' where the city, state or zip code covering the geographic area where work will commence can be entered. Once entered and the search function is executed, the online service will return a listing of the name(s) of the AJC(s) serving that geographic area as well as a contact option(s) and an indication as to whether the AJC is a ''comprehensive'' or ''affiliate'' center. Employers must contact the nearest ''comprehensive'' AJC serving the area of intended employment where work will commence or, where a ''comprehensive'' AJC is not available, the nearest ''affiliate'' AJC. A ''comprehensive'' AJC tends to be a large office that offers the full range of employment and business services, and an ''affiliate'' AJC typically is a smaller office that offers a self-service career center, conducts hiring events, and provides workshops or other select employment services for workers. Because a ''comprehensive'' AJC may not be available in many geographic areas, particularly among rural communities, this rule permits employers to contact the nearest ''affiliate'' AJC serving the area of intended employment where a ''comprehensive'' AJC is not available. In order to facilitate efficient access to AJC services, this rule requires that employers utilize available electronic methods to contact the nearest AJC to meet the contact and disclosure requirements in this rule.

Contact With AFL–CIO for Jobs in Traditionally or Customarily Unionized Occupation or Industry

When a job is in a traditionally or customarily unionized occupation or industry, during the time the SWA is actively circulating the job order, the employer must affirmatively contact the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment to provide written notice of the job opportunity and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The employer must provide the AFL–CIO office (by mail, email, or other effective written means) a copy of the job order placed with the SWA. To determine which occupations are traditionally or customarily unionized, and to obtain information about the proper AFL–CIO office to contact,[165] employers should

[165] The Departments have determined that the requirement for employers to contact the nearest AFL–CIO office properly balances the goal of increasing U.S. worker outreach in those H–2B job opportunities that are in traditionally or customarily unionized occupations, while still providing employers with necessary guidance on recruitment requirements. The AFL–CIO is a voluntary federation of more than 60 national and international labor unions covering a substantial number of union employees. AFL–CIO, About Us, *https://aflcio.org/about-us* (last visited September 20, 2024). The H–2B job opportunities in

Continued

search the resources available on the OFLC website, under the ''Customarily Unionized H–2B Occupations'' tab on the lefthand side of the OFLC homepage: *https://www.dol.gov/agencies/eta/foreign-labor.*[166] In addition, to help employers who must conduct this additional recruitment step, employers may also contact the national AFL–CIO and request assistance in circulating the job order to the nearest AFL–CIO office covering the area of intended employment to advertise and recruit U.S. workers for the job opportunity. The most effective means of contacting the national AFL–CIO is to email the job order and request for assistance to *H-2B@aflcio.org,* but employers may also visit *https://aflcio.org* to obtain information on other effective means of contacting the organization for assistance. Upon receipt, the national AFL–CIO will distribute a copy of the job order, on behalf of the employer, to the most appropriate AFL–CIO office(s) serving the area of intended employment for that job opportunity.

When applicable, the employer must include information in its recruitment report confirming that either the national or nearest AFL–CIO office was contacted and notified in writing of the job opportunity or opportunities. In the recruitment report, the employer must state whether the nearest AFL–CIO office referred qualified U.S. worker(s), including the number of referrals, or indicate that it was non-responsive to the employer's requests. The employer must retain all documentation establishing that it has contacted either the national or nearest AFL–CIO office and submit all such information upon request from the Departments. Documentation or evidence that would help employers establish that the appropriate AFL–CIO office was contacted, may include, but is not limited to: documentation proving the job order was shipped and delivered to the AFL–CIO office (*e.g.,* copy of the job order along with the certificate of shipment provided by the U.S. Postal Service or other courier mail or parcel delivery services and/or any other form of delivery confirmation); evidence confirming that the job order, along with a request for assistance to recruit workers, was in fact emailed to the appropriate AFL–CIO office (*e.g.,* copies of emails); phone records accompanied by proof of a follow-up email sending the job order to the appropriate AFL–CIO office; or copies of any correspondence exchanged (*e.g.,* letter, email) between the employer and the AFL–CIO office regarding worker referrals.

We believe the requirement that employers contact the AFL–CIO in occupations or industries that are traditionally or customarily unionized will complement the requirement that SWAs circulate the job order to the State Federation of Labor and local unions in such situations, thereby increasing the likelihood that a U.S. worker will be recruited for the job opportunity. This is because in traditionally or customarily unionized industries and occupations, unions serve as an essential conduit for communications between U.S. workers and hiring employers and have traditionally been recognized as a reliable source of referrals of U.S. workers. Unionized applicants may additionally share information about the job opportunity with nonunionized applicants, resulting in more referrals of qualified applicants to the job opportunity. Within this context, the two requirements complement each other as the State Federations of Labor and local unions that SWAs would circulate relevant job orders to, based on their knowledge of the local labor market, are comprised of various union organizations and may not always include the AFL–CIO. Since H–2B job opportunities in traditionally or customarily unionized occupations tend to fall within those industries most likely to be organized or represented by AFL–CIO member unions, this requirement increases outreach to qualified U.S. workers. Moreover, this requirement offers a chance for hiring employers to directly contact a potential pool of U.S. workers who are qualified and interested in the job opportunity, which can strengthen the probability that employers will locate U.S. workers suited for the job opportunity. For example, potential U.S. workers may be more inclined to contact an employer directly upon learning of the job opportunity rather than utilize the SWA as an intermediary since the application process could be quicker and demonstrates a willingness by employers to consider union workers. Direct contact between employers and unions may also initiate a dialogue between employers and unions that could lead to a future working relationship that fulfills the workforce needs of employers. Therefore, in providing timely and meaningful notice of job opportunities in traditionally or customarily unionized industries to the AFL–CIO, employers build on efforts by SWAs to circulate job orders to state and local unions, which may differ from the AFL–CIO, and thus broaden the scope of their U.S. worker outreach.

Contact With Former U.S. Workers

During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of 20 CFR 655.64 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other written effective means) its former U.S. workers that it employed in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite) during the period beginning January 1, 2023 until the date the I–129 petition required under 8 CFR 214.2(h)(6)(xv) is submitted. Among the employees the employer must contact are those who have been furloughed [167] or laid off during this period. The employer must disclose to its former employees the terms of the job order placed with the SWA and solicit their return to the job. The employer must provide the contact and disclosures required by this paragraph in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each former U.S. worker. The Departments are requiring written communication because they believe that written contact and disclosure of the terms of the job order is more effective than oral disclosure, and

traditionally or customarily unionized occupations most frequently fall within those industries most likely to be organized or represented by AFL–CIO member unions.

Additionally, the AFL–CIO's status as the largest federation of unions in the United States provides for comprehensive national coverage and increases the chances that a U.S. worker will be hired. *See* AFL–CIO Press Release, *https://aflcio.org/press/releases/afl-cio-teams-wilmington-trust-and-bny-mellon-expand-retirement-planning-options* (last visited September 20, 2024) (noting the AFL–CIO is ''the nation's largest federation of labor unions''). As discussed below, the SWAs circulation of relevant job orders based on their knowledge of the local labor market would provide effective outreach to other federations of unions and non-affiliated unions.

[166] These resources were developed based on recent information received from stakeholders indicating that collective bargaining agreements now exist in certain occupations, such as landscaping. In addition, the occupations or industries listed are ones in which the Department has typically observed substantial union presence in its program administration experience, such as occupations involved in public sector employment, construction and extraction activities, and service-related industries, where historical Bureau of Labor Statistics data has demonstrated a presence of union affiliated workers. *See* BLS, Economic News Release, Table 3. Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry (Jan. 23, 2024), *https://www.bls.gov/news.release/archives/union2_01232024.pdf.*

[167] Furloughed employees are employees the employer laid off (as the term is defined in 20 CFR 655.5 and 29 CFR 503.4), but the layoff is intended to last for a temporary period of time.

provides greater assurance that workers understand the terms and working conditions of the job opportunity and can more effectively pursue redress if they do not receive the disclosed terms and working conditions. Written communication and disclosure will also make it easier for employers to establish compliance with this requirement, if necessary.

Contact With the Bargaining Representative or Posting of the Job Order

As the employer was required to do when initially applying for its labor certification, the employer must provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b). Similar to the requirement to contact former U.S. workers, discussed above, the employer must provide the contact and disclosures required by this paragraph in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each former U.S. worker.

Contact With Current U.S. Workers

As was required in the FY 2024 H–2B supplemental visa TFR, employers must again contact U.S. workers currently employed at the place of employment to inform them of the job opportunity and request their assistance in recruiting qualified U.S. workers who may be seeking employment. The Departments continue to believe this recruitment step is a reasonable and cost-effective method of broadening dissemination of available job opportunities and increasing the likelihood that qualified U.S. workers will apply. We believe the requirement that employers contact their current U.S. workers employed at the place(s) of employment and solicit their assistance in recruiting other qualified U.S. workers will complement the requirement that employers post the job order in the places and manner described in 20 CFR 655.45(b), enhance word-of-mouth recruiting, which is a common method of soliciting referrals of qualified U.S. workers, and increase the likelihood of locating U.S. workers suited for the job opportunity more quickly and efficiently. U.S workers currently employed by the employer, who are more likely to be familiar with the nature of the employer's business operations and services or labor to be performed, will generally refer other U.S. workers who are qualified and may be more inclined to contact an employer directly upon learning of the job opportunity from a family, friend, or colleague with experience working for the employer.

Accordingly, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of 20 CFR 655.64 for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other effective written means) all U.S. workers it currently employs at the place(s) of employment under the certified TLC. The employer must disclose to each of its current U.S. workers the terms of the job order placed with the SWA, and request assistance in recruiting qualified U.S. workers who may be interested in applying for the job opportunity. The contacts, disclosures, and requests for assistance required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable, and in writing to ensure the recruitment effort is effective and meaningful in reaching each current U.S. worker.

The employer must retain all documentation establishing that it has contacted each U.S. worker it currently employs at the place(s) of employment under the certified TLC and submit all such information upon request from the Departments. Documentation or evidence that would help employers establish compliance with this regulatory requirement may include, but is not limited to the following: documentation proving the job order, along with a request for assistance to recruit workers, was shipped and delivered to each current U.S. worker's address (*e.g.,* copy of the job order and request for assistance along with the certificate of shipment provided by the U.S. Postal Service or other courier mail or parcel delivery services and/or any other form of delivery confirmation); evidence confirming that the job order, along with a request for assistance to recruit workers, was emailed to the current U.S. worker (*e.g.,* copies of emails); or copies of any correspondence exchanged (*e.g.,* letter, email) between the employer and the current U.S. worker regarding referrals of other qualified U.S. workers.

The requirements to contact current and former U.S. workers and provide notice to the bargaining representative or post the job order must be conducted in a language understood by the workers, as necessary or reasonable. This requirement would apply, for example, in situations where an employer has one or more employees who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English. This requirement would allow those workers to make informed decisions regarding the job opportunity and is a reasonable interpretation of the recruitment requirements in 20 CFR part 655, subpart A, in light of the need to ensure that the test of the U.S. labor market is as comprehensive as possible. Consistent with existing language requirements in the H–2B program under 20 CFR 655.20(l), DOL intends to broadly interpret the necessary or reasonable qualification and apply an exemption only in those situations where having the job order translated into a particular language would both place an undue burden on an employer and not significantly disadvantage the employee.

Posting of the Job Opportunity on the Employer's Website if the Employer Has a Website

Finally, as was required in the FY 2024 H–2B supplemental visa TFR, where the employer maintains a company website for its business operations, the employer must post an electronic advertisement of the job opportunity in a conspicuous location on this website.

Although the vast majority of small businesses in the United States maintain a website, the Departments acknowledge that not all employers maintain a company website.[168] As discussed in the prior TFR, although there is no parallel requirement for employers without a website, the Departments believe that continuing to require employers with websites to post the job announcement on their website is reasonable because this population of employers uses their websites to inform the public about their existence and/or the services they may provide. Thus, these employers' advertisement of the job opportunity, via their websites, is consistent with these employers' use of the internet/electronic means to communicate with the public. Accordingly, this recruitment requirement will continue to apply only to employers that maintain a website for business operations. For employers who must conduct this additional recruitment step, the electronic advertisement of the job opportunity on the company website must be posted in a conspicuous location. This means

[168] The U.S. Chamber of Commerce reports that 71% of small businesses have a website. *See* U.S. Chamber of Commerce, *Small Business Statistics,* available at *https://www.chamberofcommerce.org/small-business-statistics/#marketing-statistics* (accessed September 27, 2024).

access to the electronic advertisement on the company website must be clearly visible on the website's homepage or easily accessible from the website's homepage using any job search tool(s) or direct links from the homepage to a subsequent web page where other available jobs or careers are normally posted by the employer.

The Departments have concluded that keeping the electronic advertisements on company websites posted for a period of at least 15 calendar days, along with the other additional recruitment steps discussed above, will effectively ensure that U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The minimum 15 calendar day period is also consistent with the employer-conducted recruitment activity period applicable under 20 CFR 655.40(b).

The employer must retain all documentation establishing that it has posted the electronic advertisement of the job opportunity in compliance with regulatory requirements and submit all such information upon request from the Departments. Documentation or evidence for employers to establish compliance with these regulatory requirements can include screenshots of the company website on which the advertisement appears for a period of no less than 15 days and screen shots of the web pages establishing the path that U.S. workers must follow to access the advertisement on the website.

Hiring U.S. Workers

The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until either (1) the date on which the last H–2B worker departs for the place of employment, or (2) 30 days after the last date on which the SWA job order is posted, whichever is later. Additionally, consistent with 20 CFR 655.40(a), applicants may be rejected only for lawful job-related reasons. Given that the employer, SWA, and AJC(s) will be actively engaged in conducting recruitment and broader dissemination of the job opportunity during the period of time the job order is active, this requirement provides an adequate period of time for U.S. workers to contact the employer or SWA for referral to the employer and completion of the additional recruitment steps described above. As explained above, the Departments have determined that if employers file a petition 30 or more days after their dates of need, they have not conducted recruitment recently enough for the Departments to reasonably conclude that there are currently an insufficient number of U.S. workers qualified, willing, and available to perform the work absent additional recruitment.

Because of the abbreviated timeline for the additional recruitment required for employers whose initial recruitment has gone stale, the Departments have determined that this hiring period is necessary to approximate the hiring period under normal recruitment procedures and ensure that domestic workers have access to these job opportunities, consistent with the Departments' mandate. Additionally, given the relatively brief period during which additional recruitment will occur, additional time may be necessary for U.S. workers to have a meaningful opportunity to learn about the job opportunities and submit applications.

The Departments remind all H–2B employers that the job opportunity must be, through the recruitment period set forth in this rule, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, disability, or citizenship, as specified under 20 CFR 655.20(r). Further, employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the worker is being recruited so that the worker incurs little or no cost. Employers cannot provide potential H–2B workers with more favorable treatment with respect to the requirement for, and conduct of, interviews. *See* 20 CFR 655.40(d).

Any U.S. worker who applies or is referred for the job opportunity and is not considered by the employer for the job opportunity, experiences difficulty accessing or understanding the material terms and conditions of the job opportunity, or believes they have been improperly rejected by the employer may file a complaint directly with the SWA serving the area of intended employment. Each SWA maintains a complaint system for public labor exchange services, established under 20 CFR part 658, subpart E, and any complaint filed with the SWA by, or on behalf of, a U.S. worker about a specific H–2B job order will be processed under this existing complaint system. Depending on the circumstances, the SWA may seek informal resolution by working with the complainant and the employer to resolve, for example, miscommunications with the employer to be considered for the job opportunity or other concerns or misunderstandings related to the terms and conditions of the job opportunity; or issue a formal, written determination where informal resolution cannot be reached. In other circumstances, such as allegations involving discriminatory hiring practices or violations of other employment-related laws, the SWA will formally enter the complaint and refer the matter to an appropriate enforcement agency for prompt action. As mentioned above, DOL's OFLC maintains a comprehensive directory of contact information for each SWA that can be used to obtain more information on how to file a complaint.

Although the hiring period may require some employers to hire U.S. workers after the start of the contract period, this is not unprecedented. For example, in the H–2A program, employers have been required to hire U.S. workers through 50 percent of the contract period since at least 2010, which ''enhance[s] protections for U.S. workers, to the maximum extent possible, while balancing the potential costs to employers,'' and is consistent with the Departments' responsibility to ensure that these job opportunities are available to U.S. workers. 74 FR 45906, 45917. The Department acknowledges that hiring workers after the start of the contract period imposes an additional cost on employers, but that cost can be lessened, in part, by the ability to discharge the H–2B worker upon hiring a U.S. worker (note, however, that an employer must pay for any discharged H–2B worker's return transportation, 20 CFR 655.20(j)(1)(ii) and 29 CFR 503.16(j)(1)(ii)). Additionally, this rule permits employers to immediately hire H–2B workers who are already present in the United States without waiting for approval of an H–2B petition, which will reduce the potential for harm to H–2B workers as a result of displacement by U.S. workers. *See* new 8 CFR 214.2(h)(31). Most importantly, a longer hiring period will ensure that available U.S. workers have a viable opportunity to apply for H–2B job opportunities. Accordingly, the Departments have determined that in affording the benefits of this temporary cap increase to businesses that are suffering irreparable harm or will suffer impending irreparable harm, it is necessary to ensure U.S. workers have sufficient time to apply for these jobs.

As in the temporary rules implementing the supplemental cap increases in prior years, employers must retain documentation demonstrating compliance with the recruitment requirements described above. Under this TFR, in accordance with 20 CFR 655.68, employers must retain documentation that demonstrates placement of a new job order with the SWA, contact with AJCs, contact with

the bargaining representative or AFL–CIO when required, contact with former U.S. workers, compliance with 20 CFR 655.45(a) or (b), contact with current U.S. workers at the place of employment, and posting of the job opportunity on the employer's website, if the employer has a website. Employers must prepare and retain a recruitment report that describes these efforts and meets the requirements set forth in 20 CFR 655.48, including the requirement to update the recruitment report throughout the recruitment and hiring period set forth in paragraph (a)(4)(viii) of 20 CFR 655.64. Employers must maintain copies of the recruitment report, 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 655.68, 20 CFR 655.56, and 29 CFR 503.17. These requirements are similar to those that apply to certain seafood employers that stagger the entry of H–2B workers under 20 CFR 655.15(f).

The Departments are committed to ensuring that all recruitment conducted in conjunction with this rule complies with the additional recruitment requirements discussed above and encourages individuals with information about that recruitment to contact DOL through the OFLC H–2B Ombudsman Program email box (*H2B.Ombudsman@dol.gov*). The H–2B Ombudsman Program facilitates the fair and equitable resolution of concerns that arise within the H–2B filing community, by conducting independent and impartial inquiries into issues related to the administration of the H–2B program. The H–2B Ombudsman Program also receives concerns and information relevant to case processing from employers, unions, and worker advocate organizations and ensures such information is appropriately referred within OFLC or to SWAs, as appropriate.

DOL actively monitors the H–2B Ombudsman Program email box, which is the best method for the public to provide information to the Department that is relevant to the processing of H–2B applications. Such information may include information about an in-process TLC application, information regarding the employer's compliance with H–2B recruitment of U.S. workers, or information bearing on an employer's irreparable harm justification. When the H–2B Ombudsman Program receives information relevant to its review of an H–2B TLC application, the information will be forwarded to the H–2B processing center. The H–2B processing center will review the information it receives and will consider it, as appropriate.

The H–2B Ombudsman Program, however, is separate and distinct from the employment service complaint system administered by the Employment and Training Administration under regulations at 20 CFR part 658, subpart E. Any information relevant to an employment service complaint will be forwarded to the appropriate SWA. The public may also submit employment service complaints directly to the appropriate SWA; the contact information for each SWA is available at the following web page: *https://www.dol.gov/agencies/eta/foreign-labor/contact*.

Complaints regarding an employer's failure to comply with the H–2B program requirements may also be submitted to DOL's WHD. 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 to workers; make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced; make-whole relief for any person who has been discriminated against; 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 20 CFR 655.68, 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.

When conducting an investigation, WHD will generally review the employer's compliance with this rule, the H–2B program obligations in general, and any other Federal labor laws that WHD enforces (such as the Fair Labor Standards Act, which establishes minimum wage, overtime, recordkeeping and child labor obligations for most employers in the United States) and to which the employer is subject. WHD's investigations generally involve meeting with the employer, touring the worksite, conducting confidential interviews with employees, reviewing records (including those required by 20 CFR 655.68 evidencing compliance with this rule), and, when appropriate, imposing sanctions and remedies (including back wages). For example, in the past five years (fiscal years 2019–2023), WHD collected more than $16.7 million in H–2B back wages owed to 10,778 workers, and assessed more than $12.4 million in H–2B civil money penalties.

Within the context of this rule, WHD's investigative tools are particularly adept for the review of alleged violations that may result in back wages and/or that require intensive fact-finding at the worksite. Additionally, WHD is well suited to investigate alleged violations that occur after the job order has closed and H–2B workers are already in the United States. For example, WHD's tools are well suited to investigate allegations that U.S. applicants were improperly rejected for the job opportunity (if supplemental recruitment was required as outlined in 20 CFR 655.64(a)(4)) after the job order has closed, as WHD may conduct employee interviews, question the employer as to why the applicant was not hired, review recruitment records, and, if a violation is substantiated, compute back wages for the improperly rejected U.S. applicant.

Additionally, WHD is well suited to investigate allegations of retaliation, as these cases involve complex fact finding and, if allegations are substantiated, may result in make-whole relief or back wages owed to the worker. An employer is prohibited from intimidating, threatening, restraining, coercing, blacklisting, discharging, or in any manner discriminating against any person who has, among other actions: filed a complaint related to H–2B rights and protections; consulted with a workers' rights center, community organization, labor union, legal assistance program, or attorney on H–2B rights or protections; or exercised or asserted H–2B rights and protections on behalf of themselves or others. 20 CFR 655.20(n) and 29 CFR 503.16(n). Examples of protected activity include making a complaint to a manager, employer, or WHD; cooperating with a WHD investigation; requesting payment of wages; refusing to return back wages to the employer; consulting with WHD or workers' rights organization; and testifying in a trial. If other laws are applicable (such as the Fair Labor Standards Act), the anti-retaliation provisions of those laws may also be applicable.

In addition to the H–2B Ombudsman Program and the employment service complaint system under 20 CFR part 658, subpart E, which are described above, workers or U.S. applicants for job opportunities who believe their rights under the H–2B program have been violated may file complaints with WHD by telephone at 1–866–487–9243 or may access the telephone number via TTY by calling 1–877–889–5627 or visit *https://www.dol.gov/agencies/whd* to locate the nearest WHD office for assistance. Complainants should be prepared to provide their name and contact information; name, address, and contact information for the employer; and details about the alleged violation. WHD maintains all complaints as confidential unless the complainant provides WHD with permission to use their name when speaking to the employer.

DHS has the authority to verify any information submitted to establish H–2B eligibility at any time before or after the petition has been adjudicated by USCIS. *See, e.g.,* INA sections 103, 214, and 235(d) (8 U.S.C. 1103, 1184, and 1225(d)); *see also* 8 CFR part 103 and section 214.2(h). DHS' 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. USCIS will also review information received from individuals who suspect H–2B benefit fraud and abuse and reported their suspicions via the ICE Tip Form, available online at *https://www.ice.gov/webform/ice-tip-form* (last visited July 29, 2024) or via the toll-free ICE Tip Line, (866) 347–2423. Subject to the exceptions described in 8 CFR 103.2(b)(16), USCIS will provide petitioners with an opportunity to address adverse information that may result from a USCIS compliance review, verification, or site visit that occurs 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 already has the authority under 20 CFR 655.70 to conduct audit examinations on adjudicated Applications for Temporary Employment Certification, including all appropriate appendices, and verify any information supporting the employer's attestations. OFLC uses audits of adjudicated Applications for Temporary Employment Certification, as authorized by 20 CFR 655.70, to ensure employer compliance with attestations made in its Application for Temporary Employment Certification and to ensure the employer has met all statutory and regulatory criteria and satisfied all program requirements. The OFLC CO has sole discretion to choose which Applications for Temporary Employment Certification will be audited. *See* 20 CFR 655.70(a). Post-adjudication audits can be used to establish a record of employer compliance or non-compliance with program requirements and the information gathered during the audit assists DOL in determining whether it needs to further investigate or debar an employer or its agent or attorney from future labor certifications.

Under this rule, an employer may submit a petition to USCIS, including a valid TLC and Form ETA–9142B–CAA–9, in which the employer attests to compliance with requirements for access to the supplemental H–2B visas allocated through 8 CFR 214.2(h)(6)(xv), including that its business is suffering irreparable harm or will suffer impending irreparable harm, and that it will conduct additional recruitment, if necessary to refresh the TLC's labor market test. DHS and DOL consider Form ETA–9142B–CAA–9 to be an appendix to the Application for Temporary Employment Certification and the attestations contained on the Form ETA–9142B–CAA–9 and documentation supporting the attestations to be evidence that is incorporated into and a part of the approved TLC. Therefore, DOL's audit authority includes the authority to audit the veracity of any attestations made on Form ETA–9142B–CAA–9 and documentation supporting the attestations. In order to make certain that the supplemental visa allocation is not subject to fraud or abuse, DHS will continue to share information regarding Forms ETA–9142B–CAA–9 with DOL, consistent with existing authorities. This information sharing between DHS and DOL, along with relevant information that may be obtained from the SWA and WHD, are expected to support DOL's identification of TLCs used to access the supplemental visa allocation for closer examination of TLCs through the audit process.

In accordance with the documentation retention requirements in this rule, 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. Under this rule, DOL intends to audit a significant number of TLCs used to access the supplemental visa allocation to ensure employer compliance with attestations, including those regarding the irreparable harm standard and additional employer conducted recruitment, required under this rule. In the event of an audit, the OFLC CO will send a letter to the employer and, if appropriate, a copy of the letter to the employer's attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO. During audits under this rule, the CO will request documentation necessary to demonstrate the employer conducted all recruitment steps required under this rule and truthfully attested to the irreparable harm the employer was suffering or would suffer in the near future without the ability to employ all of the H–2B workers requested under the cap increase, including documentation the employer is required to retain under this rule. If necessary to complete the audit, the CO may request supplemental information and/or documentation from the employer during the course of the audit process. 20 CFR 655.70(c).

DOL relies on the employer to adhere to the H–2B regulations and fulfill its attestations as a condition of receiving a temporary labor certification, including attestations to fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL. Failure to comply in the audit process may result in the revocation of the employer's certification or in debarment, under 20 CFR 655.72 and 655.73, respectively, or require the employer to undergo assisted recruitment in future filings of an Application for Temporary Employment Certification, under 20 CFR 655.71. Specifically, when an employer fails to respond to Departmental correspondence issued under 20 CFR 655.70 it may be considered to have failed to comply with the audit process or impeded the audit under 20 CFR 655.73. Where an audit examination or review of information from DHS or other appropriate agencies 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. Those 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 DOL for 1 to 5 years. *See* 20 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 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 20 CFR 655.68, 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, 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.

IV. 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.'' Among other things, 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). Courts have found ''good cause'' under the APA in similar situations when an agency is moving expeditiously to avoid significant economic harm to a program, program users, or an industry. *See, e.g., Nat'l Fed'n of Fed. Emps.* v. *Devine,* 671 F.2d 607, 611 (D.C. Cir. 1982) (holding that an agency may use the good cause exception to address ''a serious threat to the financial stability of [a government] benefit program''); *Am. Fed'n of Gov't Emps.* v. *Block,* 655 F.2d 1153, 1156 (D.C. Cir. 1981) (finding good cause when an agency bypassed notice and comment to avoid ''economic harm and disruption'' to a given industry, which would likely result in higher consumer prices).

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 due to the time exigencies resulting from the unique procedural history of the Department's authority for this action and the ongoing economic need for this rulemaking, as described further below. Overall, the Departments are bypassing notice and comment to prevent ''serious economic harm to the H–2B community,'' including U.S. employers, associated U.S. workers, and related professional associations, that could result from the failure to provide supplemental visas as authorized by Congress. *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.,*[169] and limits eligibility for H–2B supplemental visas to only those businesses most in need, and also protects H–2B and U.S. workers.

With respect to the supplemental allocations provisions in 8 CFR 214.2 and 20 CFR part 655, subpart A, as explained above, the Departments are acting pursuant to the extension of supplemental cap authority in Section 105 of the FY 2024 Omnibus by sections 101(6) and 106 Division A, Title I of Public Law 118–83 (Sept. 26, 2024) to FY 2025. The deadline for exercising the FY 2025 supplemental cap authority under the Continuing Appropriations and Extensions Act, 2025, is December 20, 2024 the date on which the FY 2025 continuing resolution expires. This timing concern is critical since the Departments are bypassing advance notice and comment in order to urgently address increased labor demand.[170]

Acting expeditiously is intended to prevent economic harm resulting from American businesses suffering irreparable harm due to a lack of a sufficient labor force. This harm would ensue if the Departments do not exercise the authority provided by the extension of supplemental cap authority. USCIS received more than enough petitions to meet the H–2B visa statutory cap for the first half of FY 2025 on September 18, 2024.[171] Based on past years' experience, DHS anticipates that it will also receive sufficient petitions to meet the semiannual cap for the second half of the FY 2025; last year on March 7, 2024, USCIS received sufficient petitions to meet the H–2B visa statutory cap for the second half of FY 2024.[172] Given the continued high demand of American businesses for H–2B workers (as discussed in this preamble), rapidly evolving economic conditions and historically high labor demand, and the limited time remaining until the expiration of the continuing resolution authorizing supplemental cap authority to help prevent further irreparable harm currently experienced by some U.S. employers or avoid impending economic harm for others, a decision to undertake notice and comment rulemaking, which would delay final action on this matter by months, would greatly complicate and potentially preclude the Departments from successfully exercising the authority created by section 105, Public Law 118–47 as extended to FY 2025 by secs. 101(6) and 106 of Public Law 118–83. If the Departments are precluded from exercising this authority, substantial economic harm will result for the reasons stated above.

The temporary portability and change of employer provisions in 8 CFR 214.2 and 274a.12 are also supported by labor market demands. 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

[169] Because the Departments have issued this rule as a temporary final rule, the supplemental cap portion of this rule—with the sole exception of the document retention requirements—will be of no effect after September 30, 2025. The ability to initiate employment with a new employer pursuant to the portability provisions of this rule expires at the end of on January 24, 2026.

[170] *See* Lydia DePillis, *Immigration Rebound Eases Shortage of Workers, Up to a Point,* The NY Times, *https://www.nytimes.com/2023/02/06/business/economy/immigration-labor.html* (Feb. 6, 2023), (''The path of immigration policy will have a substantial bearing on the nation's supply of workers, which has been expanding more slowly as native-born workers have fewer children.'').

[171] *See* USCIS, *USCIS Reaches H–2B Cap for First Half of Fiscal Year 2025, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-first-half-of-fiscal-year-2025* (Sept. 19, 2024).

[172] *See* USCIS, *USCIS Reaches H–2B Cap for Second Half of FY 2024 and Announces Filing Dates for the Second Half of FY 2024 Supplemental Visas, https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2024-and-announces-filing-dates-for-the-second-half-of* (Mar. 8, 2024).

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).

Finally, taking public comments on this year's temporary final rule before implementation may have limited utility given that the Departments took post-promulgation public comments during a 60-day comment period on the FY 2023 nearly identical TFR, and discussed those comments in detail in the preamble of the FY 2024 TFR. In addition, DHS is separately pursuing broader programmatic improvements in the H–2B and H–2A programs through a separate notice and comment rulemaking which includes a proposal to make portability permanent for all H–2 workers.[173]

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 expressing the need for immediate action, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement.

B. Executive Order 12866: Regulatory Planning and Review; Executive Order 14094: Modernizing Regulatory Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. 58 FR 51735. Section 3(f) of E.O. 12866, as amended by E.O. 14094, defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $200 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. 88 FR 21879.

The Office of Management and Budget (OMB) has designated this temporary final rule a significant regulatory action under section 3(f)(1) of Executive Order 12866, as amended by Executive Order 14094, because its annual effects on the economy exceed $200 million in any year of the analysis. Accordingly, OMB has reviewed this rule.

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Summary

With this temporary final rule (TFR), DHS is authorizing the release of up to an additional 64,716 total H–2B visas to be allocated throughout FY 2025. In accordance with the FY 2025 continuing resolution extending the authority provided in section 105 of the FY 2024 Omnibus, DHS is allocating the supplemental visas in the following manner:

TABLE 1—ALLOCATION OF SUPPLEMENTAL VISAS

Supplement	Number of visas
FY25 First Half Returning Worker Allocation	20,716
FY25 Second Half Returning Worker Allocation	19,000
FY25 Second Half Returning Worker Allocation #2—(Late season Filers)	5,000
FY25 Country-specific Allocation (available whole FY)	20,000
FY25 Total Supplemental Visas	64,716

As with previous H–2B visa supplements, these visas will be available to businesses that: (1) show that there are an insufficient number of U.S. workers to meet their needs throughout FY 2025; (2) attest that their businesses are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all of the H–2B workers requested on their petition; and (3) petition for returning workers who were issued an H–2B visa or were otherwise granted H–2B status in FY 2022, 2023, or 2024, unless the H–2B worker is a national of one of the countries included in the country-specific allocation. Additionally, up to 20,000 visas may be granted to workers from countries included in the country-specific allocation who are exempt from the returning worker requirement. This TFR aims to prevent irreparable harm to certain U.S. businesses by allowing them to hire additional H–2B workers within FY 2025.

The estimated total costs to petitioners range from $8,798,321 to $11,964,750. The estimated total cost to the Federal Government is $270,960. Therefore, DHS estimates that the total cost of this rule ranges from $9,069,281 to $12,235,710. Total transfers from filing fees made by petitioners to the Government are $12,088,515. The benefits of this rule are diverse, though some of them are difficult to quantify. Some of these benefits include:

- Employers benefit from this rule significantly through increased access to H–2B workers;
- Customers and others benefit directly or indirectly from increased access;
- Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H–2B workers were available;
- Some American workers may benefit from the additional recruitment activities that the rule requires certain petitioners to complete, to the extent

[173] On September 20, 2023, DHS issued *Modernizing H–2 Program Requirements, Oversight, and Worker Protections,* Notice of Proposed Rulemaking (NPRM), 88 FR 65040, 65066. In that NPRM, DHS proposed to extend portability to H–2A and H–2B workers on a permanent basis.

that these activities could result in some U.S. workers being hired.

- The existence of a lawful pathway for up to 20,000 temporary workers from countries included in the country-specific allocation is likely to provide multiple benefits in terms of U.S. policy with respect to those countries; and
- The Federal Government benefits from increased evidence regarding attestations. Table 2 provides a summary of the provisions in this rule and some of their impacts.

TABLE 2—SUMMARY OF THE TFR'S PROVISIONS AND ECONOMIC IMPACT

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
—The current statutory cap limits H–2B visa allocations to 66,000 workers a year.	—The amended provisions will allow for an additional 64,716 H–2B temporary workers. Up to 20,000 of the 64,716 additional visas will be reserved for workers who are nationals of the countries included in the country-specific allocation and will be exempt from the returning worker requirement.	—The total estimated opportunity cost of time to file Form I–129 (Petition for a Nonimmigrant Worker) by human resource specialists is approximately $552,801. The total estimated opportunity cost of time to file Form I–129 and Form G–28 will range from approximately $1,383,848 if filed by in-house lawyers to approximately $2,385,900 if filed by outsourced lawyers. The total estimated opportunity cost of time associated with filing additional petitions ranges from $1,936,649 to $2,938,701 depending on the filer. —The total estimated opportunity cost of time associated with filing Form I–907 (Request for Premium Processing Service) if it is filed with Form I–129 is $40,908 if filed by human resource specialists. The total estimated costs associated with filing Form I–907 would range from approximately $86,625 if filed by an in-house lawyer to approximately $149,347 if filed by an outsourced lawyer. The total estimated opportunity cost of time associated with requesting premium processing ranges from approximately $127,533 to approximately $190,255. —The total estimated costs of this provision to petitioners range from $2,064,183 to $3,128,957, depending on the filer.	—Form I–129 petitioners would be able to hire temporary workers needed to prevent their businesses from suffering irreparable harm. —Businesses that are dependent on the success of other businesses that are dependent on H–2B workers would be protected from the repercussions of local business failures. —Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if additional H–2B workers were not available. —Additional recruitment activities may result in some U.S. workers being hired.
n/a	—Petitioners will be required to fill out Form ETA–9142B in order to utilize the 5,000 late season H–2B visas allocated under the rule.	—The estimated cost for late season petitioners to file Form ETA–9142B ranges from $63,347 to $94,469 depending on the filer.	—An approved Form ETA–9142B is required before filing a Form I–129 to request H–2B workers.
n/a	—Petitioners will be required to fill out the newly created Form ETA–9142–B–CAA–9, Attestation for Employers Seeking to Employ H–2B Nonimmigrant Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83.	—The total estimated cost to petitioners to complete and file Form ETA–9142–B–CAA–9 is approximately $1,992,995.	—Form ETA–9142–B–CAA–9 will serve as initial evidence to DHS that the petitioner meets the irreparable harm standard and returning worker requirements.

TABLE 2—SUMMARY OF THE TFR'S PROVISIONS AND ECONOMIC IMPACT—Continued

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
n/a	—Certain Petitioners will be required to conduct an additional round of recruitment.	—The total estimated cost to petitioners to conduct an additional round of recruitment is approximately $296,968.	—The additional round of recruitment will ensure that a U.S. worker who is willing and able to fill the position is not replaced by a nonimmigrant worker. Furthermore, additional recruitment activities may result in some U.S. workers being hired.
Temporary Portability	—An H–2B nonimmigrant who is physically present in the United States may port to another employer.	—The total estimated opportunity cost of time to file Form I–129 by human resource specialists is approximately $45,462. The total estimated opportunity cost of time to file Form I–129 and Form G–28 will range from approximately $113,387 if filed by in-house lawyers to approximately $195,491 if filed by outsourced lawyers. —The total estimated costs associated with filing Form I–907 if it is filed with Form I–129 is $3,355 if filed by human resource specialists. The total estimated costs associated with filing Form I–907 would range from approximately $7,101 if filed by an in-house lawyer to approximately $12,243 if filed by an outsourced lawyer. —The total estimated costs associated with the portability provision ranges from $169,305 to $256,551, depending on the filer. —DHS may incur some additional adjudication costs as more petitioners file Form I–129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.	—H–2B workers present in the United States will be able to port to another employer and potentially extend their stay and, therefore, earn additional wages. —An H–2B worker with an employer that is not complying with H–2B program requirements would have additional flexibility in porting to another employer's certified position. —This provision would ensure employers will be able to hire the H–2B workers they need.
n/a	—DHS and DOL intend to conduct several audits during the period of temporary need to verify compliance with H–2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.	—Employers will have to comply with audits for an estimated total opportunity cost of time of $159,090. —It is expected both DHS and DOL will be able to shift resources to be able to conduct these audits without incurring additional costs. However, the Departments will incur opportunity costs of time. The audits are expected to take a total of approximately 3,000 hours and cost approximately $270,960.	—DOL and DHS audits will yield evidence of the efficacy of attestations in enforcing compliance with H–2B supplemental cap requirements. —Conducting a significant number of audits will discourage uncorroborated attestations. —Conducting a significant number of audits will ensure that increasing the number of H–2B employers through the supplemental cap does not undermine the integrity of the H–2B program.
Additional Scrutiny	—Some petitioners will provide additional evidence.	—Some employers will need to print and ship additional evidence to USCIS. Opportunity costs of time associated with compiling such evidence are unavailable due to the unique fact pattern in each instance and a lack of data regarding the time to comply. The estimated cost to submit additional evidentiary requirements is $20,740.	—Additional scrutiny of employers with past H–2B program violations are aimed at ensuring compliance with program requirements, reducing harms to both U.S. workers and H–2B workers.
Familiarization Cost	—Petitioners or their representatives will familiarize themselves with the rule.	—Petitioners or their representatives will need to read and understand the rule at an estimated total opportunity cost of time that ranges from $4,031,694 to $6,014,981.	—Petitioners will have the necessary information to take advantage of and comply with the provisions of this rule.

TABLE 2—SUMMARY OF THE TFR'S PROVISIONS AND ECONOMIC IMPACT—Continued

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
Total Costs		Total cost of the rule to petitioners ranges from $8,798,321 to $11,964,750 depending on the filer. Total costs of the rule to government are $270,960. Total costs of the rule range from $9,069,281 to $12,235,710.	

Source: USCIS and DOL analysis.

Background and Purpose of the Temporary Rule

The H–2B visa classification program was designed to serve U.S. businesses that are unable to find enough U.S. workers to perform nonagricultural work of a temporary nature. For a nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: (1) receive a temporary labor certification (TLC) from the Department of Labor (DOL); and (2) file 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.[174] The INA sets the annual number of H–2B visas for workers performing temporary nonagricultural work at 66,000 to be distributed semiannually beginning in October (33,000) and in April (33,000).[175] Any unused H–2B visas from the first half of the fiscal year are available for employers seeking to hire H–2B workers during the second half of the fiscal year. However, any unused H–2B visas from one fiscal year do not carry over into the next and would therefore not be made available.[176] Once the statutory H–2B visa cap limit has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional visas to become available.

On September 25, 2024, the President signed the Continuing Appropriations and Extensions Act, 2025. Sections 101(6) and 106 reauthorize section 105 of Div. G, Title I of the Further Consolidated Appropriations Act, 2024, permitting 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 the Homeland Security has determined it is appropriate to exercise his discretion and raise the H–2B cap by up to a total of 64,716 visas for FY 2025. The total supplemental allocation will be divided into four separate allocations: one for the first half of FY 2025, two for the second half of FY 2025 (a first one for employment from April 1 through May 14, 2025, and a second one for those with start dates on or after May 15, 2025), and a full fiscal year allocation for workers from the countries included in the country-specific allocation. As with previous supplemental allocations, USCIS will make these supplemental visas available only to businesses that qualify and meet the requirements for the supplemental visas. These businesses must attest that they are suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition.

This TFR will cover the entirety of FY 2025. While the Departments cannot predict with certainty what labor market conditions will be during the second half of FY 2025, they believe that the structure of this TFR is reasonable because: (1) the availability of the second half FY supplemental visas is contingent on the exhaustion of the second half FY statutory cap, (2) strong historical demand for H–2B workers, and (3) mainstream estimates of labor market conditions for FY 2025 indicate a continuation of labor market tightness from a historical perspective.[177]

TABLE 3—DOL CERTIFIED WORKER DEMAND *

Fiscal year	Number of certifications	Number of DOL certified workers requested	DOL certified workers with requested start dates April 1 or later
2020	5,903	115,116	88,466
2021	7,772	159,081	100,522
2022	10,674	205,037	127,654
2023	12,126	220,552	128,115
2024	13,143	227,226	127,324
5-year Average **	9,924	185,402	114,416

Source: USCIS analysis.
Note:

[174] Revised effective 1/18/2009; *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers; Correction,* 73 FR 78104 (Jan. 19, 2009); *Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers; Correction,* 74 FR 2837 (Jan 18, 2009).

[175] *See* INA 214(g)(1)(B), 8 U.S.C. 1184(g)(1)(B) and INA 214(g)(4), 8 U.S.C. 1184(g)(4).

[176] A temporary labor certification (TLC) approved by the Department of Labor must accompany an H–2B petition. The employment start date stated on the petition must match the start date listed on the TLC. *See* 8 CFR 214.2(h)(6)(iv)(A) and (D).

[177] September 2023 Federal Open Market Committee (FOMC) projections for unemployment rate in 2024 ranged from 4.2 to 4.5% with central tendency more tightly clustered between 4.3 and 4.4%. *See https://www.federalreserve.gov/monetarypolicy/fomcprojtabl20240918.htm* (last accessed Sept. 25, 2024).

* USCIS analysis of OFLC Performance data. All data are for applications listed as having a case status of ''Certification'', ''Partial Certification'', ''Determination—Certification'', or ''Determination—Partial Certification.'' Furthermore, data have been adjusted to a fiscal year using the employment begin date provided on the TLC application. As such, counts differ from counts based on the Disclosure Files of OFLC H–2B Performance data. This adjustment was made so that the OFLC data more closely align to USCIS I–129 data. Data for FY 2024 include data through the end of quarter 3.

** Averages are rounded to the nearest whole number.

With respect to historical demand for H–2B workers, Table 3 makes two important points supporting the Departments' decision to structure this rule in a manner that covers the entire fiscal year. First, Table 3 shows that H–2B demand, as represented by the number of workers requested on certified TLCs, has outpaced the statutorily capped allotment of H–2B visas, which demonstrates that, in aggregate, sufficient demand exists for the entire supplementary allocation that the Departments are making available. To that end, the 5-year average of workers requested on certified TLCs, 185,402, would still completely exhaust the total supplemental allocation made available by the TFR. Second, Table 3 demonstrates that within a given fiscal year, demand for H–2B workers is particularly strong in the second half of the fiscal year. On average over the last 5 fiscal years, H–2B employers have requested 114,416 employees with start dates on April 1 or later, which would completely exhaust the 24,000 total supplemental H–2B visas178 explicitly set aside for workers with employment start dates in the second half of FY 2025. Given these conditions, the Departments believe that the decision to authorize a second half supplement is reasonable.

For the visas being made available by the rule, the Departments have determined that up to 44,716 of the 64,716 supplemental visas will be limited to returning H–2B returning workers for nationals of any country. These individuals must be workers who were issued H–2B visas or were otherwise granted H–2B status in fiscal years 2022, 2023, or 2024. The 44,716 visas for returning workers will be divided into three separate allocations that will be available to petitioners over the fiscal year. The first allocation is comprised of 20,716 visas for returning workers with requested start dates between October 1, 2024, and March 31, 2025. These visas will be available to petitioners immediately upon the publication of the rule. The second allocation is comprised of 19,000 visas for returning workers with requested start dates between April 1, 2025, and May 14, 2025. These visas will be available to petitioners 15 calendar days after the second half statutory cap of 33,000 visas is reached. The third allocation is comprised of 5,000 visas for returning workers with requested start dates between May 15, 2025, and September 30, 2025. These visas will be available to petitioners 45 calendar days after the second half statutory cap of 33,000 visas is reached.

The inclusion of an allocation of visas starting on or after May 15 specifically for those petitioners with employment needs is in response to trends in TLC data and conclusions gleaned from the two years that a late season filer allocation has been available to petitioners with late season employment needs. As stated in the FY 2023 H–2B TFR, the relative demand in FY 2016 for workers with start dates later in the fiscal year was higher relative to recent years. More specifically, data for FY 2016 show that approximately 45.51 percent of certified TLCs requested workers with start dates in April while 17.93 percent of certified TLCs requested workers with start dates after April.[179] Table 4 and Table 5 demonstrate that the 5-year average for these values has moved away from April start dates after the implementation of a late season filer allocation. The decrease in the relative prevalence of April 1 start dates since the implementation of a late season filer allocation supports the rationale for providing such an allocation in response to concerns that, absent such an allocation, employers with late season employment needs could be effectively shut out of the H–2B program. Under DOL regulations, employers must apply for a TLC 75 to 90 days before the start date of work.[180] Employers must have a DOL-approved TLC before filing their Form I–129 request for H–2B workers with USCIS. Because the availability of H–2B visas is limited by statute and regulation, USCIS generally announces to the public when it has received a sufficient number of I–129 petitions, and by extension H–2B beneficiaries, to exhaust the respective H–2B visa allocation.[181] USCIS rejects H–2B I–129 petitions that are received after USCIS has determined that a given allocation has been fully utilized. Functionally, this means a subset of petitioners who would employ H–2B workers, given the chance, may not be able to do so because the available visas have already been allocated before they can petition USCIS for the necessary workers.

Using OFLC TLC data, Table 4 illustrates that relative to previous fiscal years that did *not* include a late-season filer allocation, requested H–2B employment start dates have become less concentrated in April.[182]

TABLE 4—DOL CERTIFIED WORKER DEMAND FOR APRIL START DATES

Fiscal year	Certified DOL workers requested	DOL certified workers with requested start dates *in* April	Percentage of DOL certified workers with requested start dates in April
2020	115,116	82,757	71.89
2021	159,081	94,656	59.50
2022	205,037	118,381	57.74
2023	220,552	112,639	51.07

[179] *See* Table 4 and Table 5, *https://www.federalregister.gov/documents/2022/12/15/2022-27236/exercise-of-time-limited-authority-to-increase-the-numerical-limitation-for-fy-2023-for-the-h-2b* (accessed September 20, 2024).

[180] *See* 20 CFR 655.15(b).

[181] *See* USCIS, *https://www.uscis.gov/newsroom/alerts/cap-reached-for-additional-returning-worker-h-2b-visas-for-the-early-second-half-of-fy-2024,* for example (accessed October 25, 2024).

[182] Tables 4 and 5 contain USCIS analysis of OFLC Performance data. All data are for applications listed as having a case status of ''Certification'', ''Partial Certification'', ''Determination—Certification'', or ''Determination—Partial Certification.'' Furthermore, data have been adjusted to a fiscal year using the employment begin date provided on the TLC application. As such, counts differ from counts based on the Disclosure Files of OFLC H–2B Performance data. This adjustment was made so that the OFLC data more closely align to USCIS I–129 data.

TABLE 4—DOL CERTIFIED WORKER DEMAND FOR APRIL START DATES—Continued

Fiscal year	Certified DOL workers requested	DOL certified workers with requested start dates *in* April	Percentage of DOL certified workers with requested start dates in April
2024	227,226	113,760	50.06

TABLE 5—DOL CERTIFIED WORKER DEMAND FOR POST-APRIL START DATES

Fiscal year	Certified DOL workers requested	DOL certified workers with requested start dates *after* April	Percentage of DOL certified workers with requested start dates after April
2020	115,116	5,709	4.96
2021	159,081	5,866	3.69
2022	205,037	9,273	4.52
2023	220,552	15,476	7.02
2024	227,226	13,564	5.97

As part of the FY 2023 and FY 2024 H–2B TFRs, USCIS made 10,000 and 5,000 visas available to petitioners with start dates later in the season (on or after May 15), respectively. The goal for having a separate allocation was to address this potentially inequitable situation and to take steps towards collecting information through that rule to determine whether such a structural barrier exists. Approximately 72% of the late season filer allocation for FY 2023 was utilized (as defined by the number of beneficiaries of Form I–129 petitions approved for this allocation relative to the total allocation of 10,000 visas).[183] However, visa issuance data shows that only slightly more than 5,000 visas were actually issued under the FY 2023 late season filer allocation. This compares to the late season filer allocation for FY 2024, for which USCIS approved more beneficiaries of Form I–129 petitions than the total number of visas available, although, as of October 2024, still has not received a sufficient number of petitions to achieve issuance of 5,000 visas according to its projections.[184] In sum, the data from the last two H–2B TFRs indicate that including another late-season filer allocation of 5,000 visas for FY 2025 is reasonable.

The Secretaries have determined that up to 20,000 of the 64,716 additional visas will be reserved for workers who are nationals of the countries included in the country-specific allocation and that these 20,000 workers will be exempt from the returning worker requirement. These visas will be available for the entirety of the fiscal year and do not have limitations regarding the requested start date of the H–2B beneficiaries' employment within the fiscal year. If the 20,000-visa limit has been reached, a petitioner may request H–2B visas for workers who are nationals of the countries included in the country-specific allocation but these workers must be returning workers.

The Departments note that they are committed to analyzing the results and impacts of this and future H–2B supplemental visa TFRs in a holistic manner and have attempted to fully quantify the potential impacts of the FY 2025 TFR, where time and data allow.

Population

This rule will affect those employers that file Form I–129 on behalf of nonimmigrant workers they seek to hire under the H–2B visa program. More specifically, this rule will affect those employers that can establish that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Due to historical trends and strong demand for the H–2B program (see Table 3), the Departments believe it is reasonable to assume that the population of eligible petitioners for these additional 64,716 visas will generally be the same population as those employers that would already complete the steps to receive an approved TLC irrespective of this rule. One exception is the population of late season employers, described below.

This rule will also have additional impacts on the population of H–2B employers and workers presently in the United States by permitting some H–2B workers to port to another certified H–2B employer. These H–2B workers will continue to earn wages and gaining employers will continue to obtain necessary workers.

a. Population That Will File a Form I–129, Petition for a Nonimmigrant Worker

As discussed above, the population that will file a Form I–129 is necessarily limited to those business that have already established that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on their petition and without the exercise of authority that is the subject of this rule. Because the number of supplementary visas available is finite, USCIS has generally informed the public when the number of submitted Form I–129 petitions and, by extension, the number of respective beneficiaries is enough to exhaust the supply of supplemental visas.[185]

[183] USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 09/2023, TRK 12921.

Calculation: 7,198 beneficiaries approved under the late-season filer allocation/10,000 visas allocated = 71.98% utilization.

[184] Under the late season allocation for FY 2024, USCIS approved 6,314 beneficiaries, while DOS issued 3,906 visas. Department of Homeland Security, U.S. Citizenship and Immigration Services, Office of Performance and Quality, ELIS, CLAIMS3, VIBE, DOS Visa Issuance Data queried 10/2024, PAER0016221.

[185] *See, e.g., https://www.uscis.gov/newsroom/alerts/uscis-reaches-h-2b-cap-for-second-half-of-fy-2024-and-announces-filing-dates-for-the-second-half-of.*

TABLE 6—FORM I–129 PETITIONS PER SUPPLEMENTAL H–2B VISA ALLOCATION

Supplement	Supplement amount	Total form I–129 petitions received	Total form I–129 beneficiaries	Beneficiaries per form I–129 petition
2019 Supplement	30,000	2,700	33,239	12.31
2021 Supplement *	22,000	2,180	31,274	14.35
2022 Supplement **	55,000	4,045	61,868	15.29
2023 Supplement	64,716	4,902	79,057	16.13
2024 Supplement	64,716	5,399	86,036	15.94
Average				14.80

Source: USCIS Analysis.

Notes:

* In Fiscal Year 2021, the Departments authorized a single supplemental allocation which was divided between returning workers and workers from specific countries. *See https://www.federalregister.gov/documents/2021/05/25/2021-11048/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2021-numerical-limitation-for-the* (accessed September 25, 2024).

** In Fiscal Year 2022, the Departments authorized two separate supplemental allocations of H–2B Visas, with each being further divided between returning workers and workers from specific countries. *See https://www.federalregister.gov/documents/2022/01/28/2022-01866/exercise-of-time-limited-authority-to-increase-the-fiscal-year-2022-numerical-limitation-for-the; https://www.federalregister.gov/documents/2022/05/18/2022-10631/exercise-of-time-limited-authority-to-increase-the-numerical-limitation-for-second-half-of-fy-2022.*

Table 6 shows the total supplemental H–2B visa allocations issued by the Departments in each fiscal year since FY 2019,[186] including the total number of petitions and the total number of beneficiaries submitted under a supplement in each fiscal year. Using the historical average of 14.80 beneficiaries per petition for supplemental visas derived in Table 6, USCIS anticipates that 4,373 Forms I–129 will be submitted as a result of this temporary final rule.[187]

Using the estimates in Table 6, the Departments further estimate that the allocation of 5,000 visas for late season filers made by this TFR, addressing the disadvantage these employers face in accessing scarce H–2B visas, will result in 338 additional Form ETA–9142B requests [188] to DOL, assuming each late season visa requestor submits a TLC and Form I–129 for the historic average of 14.80 beneficiaries. The number of additional Form ETA–9142B requests could be lower if some petitioners that would have filed for April 1 start dates in the absence of this TFR change their behavior to request late season workers as a result of this allocation. Alternatively, this number could be higher if late season filers are at a larger disadvantage in accessing H–2B workers than recent data suggests. The Departments commit to monitoring the utilization of these late season FY25 visas to determine if this carve-out promotes access, as anticipated, to employers with needs for workers later in the second half of the fiscal year but that have faced obstacles to accessing H–2B workers in the past.

DHS recognizes that some employers will be required to submit two Form I–129 petitions if they choose to request H–2B workers under both the returning worker and country-specific caps. At this time, DHS cannot predict how many employers will choose to take advantage of more than one allocation, and therefore recognizes that the number of petitions may be underestimated.

b. Population That Files Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative

If a lawyer or accredited representative 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.[189] Using data from FY 2020 to FY 2024, we estimate that a lawyer or accredited representative will file 47.73 percent of Form I–129 petitions. Table 7 shows the percentage of Form I–129 H–2B petitions that were accompanied by a Form G–28. Therefore, we estimate that in-house or outsourced lawyers will file 2,087 Forms I–129 and Forms G–28, and that human resources (HR) specialists will file 2,286 Forms I–129.[190]

TABLE 7—FORM I–129 H–2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY FORM G–28, FY 2020–2024

Fiscal year	Number of Form I–129 H–2B petitions accompanied by a Form G–28	Total number of Form I–129 H–2B petitions received	Percent of Form I–129 H–2B petitions accompanied by a Form G–28
2020	2,434	5,422	44.89%
2021	4,228	9,160	46.16
2022	5,984	12,392	48.29
2023	6,837	13,744	49.75
2024	6,048	12,773	47.35

[186] FY 2020 was not included due to the suspension of additional H–2B visas to be released in 2020. DHS also noted that the Department of State had suspended routine visa services.

[187] Calculation for expected petitions. If each Form I–129 petition requests 14.80 workers, we'd expect to see 4,373 petitioners exhausting the 64,716 supplement allocated this year: 64,716/14.80 = 4,373 (rounded)

[188] Calculation for expected late season TLCs: 5,000 visas/14.80 beneficiaries per petition = 338 TLCs (rounded).

[189] USCIS, *Filing Your Form G–28, https://www.uscis.gov/forms/filing-your-form-g-28.*

[190] Calculation: 4,373 estimated additional petitions * 47.73 percent of petitions filed by a lawyer = 2,087 (rounded) petitions filed by a lawyer.

Calculation: 4,373 estimated additional petitions—2,087 petitions filed by a lawyer = 2,286 petitions filed by an HR specialist.

TABLE 7—FORM I–129 H–2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY FORM G–28, FY 2020–2024—Continued

Fiscal year	Number of Form I–129 H–2B petitions accompanied by a Form G–28	Total number of Form I–129 H–2B petitions received	Percent of Form I–129 H–2B petitions accompanied by a Form G–28
Total	25,531	53,491	47.73

Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.

c. Population That Files Form I–907, Request for Premium Processing Service

Employers may use Form I–907, Request for Premium Processing Service, to request faster processing of their Form I–129 petitions for H–2B visas. Table 8 shows the percentage of Form I–129 H–2B petitions that were filed with a Form I–907. Using data from FY 2020 to FY 2024, DHS estimates that approximately 91.19 percent of Form I–129 H–2B petitioners will file a Form I–907 requesting premium processing. Based on this historical data, DHS estimates that 3,988 Forms I–907 will be filed with the Forms I–129 as a result of this rule.[191] Of these 3,988 premium processing requests, we estimate that in-house or outsourced lawyers will file 1,903 Forms I–907 and HR specialists or an equivalent occupation will file 2,085.[192]

TABLE 8—FORM I–129 H–2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY FORM I–907, FY 2020–2024

Fiscal year	Number of Form I–129 H–2B petitions accompanied by Form I–907	Total number of Form I–129 H–2B petitions received	Percent of Form I–129 H–2B petitions accompanied by Form I–907
2020	4,341	5,422	80.06%
2021	8,650	9,160	94.43
2022	11,773	12,392	95.00
2023	12,078	13,744	87.88
2024	11,936	12,773	93.45
5-Year Total	48,778	53,491	91.19

Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.

d. Population That Files Form ETA–9142–B–CAA–9, Attestation for Employers Seeking To Employ H–2B Nonimmigrant Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83

Petitioners seeking to take advantage of this FY 2025 H–2B supplemental visa cap will need to file a Form ETA–9142–B–CAA–9 attesting that their business is suffering irreparable harm or will suffer impending irreparable harm without the ability to employ all the H–2B workers requested on the petition, comply with third-party notification, and maintain required records, among other requirements. DOL estimates that each of the 4,373 petitions will need to be accompanied by Form ETA–9142–B–CAA–9 and petitioners filing these petitions and attestations will incur burdens complying with the evidentiary requirements.

e. Population of Late Season Employers That File Form ETA–9142B, Application for Temporary Employment Certification

As Table 3 above demonstrated, historical data strongly indicate that there will be sufficient demand such that only those petitioners that utilize the late season allocation of supplemental visas will need to file an additional Form ETA–9142B. Assuming that the historical average of 14.80 beneficiaries per I–129 petition holds, 338 petitioners [193] will need to file Form ETA–9142B as a direct result of the provision reserving 5,000 visas for beneficiaries of these employers. Given estimates from Table 7 of the percentage of Form I–129 H–2B petitions accompanied by a Form G–28, we estimate that the number of Form ETA–9142B in-house or outsourced lawyers will file is 161 and that the number of Form ETA–9142B human resources (HR) specialists will file is 177.[194]

f. Population That Must Undergo Additional Recruitment Activities

An employer that files Form ETA–9142B–CAA–9 and the I–129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of placing a new job order with the State Workforce Agency (SWA), contacting the relevant American Job Center (AJC), contacting former U.S. workers, contacting the bargaining representative or posting the job order in the places and manner described in 20 CFR 655.45(b) if there is no bargaining representative, contacting

[191] Calculation: 4,373 estimated additional petitions * 91.19 percent premium processing filing rate = 3,988 (rounded) additional Form I–907.

[192] Calculation: 3,988 additional Form I–907 * 47.73 percent of petitioners represented by a lawyer = 1,903 (rounded) additional Form I–907 filed by a lawyer.

Calculation: 3,988 additional Form I–907—1,903 additional Form I–907 filed by a lawyer = 2,085 additional Form I–907 filed by an HR specialist.

[193] Calculation for expected late season TLCs: 5,000 late season visas/14.80 beneficiaries per petition = 338 TLCs (rounded).

[194] Calculation: 338 estimated additional requests * 47.73 percent of petitions filed by a lawyer (see) = 161 (rounded) ETA–9142–B requests filed by a lawyer.

Calculation: 338 estimated additional requests—161 requests filed by a lawyer = 177 requests filed by an HR specialist.

current U.S. workers, posting the job to the company's website if it maintains one and, if applicable, contacting the AFL–CIO.

The Departments assume that, due to the timing of the publication of the rule, only petitioners that file for H–2B workers under the first half supplemental allocation of 20,716 workers will incur burdens associated with this additional recruitment. Using the average number of beneficiaries per Form I–129 petition established in Table 6, the Departments estimate that the population of petitioners that would need to fulfill the additional recruitment requirements would be 1,400.[195]

g. Population Affected by the Portability Provision

The population affected by this provision are nonimmigrants in H–2B status who are present in the United States and the employers with valid TLCs seeking to hire H–2B workers. We use the population of 66,000 H–2B workers authorized by statute and the 64,716 additional H–2B workers authorized by this rule as a proxy for the H–2B population that could be currently present in the United States.[196] DHS uses the number of Forms I–129 filed for extension of stay due to change of employer relative to the Forms I–129 filed for new employment from FY 2016 to FY 2020, the five years prior to the implementation of the first portability provision in a H–2B supplemental cap TFR, to estimate the baseline rate. We compare the average rate from FY 2016–FY 2020 to the average rate from FY 2021–FY 2024. Table 9 presents the number of Forms I–129 filed for extensions of stay due to change of employer and Forms I–129 filed for new employment for Fiscal year 2016 FY through FY 2020. The average rate of extension of stay due to change of employer compared to new employment is approximately 12.6 percent.

TABLE 9—NUMBERS OF FORM I–129 H–2B PETITIONS FILED FOR EXTENSION OF STAY DUE TO CHANGE OF EMPLOYER AND FORM I–129 H–2B PETITIONS FILED FOR NEW EMPLOYMENT, FY 2016–FY 2020

Fiscal year	Form I–129 H–2B petitions filed for extension of stay due to change of employer	Form I–129 H–2B petitions filed for new employment	Rate of extension to stay due to change of employer filings relative to new employment filings (%)
2016	427	5,750	7.4
2017	556	5,298	10.5
2018	744	5,136	14.5
2019	812	6,252	13.0
2020	804	3,997	20.1
Total	3,343	26,433	12.6

Source: USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.

In FY 2021, the first year an H–2B supplemental cap included a portability provision, 1,113 Forms I–129 were filed for extension of stay due to change of employer compared to 7,206 Forms I–129 filed for new employment.[197] In FY 2022, 1,795 Forms I–129 were filed for extension of stay due to change of employer compared to 9,231 Forms I–129 filed for new employment.[198] In FY 2023, 2,277 Forms I–129 were filed for extension of stay due to change of employer compared to 9,895 Forms I–129 filed for new employment.[199] In FY 2024, 2,181 Forms I–129 were filed for extension of stay due to change of employer compared to 9,097 Forms I–129 filed for new employment.[200] Over the period when a portability provision was in place for H–2B workers, the rate of Form I–129 for extension of stay due to change of employer relative to new employment is 20.8 percent.[201] This is above the 12.6 percent rate expected without a portability provision. We estimate that 20.8 percent is the expected rate in periods with a portability provision in the supplemental visa allocation. Using 4,373 as our estimate for the number of Forms I–129 filed for H–2B new employment in FY 2024, we estimate that 551 Forms I–129 would be filed for extension of stay due to change of employer in absence of this provision.[202] With this portability

[195] Calculation: 20,716 workers in the 1st half returning working supplemental allocation/14.80 workers per petitioner = 1,400 (rounded) petitioners required to undertake additional recruitment.

[196] H–2B workers may have varying lengths in time approved on their H–2B visas. This number may overestimate H–2B workers who have already completed employment and departed and may underestimate H–2B workers not reflected in the current cap and long-term H–2B workers. In FY 2023, USCIS approved 407 requests for change of status to H–2B, and Customs and Border Protection (CBP) processed 1,053 crossings of visa-exempt H–2B workers. *See Characteristics of H–2B Nonagricultural Temporary Workers FY2023 Report to Congress, https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY23-Characteristics-Report.pdf* (accessed September 25, 2024). DHS assumes some of these workers, along with current workers with a valid H–2B visa under the cap, could be eligible to port under this new provision. DHS does not know the exact number of H–2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

[197] USCIS, Office of Performance and Quality, SAS PME C3 Consolidated, Data queried 08/2024, TRK 15749.

[198] *See Id.*

[199] *See Id.*

[200] *See Id.*

[201] Calculation, Step 1: 1,113 Form I–129 petitions for extension of stay due to change of employer FY 2021 + 1,795 Form I–129 petitions for extension of stay due to change of employer in FY 2022 +2,277 Form I–129 petitions for extension of stay due to change of employer FY 2023 + 2,181 Form I–129 petitions for extension of stay due to change of employer FY 2024 = 7,366 Form I–129 petitions filed extension of stay due to change of employer in portability provision years.

Calculation, Step 2: 7,206 Form I–129 petitions filed for new employment in FY 2021 + 9,231 Form I–129 petitions filed for new employment in FY 2022 + 9,895 Form I–129 petitions filed for new employment in FY 2023 + 9,097 Form I–129 petitions filed for new employment in FY 2024 = 35,429 Form I–129 petitions filed for new employment in portability provision years

Calculation, Step 3: 7,366 extension of stay due to change of employment petitions/35,429 new employment petitions = 20.8 percent rate of extension of stay due to change of employment to new employment (rounded).

[202] Calculation: 4,373 Form I–129 H–2B petitions filed for new employment * 12.6 percent = 551 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision.

provision, we estimate that 910 Forms I–129 would be filed for extension of stay due to change of employer,[203] which results in a difference of 359 additional Forms I–129 as a result of this provision.[204] As previously estimated, we expect that about 47.73 percent of Form I–129 petitions will be filed by an in-house or outsourced lawyer. Therefore, we expect that a lawyer will file 171 of these petitions and an HR specialist or equivalent occupation will file the remaining 188.[205] Previously in this analysis, we estimated that about 91.19 percent of Form I–129 H–2B petitions are filed with Form I–907 for premium processing. As a result of this portability provision, we expect that an additional 327 Forms I–907 will be filed.[206] We expect a lawyer to file 156 of those Forms I–907 and an HR specialist to file the remaining 171.[207]

h. Population Affected by the Audits

Under this time-limited FY 2025 H–2B supplemental cap rule, DHS intends to conduct a minimum of 150 audits of employers hiring H–2B workers under this TFR. While this number of TFR-related audits is lower than previous years' TFR-related audits, DHS has increased the number of targeted site visits it conducts on H–2B petitioners under the regular H–2B program. Specifically, in addition to the 150 audits DHS will perform under this TFR, DHS will also routinely conduct at least 150 targeted site visits annually to H–2B petitioners to determine compliance with H–2B program requirements overall. During site visits, FDNS officers visit the work location, conduct in-person interviews, and review documents. These targeted H–2B site visits are conducted outside of the supplemental cap program, but overlap may exist between petitioners who file under the regular cap and the TFR. These increased targeted site visits, taken together with the audits conducted under this TFR, will increase oversight into the integrity of the H–2B program overall. Separately, DOL intends to conduct 100 audits of employers hiring H–2B workers under this TFR. The determination of which employers will be audited will be done at the discretion of the Departments, though the agencies will coordinate so that no employer is audited by both DOL and DHS. Therefore, the Federal Government expects to conduct a total of 250 audits on employers that petition for H–2B workers under this TFR.[208]

i. Population Sffected by Additional Scrutiny

DHS expects that petitioners that have been cited by WHD for H–2B program violations will undergo additional scrutiny from USCIS. To estimate the number of firms expected to undergo increased scrutiny, we utilize DOL's Wage and Hour Compliance Action Data.[209] The data available is for concluded cases. Table 10 presents the number of employers that were cited for H–2B violations that have a worker protection violation end date in FY 2019–2023. The worker protection violation end date is established based on the ''findings end date,'' which represents the date that the last worker protection violation occurred in the concluded case. During FY 2019–2023, an average of 72 (rounded) employers were cited for H–2B violations with a worker protection violation by the end date each year. USCIS intends to request evidence from employers cited for H–2B violations with a worker protection violation end date in the last two years. Therefore, for purposes of this analysis, we expect 144 petitioners will undergo additional scrutiny from USCIS.[210]

TABLE 10—EMPLOYERS WITH H–2B VIOLATIONS WITH WORKER PROTECTION VIOLATION END DATE IN FY 2019–2023

Fiscal year	Employers cited for H–2B violations with worker protection violation end date in fiscal year
2019	124
2020	89
2021	55
2022	70
2023	22
5-year Average (rounded)	72

Source: USCIS analysis of DOL Wage and Hour Compliance Action Data.

j. Population Expected To Familiarize Themselves With This Rule

DHS expects employers that have filed for TLCs to familiarize themselves with this rule. Table 3 shows that the average number of certifications over the last five fiscal years is 9,924. We use the TLC population, rather than the estimated 4,373 expected to file a Form I–129 petition, because employers that have applied for TLCs would need to familiarize themselves with the rule in order to determine whether or not to subsequently file a Form I–129 petition.

We expect a HR specialist, in-house lawyer, or outsourced lawyer will perform familiarization with the rule at the same rate as petitioners that file a Form G–28. As discussed above, an estimated 47.73 percent of petitioners are submitted by lawyers. Therefore, we estimate that 4,737 lawyers and 5,187 HR specialists will incur familiarization costs.[211]

Cost-Benefit Analysis

The provisions of this rule require the submission of a Form I–129 H–2B petition. The costs for this form include the opportunity cost of time to complete and submit the form.[212] The estimated time to complete and file Form I–129 for H–2B classification is 4.56 hours.[213] A U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent

[203] Calculation: 4,373 Form I–129 H–2B petitions filed for new employment * 20.8 percent = 910 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision.

[204] Calculation: 910 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, with a portability provision—551 estimated number of Form I–129 H–2B petitions filed for extension of stay due to change of employer, no portability provision = 359 Form I–129 H–2B petition increase as a result of portability provision.

[205] Calculation, Lawyers: 359 additional Form I–129 due to portability provision * 47.73 percent of Form I–129 for H–2B positions filed by an attorney or accredited representative = 171 (rounded) estimated Form I–129 filed by a lawyer.

Calculation, HR specialist: 359 additional Form I–129 due to portability provision—171 estimated Form I–129 filed by a lawyer = 188 estimated Form I–129 filed by an HR specialist.

[206] Calculation: 359 Form I–129 H–2B petitions * 91.19 percent premium processing filing rate = 327 (rounded) Forms I–907.

[207] Calculation, Lawyers: 327 Forms I–907 * 47.73 percent filed by an attorney or accredited representative = 156 (rounded) Forms I–907 filed by a lawyer.

Calculation, HR specialists: 327 Forms I–907—156 Forms I–907 filed by a lawyer = 171 Forms I–907 filed by an HR specialist.

[208] These 250 audits are separate and distinct from WHD's investigations pursuant to its existing enforcement authority.

[209] Available at *https://enforcedata.dol.gov/views/data_catalogs.php* (accessed September 5, 2024).

[210] It is possible not every employer that has been cited for an H–2B violation in the last two years will petition for H–2B employees under this supplemental cap authority. DHS considers an upper limit of 144 to be a reasonable estimate of the number of petitioners that will undergo additional scrutiny.

[211] Calculation for lawyers: 9,924 estimated applicants * 47.73 percent represents by a lawyer = 4,737 (rounded) represented by a lawyer.

Calculation for HR specialists: 9,924 approved, pending, and projected applicants—4,737 represented by a lawyer = 5,187 represented by an HR specialist.

[212] Filing fees are not considered costs to society. These fees have been accounted for as a transfer from petitioners to USCIS.

[213] The public reporting burden for this form is 2.487 hours for Form I–129 and an additional 2.07 hours for H Classification Supplement, totaling 4.56 hours (rounded). *See* Form I–129 instructions at *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (accessed August 13, 2024).

must file the petition. DHS estimates that an in-house or outsourced lawyer will file 47.73 percent of Form I–129 H–2B petitions, and an HR specialist or equivalent occupation will file the remainder (52.27 percent). DHS presents estimated costs for HR specialists filing Form I–129 petitions and an estimated range of costs for in-house lawyers or outsourced lawyers filing Form I–129 petitions.

To estimate the total opportunity cost of time to HR specialists who complete and file Form I–129, DHS uses the mean hourly wage rate of HR specialists of $36.57 as the base wage rate.[214] If petitioners hire an in-house or outsourced lawyer to file Form I–129 on their behalf, DHS uses the mean hourly wage rate $84.84 as the base wage rate.[215] Using the most recent BLS data, DHS calculated a benefits-to-wage multiplier of 1.45 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.[216] DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate total compensation to employees. The total compensation for an HR specialist is $53.03 per hour, and the total compensation for an in-house lawyer is $123.02 per hour.[217] In addition, DHS recognizes that an entity may not have an in-house lawyer and may 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 recognizes that the wages for outsourced lawyers may be much higher than in-house lawyers and therefore uses a higher compensation-to-wage multiplier of 2.5 for outsourced lawyers.[218] DHS estimates the total compensation for an outsourced lawyer is $212.10 per hour.[219] If a lawyer submits Form I–129 on behalf of the petitioner, Form G–28 must accompany the Form I–129 petition.[220] DHS estimates the time burden to complete and submit Form G–28 for a lawyer is 50 minutes (0.83 hour, rounded).[221] 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. This results in a time burden of 5.39 hours for in-house lawyers and outsourced lawyers to complete Form G–28 and Form I–129.[222] Therefore, the total opportunity cost of time per petition for an HR specialist to complete and file Form I–129 is approximately $241.82, for an in-house lawyer to complete and file Forms I–129 and G–28 is about $663.08, and for an outsourced lawyer to complete and file is approximately $1,143.22.[223]

a. Transfers

i. Transfers From Petitioners to the Government

The provisions of this rule require the submission of a Form I–129 H–2B petition. The transfers for this form include the filing costs to submit the form. In previous years, all filers of the Form I–129 paid a standard fee. As of April 1, 2024, the fee structure for I–129 H–2B petitions has changed, and now takes into account whether petitioners are named or unnamed, as well as the characteristics of the petitioner based on size. Additionally, petitioners pay a variable Asylum Processing Fee based on the identity of the petitioner based on entity type. All petitioners pay an additional Fraud Prevention and Detection Fee of $150.[224] The new fee structure is summarized in Table 11 below. These filing fees are not a cost to society or an expenditure of new resources but a transfer from the petitioner to USCIS in exchange for agency services. DHS anticipates that petitioners will file 4,373 Forms I–129 due to the rule's supplemental visa allocation and an additional 359 Forms I–129 due to the rule's portability provision.

TABLE 11—FORM I–129 FILING FEES BY PETITIONER TYPE

Petitioner type	Base fee	Fraud prevention and detection fee	Asylum processing fee	Total fee
H–2B Named Non-Small Employer or Nonprofit	$1,080	$150	$600	$1,830
H–2B Named Small Employer	540	150	300	990

[214] U.S. Department of Labor, Bureau of Labor Statistics, ''May 2023 National Occupational Employment and Wage Statistics'' Human Resources Specialist (13–1071), Mean Hourly Wage, available at *https://www.bls.gov/news.release/archives/ocwage_04032024.pdf* (accessed October 25, 2024).

[215] U.S. Department of Labor, Bureau of Labor Statistics. ''May 2023 National Occupational Employment and Wage Estimates'' Lawyers (23–1011), Mean Hourly Wage, available at *https://www.bls.gov/news.release/archives/ocwage_04032024.pdf*(accessed October 25, 2024).

[216] Calculation: $46.21 mean Total Employee Compensation per hour for civilian workers/$31.80 mean Wages and Salaries per hour for civilian workers = 1.45 benefits-to-wage multiplier. *See* Economic News Release, Bureau of Labor Statistics, U.S. Department of Labor, Employer Costs for Employee Compensation—June 2024 Table 1. Employer Costs for Employee Compensation by ownership, Civilian workers, available at *https://www.bls.gov/news.release/archives/ecec_09102024.pdf* (accessed October 25, 2024).

[217] Calculation, HR specialist: $36.57 mean hourly wage * 1.45 benefits-to-wage multiplier = $53.03 hourly total compensation (hourly opportunity cost of time).

Calculation, In-house Lawyer: $84.84 mean hourly wage * 1.45 benefits-to-wage multiplier = $123.02 hourly total compensation (hourly opportunity cost of time).

[218] The DHS ICE ''Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'' acknowledges that ''the cost of hiring services provided by an outside vendor or contractor is two to three times more expensive than the wages paid by the employer for that service produced by an in-house employee,'' based on information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis (SEIA) remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule: *Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis,* 73 FR 63843 (Oct. 28, 2008), available at *https://www.regulations.gov/document/ICEB-2006-0004-0921* (accessed September 25, 2024). *See also Exercise of Time-Limited Authority To Increase the Fiscal Year 2022 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers,* 87 FR 4722 (Jan. 28, 2022), available at *https://www.regulations.gov/document/DHS-2022-0010-0001* (accessed September 25, 2024).

[219] Calculation, Outsourced Lawyer: $84.84 mean hourly wage * 2.5 benefits-to-wage multiplier = $212.10 hourly total compensation (hourly opportunity cost of time).

[220] USCIS, Filing Your Form G–28, *https://www.uscis.gov/forms/filing-your-form-g-28* (accessed September 25, 2024).

[221] USCIS, G–28, Instructions for Notice of Entry of Appearance as Attorney or Accredited Representative, *https://www.uscis.gov/sites/default/files/document/forms/g-28instr.pdf.*

Calculation: 50 minutes/60 minutes per hour = 0.83 hour (rounded).

[222] Calculation: 0.83 hour to file Form G–28 + 4.56 hours to file Form I–129 = 5.39 hours to file both forms.

[223] Calculation, HR specialist files Form I–129: $53.03 hourly opportunity cost of time * 4.56 hours = $241.82 opportunity cost of time per petition.

Calculation, In-house Lawyer files Form I–129 and Form G–28: $123.02 hourly opportunity cost of time * 5.39 hours = $663.08 opportunity cost of time per petition.

Calculation, Outsourced Lawyer files Form I–129 and Form G–28: $212.10 hourly opportunity cost of time * 5.39 hours = $1,143.22 opportunity cost of time per petition.

[224] *See* Form I–129 instructions at *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (accessed September 4, 2024). *See also* 8 U.S.C. 1184(c)(13).

TABLE 11—FORM I–129 FILING FEES BY PETITIONER TYPE—Continued

Petitioner type	Base fee	Fraud prevention and detection fee	Asylum processing fee	Total fee
H–2B Named Nonprofit	540	150	0	690
H–2B Unnamed Non-Small Employer or Nonprofit	580	150	600	1,330
H–2B Unnamed Small Employer	460	150	300	910
H–2B Unnamed Nonprofit	460	150	0	610

Source: USCIS, Form I–129 instructions at *https://www.uscis.gov/sites/default/files/document/forms/i-129instr.pdf* (accessed September 4, 2024). *See also* 8 USC 1184(c)(13).

Using a historical average of petitioners requesting named versus unnamed beneficiaries from FY 2021–FY2024, DHS estimates that 6 percent will request named beneficiaries and 94 percent will request unnamed beneficiaries. Based on analysis conducted as part of the USCIS 2024 Fee Rule, DHS assumes that 30 percent of I–129 H–2B petitioners have 26 or more employees, 55 percent have 25 or fewer employees, and 15 percent have non-profit status.[225] This equates to 1,312 petitioners with 26 or more employees,[226] 2,405 petitioners with 25 or fewer employees,[227] and 656 non-profit petitioners filing Forms I–129 as part of the supplemental allocation.[228] USCIS assumes that the percentage of named versus unnamed beneficiaries does not vary by employer size or nonprofit status. Thus, by multiplying the percentages of requests of named versus unnamed beneficiaries by the number of petitioners by characteristic, this equates to 79 petitioners with 26 or more employees requesting named beneficiaries,[229] 1,233 petitioners with 26 or more employees requesting unnamed beneficiaries,[230] 144 petitioners with 25 or fewer employees requesting named beneficiaries,[231] 2,261 petitioners with 25 or fewer employees requesting unnamed beneficiaries,[232] 39 non-profit petitioners requesting named beneficiaries,[233] and 617 non-profit petitioners requesting unnamed beneficiaries as part of the supplemental allocation.[234] Additionally, DHS estimates that 359 additional Forms I–129 will be filed due to the portability provision of this rule. Petitions filed under the portability provision must request named beneficiaries. Thus, DHS estimates that this population will consist of 108 petitioners with 26 or more employees requesting named beneficiaries,[235] 197 petitioners with 25 or fewer employees requesting named beneficiaries,[236] and 54 non-profit petitioners requesting named beneficiaries.[237]

The total transfers from petitioners to the government for filing Forms I–129 H–2B petitioners are $4,817,740.[238] Transfers from petitioners to the Government related to the filing of Forms I–907 as a result of the rule are $7,270,775.[239] Total transfers from petitioners to the Government are $12,088,515.[240]

b. Cost to Petitioners

As mentioned in *Section 3,* the estimated population impacted by this rule is 4,373 eligible petitioners that are projected to apply for the additional 64,716 H–2B visas, with 20,000 of those additional visas reserved for employers that will petition for workers who are nationals of the countries included in the country-specific allocation, who are exempt from the returning worker requirement.

i. Costs to Petitioners To File Form I–129 and Form G–28

As discussed above, DHS estimates that HR specialists will file an additional 2,286 petitions using Form I–129 and lawyers will file an additional 2,087 petitions using Form I–129 and Form G–28. DHS estimates the total cost to file Form I–129 petitions if filed by HR specialists is $552,801 (rounded).[241] DHS estimates the total cost to file Form I–129 petitions and Form G–28 if filed by lawyers will range from $1,383,848 (rounded) if only in-house lawyers file these forms, to $2,385,900 (rounded) if only outsourced lawyers file them.[242] Therefore, the estimated total cost to file Form I–129 and Form G–28 range from $1,936,649 and $2,938,701.[243]

ii. Costs To File Form I–907

Employers may use Form I–907 to request premium processing of Form I–129 petitions for H–2B visas. The filing fee for Form I–907 for H–2B petitions is

[225] *See* Table 25 of the Fee Rule Regulatory Impact Analysis at *https://www.regulations.gov/document/USCIS-2021-0010-8179* (accessed October 28, 2024).

[226] Calculation: 4,373 expected additional Forms I–129 * 30 percent petitioners with 26 or more employees = 1,312 (rounded).

[227] Calculation: 4,373 expected additional Forms I–129 * 55 percent petitioners with 25 or fewer employees = 2,405 (rounded).

[228] Calculation: 4,373 expected additional Forms I–129 * 15 percent non-profit petitioners = 656 (rounded).

[229] Calculation: 1,312 petitioners with 26 or more employees * 6 percent unnamed beneficiaries = 79 (rounded).

[230] Calculation: 1,312 petitioners with 26 or more employees * 94 percent unnamed beneficiaries = 1,233 (rounded).

[231] Calculation: 2,405 petitioners with 25 or fewer employees * 6 percent unnamed beneficiaries = 144 (rounded).

[232] Calculation: 2,405 petitioners with 25 or fewer employees * 94 percent unnamed beneficiaries = 2,261 (rounded).

[233] Calculation: 656 non-profit petitioners * 6 percent unnamed beneficiaries = 39 (rounded).

[234] Calculation: 656 non-profit petitioners * 94 percent unnamed beneficiaries = 617 (rounded).

[235] Calculation: 359 expected additional Forms I–129 * 30 percent petitioners with 26 or more employees = 108 (rounded).

[236] Calculation: 359 expected additional Forms I–129 * 55 percent petitioners with 25 or fewer employees = 197 (rounded).

[237] Calculation: 359 expected additional Forms I–129 * 15 percent non-profit petitioners = 54 (rounded).

[238] Calculation: 187 petitioners with 26 or more employees requesting named beneficiaries × $1,830 + 1,233 petitioners with 26 or more employees requesting unnamed beneficiaries × $1,330 + 341 petitioners with 25 or fewer employees requesting named beneficiaries × $990 + 2,261 petitioners with 25 or fewer employees requesting unnamed beneficiaries × $910 + 93 non-profits requesting named beneficiaries × $690 + 617 non-profits requesting unnamed beneficiaries × $610 = $4,817,740

[239] Calculation: $1,685 per petition * 4,315 Forms I–907 = $7,270,775

[240] Calculation: $4,817,740 + $7,270,775 = $12,088,515.

[241] Calculation, HR specialist: $241.82 cost per petition * 2,286 Form I–129 = $552,801 (rounded) total cost.

[242] Calculation, In-house Lawyer: $663.08 cost per petition * 2,087 Form I–129 and Form G–28 = $1,383,848 (rounded) total cost.

Calculation, Outsourced Lawyer: $1,143.22 cost per petition * 2,087 Form I–129 and Form G–28 = $2,385,900 (rounded) total cost.

[243] Calculation: $552,801 total cost of Form I–129 filed by HR specialists + $1,383,848 total cost of Form I–129 and Form G–28 filed by in-house lawyers = $1,936,649 estimated total costs to file Form I–129 and G–28.

Calculation: $552,801 total cost of Form I–129 filed by HR specialists + $2,385,900 total cost of Form I–129 and G–28 filed by outsourced lawyers = $2,938,701 estimated total costs to file Form I–129 and G–28.

$1,685, and the time burden for completing the form is 22 minutes (0.35 hour).[244] [245] Using the wage rates established previously, the opportunity cost of time to file Form I–907 is approximately $19.62 for an HR specialist, $45.52 for an in-house lawyer, and $78.48 for an outsourced lawyer.[246]

As discussed above, DHS estimates that HR specialists will file an additional 2,085 Form I–907 and lawyers will file an additional 1,903 Form I–907. DHS estimates the total cost of Form I–907 filed by HR specialists is about $40,908 (rounded).[247] DHS estimates the total cost to file Form I–907 filed by lawyers range from about $86,625 (rounded) for only in-house lawyers, to $149,347 (rounded) for only outsourced lawyers.[248] The estimated total cost to file Form I–907 range from $127,533 and $190,255.[249]

iii. Cost to Late Season Employers Filing Form ETA–9142B

In addition to the costs for employers projected to request TLCs irrespective of this rule, the population of 338 late season employers that would not otherwise request H–2B workers will file Form ETA–9142B as a precondition to utilizing the late season allocation of H–2B visas made available by the rule. There is no filing fee for Form ETA–9142B, and the time burden for completing the form, including Appendix A, Appendix B, Appendix C, Appendix D, and record keeping, is 2 hours and 10 minutes (2.17 hours).[250] DHS estimates the total cost of Form ETA–9142B filed by HR specialists is about $20,368 (rounded).[251] DHS estimates the total cost to file Form ETA–9142B by lawyers range from about $42,979 (rounded) for only in-house lawyers, to $74,101 (rounded) for only outsourced lawyers.[252] The estimated total cost to file Form ETA–9142B range from $63,347 and $94,469.[253]

iv. Cost To File Form ETA–9142–B–CAA–9

Form ETA–9142–B–CAA–9 is an attestation form that 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 hours, 0.25 hours for retaining records, and 0.50 hours to comply with the returning workers' attestation, for a total time burden of 1 hour. Using the $53.03 hourly total compensation for an HR specialist, the opportunity cost of time for an HR specialist to complete the attestation form, notify third parties, and retain records relating to the returning worker requirements is approximately $53.03.[254] Employers are also required to send OFLC and AFL–CIO the ETA case number when filing a petition with DHS. DOL estimates the time burden for this task is 10 minutes (0.17 hours) for an HR specialist. The opportunity cost of time for an HR specialist to send OFLC and AFL the ETA case number is approximately $9.02.[255] The total opportunity cost of time for filing Form ETA–9142–B–CAA–9 and emailing the ETA case number to both OFLC and the AFL–CIO is $74.[256]

Additionally, the form requires that petitioners assess, prepare a detailed written statement, 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 mean hourly wage for a financial analyst is $54.30,[257] and the estimated hourly total compensation for a financial analyst is $78.74.[258] DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records, for a total time burden of 5 hours. Therefore, the total opportunity cost of time for a financial analyst to assess, document, and retain supporting evidence is approximately $393.70.[259]

As discussed previously, DHS believes that the 4,373 Form I–129 petitions required to exhaust the number of supplemental visas made available in this rule represents the number of potential employers that will request to employ H–2B workers under this rule. This number of petitions is a reasonable proxy for the number of employers that may need to review and sign the attestation. Using this estimate for the total number of certifications, we estimate the opportunity cost of time for completing the attestation and sending the ETA case number to OFLC and AFL–CIO for HR specialists is approximately $271,345 (rounded) and for financial analysts is about $1,721,650 (rounded).[260]

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[244] The filing fee is a transfer from the petitioner requesting premium processing and proxy for the total costs to USCIS.

[245] See Form I–907 instructions at *https://www.uscis.gov/sites/default/files/document/forms/i-907instr.pdf* (accessed September 25, 2024).

Calculation: 22 minutes/60 minutes per hour = 0.37 (rounded) hour.

[246] Calculation, HR specialist Form I–907: $53.03 hourly opportunity cost of time * 0.37 hour = $19.62 opportunity cost of time per request.

Calculation, In-house Lawyer Form I–907: $123.02 hourly opportunity cost of time * 0.37 hour = $45.52 opportunity cost of time per request.

Calculation, Outsourced Lawyer Form I–907: $212.10 hourly opportunity cost of time * 0.37 hour = $78.48 opportunity cost of time per request.

[247] Calculation, HR specialist: $19.62 opportunity cost of time per request * 2,085 Form I–907 = $40,908 (rounded) total cost of Form I–907 filed by HR specialists.

[248] Calculation, In-house Lawyer Form I–907: $45.52 hourly opportunity cost of time * 1,903 applications = $86,625.

Calculation, Outsourced Lawyer Form I–907: $78.48 hourly opportunity cost of time * 1,903 applications = $149,347.

[249] Calculation: $40,908 total cost of Form I–907 filed by HR specialists + $86,625 total cost of Form I–907 filed by in-house lawyers = $127,533 estimated total costs to file Form I–907.

Calculation: $40,908 total cost of Form I–129 filed by HR specialists + $149,347 total cost of Form I–907 filed by outsourced lawyers = $190,255 estimated total costs to file Form I–907.

[250] The time burden estimate of 130 minutes is as follows: 9142–B—55 minutes, Appendix A—15 minutes, Appendix B—15 minutes, Appendix C—20 minutes, Appendix D—10 minutes, Record Keeping—15 minutes. *See* Form ETA–9142–B at *https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/Form-ETA-9142B-Instructions-1205-0509.pdf* (accessed August 22, 2024)

[251] Calculation, HR specialist: $53.03 per hour * 2.17 hours * 177 Form ETA–9142–B = $20,368 (rounded) total cost of Form ETA–9142–B filed by HR specialists.

[252] Calculation, In-house Lawyer Form ETA–9142–B: $123.02 per hour * 2.17 hours * 161 applications = $42,979 (rounded). Calculation, Outsourced Lawyer Form ETA–9142–B: $212.10 per hour * 2.17 hours * 161 applications = $74,101 (rounded).

[253] Calculation: $20,368 total cost of Form ETA–9142–B filed by HR specialist + $42,979 total cost of Form ETA–9142–B filed by In-house Lawyer = $63,347 estimated total costs to file Form ETA–9142–B.

Calculation: $20,368 total cost of Form ETA–9142–B filed by HR specialist + $74,101 total cost of Form ETA–9142–B filed by Outsourced Lawyer = $94,469 estimated total costs to file Form ETA–9142–B.

[254] Calculation: $53.03 hourly opportunity cost of time * 1-hour time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements = $53.03.

[255] Calculation: $53.03 hourly opportunity cost of time * 0.17 hours to send OFLC and AFL–CIO the ETA case number = $9.02 (rounded).

[256] Calculation: $53.03 + $9.02 = $62.05.

[257] *See* U.S. Department of Labor, Bureau of Labor Statistics, ''May 2023 National Occupational Employment and Wage Statistics'' Financial and Investment Analysts (13–2051), *https://www.bls.gov/news.release/archives/ocwage_04032024.pdf* (accessed October 25, 2024).

[258] Calculation: $54.30 mean hourly wage for a financial analyst * 1.45 benefits-to-wage multiplier = $78.74 (rounded).

[259] Calculation: $78.74 estimated total compensation for a financial analyst * 5 hours to meet the requirements of the irreparable harm standard = $393.70.

[260] Calculations, HR specialists: $62.05 opportunity cost of time to comply with attestation requirements and to send the ETA case number to OFLC and AFL–CIO * 4,373 estimated additional petitions = $271,345 (rounded) total cost to comply with attestation requirements.

Calculation, Financial Analysts: $393.70 opportunity cost of time to comply with attestation requirements * 4,373 estimated additional petitions

The estimated total cost to file Form ETA–9142–B–CAA–9 and comply with the attestation is approximately $1,992,995.[261]

v. Cost To Conduct Recruitment

An employer that files Form ETA–9142B–CAA–99 and the I–129 petition 30 or more days after the certified start date of work must conduct additional recruitment of U.S. workers. This consists of: (1) placing a new job order with the State Workforce Agency (SWA), (2) contacting the relevant American Job Center (AJC), (3) contacting the AFL–CIO if applicable, (4) contacting former U.S. workers, (5) recruiting U.S. workers as provided in § 655.45(a) and (b), (6) contacting current employees for referrals, and (7) placing the available job opportunity on the employer's website if the employer maintains a website for its business.

Specifically, the employer must place a new job order for the job opportunity with the SWA serving the area of intended employment. During the period the SWA is actively circulating the job order, employers must also contact, by email or other available electronic means, the nearest local AJC to request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and to provide to the AJC the unique identification number associated with the job order placed with the SWA.

If the occupation is traditionally or customarily unionized, employers must provide written notification of the job opportunity to the nearest American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) office covering the area of intended employment, by providing a copy of the job order, and request assistance in recruiting qualified U.S. workers for the job opportunity.

Employers are required to make reasonable efforts to contact, by mail or other effective means, their former U.S. workers, including those workers who were furloughed and laid off, beginning January 1, 2023. Employers must disclose the terms of the job order to these workers as required by the rule.

The employer must provide a copy of the job order to the bargaining representative for its employees in the occupation and area of intended employment, consistent with 20 CFR 655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b).

Employers are also required to contact current employees regarding available job opportunities for referrals.

Finally, employers are required to post the available job opportunity on the employer's website if the employer maintains a website for its business.

DOL estimates the average expected time burden for activities related to conducting recruitment is 4 hours.[262] Assuming this work will be done by an HR specialist or an equivalent occupation, the estimated cost to each petitioner is approximately $212.12.[263] Using 1,400 as the estimated number of petitioners required to undergo additional recruitment activities, the estimated total cost of this provision is approximately $296,968 (rounded).[264]

It is possible that if U.S. employees apply for these positions, H–2B employers may incur some costs associated with reviewing applications, interviewing, vetting, and hiring applicants who are referred to H–2B employers by the recruiting activities required by this rule. However, DOL is unable to quantify the impact.

vi. Cost of the Portability Provision

Petitioners seeking to hire H–2B nonimmigrants who are currently present in the United States with a valid H–2B visa would need to file a Form I–129, which includes paying the associated fee as discussed above. Also previously discussed, we estimate that approximately 359 additional Form I–129 H–2B petitions will be filed as a result of this provision.

As discussed previously, if a petitioner is represented by a lawyer, the lawyer must file Form G–28. In addition, if a petitioner desires premium processing, the petitioner must file Form I–907 and pay the associated fee. We expect an HR specialist, in-house lawyer, or an outsourced lawyer will perform these actions. Moreover, as previously estimated, we expect that an in-house or outsourced lawyer will file about 47.73 percent of these Form I–129 petitions. Therefore, we expect that a lawyer will file 171 of these petitions and an HR specialist or equivalent occupation will file the remaining 188. As previously discussed, the opportunity cost of time to file a Form I–129 H–2B petition is $241.82 for an HR specialist; and the opportunity cost of time to file a Form I–129 H–2B petition with accompanying Form G–28 is $663.08 for an in-house lawyer and $1,143.22 for an outsourced lawyer. Therefore, we estimate the cost of the additional Forms I–129 from the portability provision for HR specialists is $45,462.[265] The estimated cost of the additional Forms I–129 accompanied by Forms G–28 from the portability provision for lawyers is $113,387 if filed by in-house lawyers and $195,491 if filed by outsourced lawyers.[266]

Previously in this analysis, we estimated that about 91.19 percent of Form I–129 H–2B petitions are filed with Form I–907 for premium processing. As a result of this provision, we expect that an additional 327 Forms I–907 will be filed.[267] We expect a lawyer will file 156 of those Forms I–907 and an HR specialist or equivalent occupation will file the remaining 171.[268] As previously discussed, the estimated opportunity cost of time to file a Form I–907 is $19.62 for an HR specialist; and the estimated opportunity cost of time to file a Form I–907 is approximately $45.52 for an in-house lawyer and $78.48 for an outsourced lawyer. The estimated total cost of the additional Forms I–907 if HR

= $1,721,650 (rounded) to comply with attestation requirements.

[261] Calculation: $271,345 total cost for HR specialist to comply with attestation requirement and to send the ETA case number to OFLC and AFL–CIO + $1,721,650 total cost for financial analysts to comply with attestation requirements = $1,992,995 total cost to comply with attestation requirements.

[262] This is the average expected time burden across all employers; not all employers will need to notify the AFL–CIO, because not all occupations are traditionally or customarily unionized. DOL estimates the time burden for placing a new job order for the job opportunity with SWA is 1 hour, 0.5 hours for contacting the nearest AJC, 1 hour for contacting former U.S. workers, 0.5 hours for contacting current employees for referrals, 0.5 hours for placing the available job opportunity on the employer's website, and 0.5 hours to provide a copy of job order to the bargaining representative and written notification of job opportunity to nearest AFL–CIO if the occupation is traditionally or customarily unionized, for a total time burden of 4 hours.

[263] Calculation: $53.03 hourly opportunity cost of time for an HR specialist * 4 hours to conduct additional recruitment = $212.12 per petitioner cost to conduct additional recruitment.

[264] Calculation: 1,400 estimated number of petitioners subject to additional recruitment requirements * $212.12 per petitioner cost to conduct additional recruitment = $296,968 (rounded) total cost to conduct additional recruitment.

[265] Calculation, HR specialist: $241.82 estimated cost to file a Form I–129 H–2B petition * 188 petitions = $45,462 (rounded).

[266] Calculation, In-house Lawyer: $663.08 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 * 171 petitions = $113,387 (rounded).

Calculation, Outsourced Lawyer: $1,143.22 estimated cost to file a Form I–129 H–2B petition and accompanying Form G–28 * 171 petitions = $195,491 (rounded).

[267] Calculation: 359 estimated additional Form I–129 H–2B petitions * 91.19 percent accompanied by Form I–907 = 327 (rounded) additional Form I–907.

[268] Calculation, Lawyers: 327 additional Form I–907 * 47.73 percent = 156 (rounded) Form I–907 filed by a lawyer. Calculation, HR specialists: 327 Form I–907—156 Form I–907 filed by a lawyer = 171 Form I–907 filed by an HR specialist.

specialists file is $3,355.[269] The estimated total cost of the additional Forms I–907 is $7,101 if filed by in-house lawyers and $12,243 if filed by outsourced lawyers.[270]

The estimated total cost of this provision ranges from $169,305 to $256,551 depending on what share of the forms are filed by in-house or outsourced lawyers.[271]

vii. Cost of Audits to Petitioners

As discussed above, DHS intends to conduct 150 audits of employers hiring H–2B workers under this TFR,[272] and DOL intends to conduct 100 audits of employers hiring H–2B workers under this TFR, for a total of 250 employers. Employers will need to provide requested information to comply with the audit. We estimate that the expected time burden to comply with audits conducted by DHS and DOL's Office of Foreign Labor Certification is 12 hours.[273] We expect that an HR specialist or equivalent occupation will provide these documents. Given an hourly opportunity cost of time of $53.03, the estimated cost of complying with audits is $636.36 per audited employer.[274] Therefore, the total estimated cost to employers to comply with audits is $159,090.[275]

viii. Cost of Additional Scrutiny

The Departments expect that petitioners undergoing additional scrutiny will need to submit additional evidence to USCIS. The costs associated with additional scrutiny include the opportunity cost of time to assess, document, and compile evidence and the costs (both explicit costs and opportunity costs of time) of submitting the compiled evidence.

The opportunity costs of time associated with compiling such evidence are unavailable due to the unique fact pattern in each instance and a lack of data at this time regarding the time to comply. To estimate the explicit costs of additional scrutiny, we assume 144 petitioners will need to print 500 pages of documents and mail this to USCIS. We expect these documents to be able to fit in a Priority Mail Medium Flat Rate box, which costs $16.00.[276] We estimate the costs of printing at $0.15 per page and the cost of printing 500 at $75.00.[277] The estimated cost for an employer to print and ship evidence to USCIS is $91.00.[278] With an estimated 144 petitioners expected to print and ship evidence, the total estimated costs for printing and shipping evidence is $13,104.[279]

We also expect petitioners to incur a time burden associated with printing and shipping evidence to USCIS. We estimate it will take an HR specialist or equivalent employee 1 hour to print and ship evidence. Using the $53.03 hourly opportunity cost of time for HR specialist, we estimate the opportunity cost of time for each petitioner is $53.03.[280] With an estimated 144 petitioners expected to print and ship evidence, the total estimated opportunity cost of time to print and ship evidence is $7,636.[281]

We do not expect this provision to impose new costs on to USCIS. The costs to request and review evidence from petitioners is included in the fees paid to the agency.

The total estimated cost of additional scrutiny is $20,740.[282]

ix. Familiarization Costs

We expect that petitioners or their representatives will need to read and understand this rule if they seek to take advantage of the supplemental cap. As a result, we expect this rule will impose one-time familiarization costs associated with reading and understanding this rule. As shown previously, we estimate that approximately 9,924 petitioners may take advantage of the provisions of this rule, and that a lawyer will represent 4,737 of these petitioners and an HR specialist or equivalent occupation will represent 5,187.

To estimate the costs of rule familiarization, we estimate the time it will take to read and understand the rule by assuming a reading speed of 238 words per minute.[283] This rule has approximately 67,000 words.[284] Using a reading speed of 238 words per minute, DHS estimates it will take approximately 4.7 hours to read and understand this rule.[285]

The estimated hourly total compensation for a HR specialist, in-house lawyer, and outsourced lawyer are $53.03, $123.02, and $212.10, respectively. The estimated opportunity cost of time for each of these filers to read and understand the rule are $249.24, $578.19, and $996.87, respectively.[286] The estimated total opportunity cost of time for 5,187 HR specialists to familiarize themselves with this rule is approximately $1,292,808.[287] The estimated total

[269] Calculation, HR specialist: $19.62 to file a Form I–907 * 171 forms = $3,355 (rounded).

[270] Calculation, In-house lawyer: $45.52 to file a Form I–907 * 156 forms = $7,101 (rounded).

Calculation for an outsourced lawyer: $78.48 to file a Form I–907 * 156 forms = $12,243 (rounded).

[271] Calculation for HR specialists and in-house lawyers: $45,462 for HR specialists to file Form I–129 H–2B petitions + $113,387 for in-house lawyers to file Form I–129 and the accompanying Form G–28 + $3,355 for HR specialists to file Form I–907 + $7,101 for in-house lawyers to file Form I–907 = $169,305.

Calculation for HR specialists and outsourced lawyers: $45,462 for HR specialists to file Form I–129 H–2B petitions + $195,491 for outsourced lawyers to file Form I–129 and the accompanying Form G–28 + $3,355 for HR specialists to file Form I–907 + $12,243 for outsourced lawyers to file Form I–907 = $256,551.

[272] As noted above, in addition to these TFR-specific audits, DHS will also be conducting at least 150 targeted site visits annually related to other H–2B petitions to determine compliance with H–2B program requirements and provide increased oversight into the integrity of the H–2B program overall.

[273] The number in hours for audits was provided by the USCIS, Service Center Operations.

[274] Calculation: $53.03 hourly opportunity cost of time for an HR specialist * 12 hours to comply with an audit = $636.36 per audited employer.

[275] Calculation: 250 audited employers * $636.36 opportunity cost of time to comply with an audit = $159,090.

[276] USPS, Priority Mail, *https://www.usps.com/ship/priority-mail.htm* (accessed August 22, 2024).

[277] *See https://www.montgomerycountymd.gov/Library/services/computerhelp.html* (accessed August 22, 2024). Cost to make black and white copies. Calculation: 500 pages * $0.15 per page = $75.00 in printing costs.

[278] Calculation: $75.00 in printing costs + $16.00 in shipping costs = $91.00 to print and ship evidence.

[279] Calculation: 144 petitioners * $91.00 to print and ship evidence = $13,104 total printing and shipping costs.

[280] Calculation: $53.03 hourly opportunity cost of time for HR specialist * 1 hour to print and ship evidence = $53.03 opportunity cost of time per petitioner.

[281] Calculation: 144 petitioners * $53.03 opportunity cost of time per petitioner = $7,636 total estimated opportunity cost of time to print and ship evidence.

[282] Calculation: $13,104 total printing and shipping costs + $7,636 total opportunity cost of time = $20,740 total estimated cost of additional scrutiny.

[283] Brysbaert, Marc (2019, April 12). 'How many words do we read per minute? A review and meta-analysis of reading rate.' *https://doi.org/10.31234/osf.io/xynwg* (accessed September 25, 2024). We use the average speed for silent reading of English nonfiction by adults.

[284] Please note that this number represents that Departments' best estimate of the final word count, given that the actual word may change during the promulgation of the Rule.

[285] Calculation, Step 1: roughly 67,000 words/238 words per minute = 282 (rounded) minutes.

Calculation, Step 2: 282 minutes/60 minutes per hour = 4.7 (rounded) hours.

[286] Calculation, HR Specialists: $53.03 estimated hourly total compensation for an HR specialist * 4.7 hours to read and become familiar with the rule = $249.24 opportunity cost of time for an HR specialist to read and understand the rule.

Calculation, In-house lawyer: $123.02 estimated hourly total compensation for an in-house lawyer * 4.7 hours to read and become familiar with the rule = $578.19 (rounded) opportunity cost of time for an in-house lawyer to read and understand the rule.

Calculation, Outsourced lawyer: $212.10 estimated hourly total compensation for an outsourced lawyer * 4.7 hours to read and become familiar with the rule = $996.87 (rounded) opportunity cost of time for an outsourced lawyer to read and understand the rule.

[287] Calculation, HR specialists: $249.24 opportunity cost of time * 5,187 = $1,292,808 (rounded).

opportunity cost of time for 4,737 lawyers to familiarize themselves with this rule is approximately $2,738,886 if they are all in-house lawyers and $4,722,173 if they are all outsourced lawyers.[288] Accordingly, the estimated total opportunity costs of time for petitioners' representatives to familiarize themselves with this rule ranges from $4,031,694 to $6,014,981.[289]

x. Estimated Total Costs to Petitioners

In sum, the monetized costs of this rule come from time spent filing and complying with Form I–129, Form G–28, Form I–907, and Form ETA–9142–B–CAA–9, as well as contacting and refreshing recruitment efforts, posting notifications, time spent filing to obtain a porting worker, and complying with audits. The estimated total cost to file Form I–129 and an accompanying Form G–28 ranges from $1,936,649 to $2,938,701, depending on the filer. The estimated total cost of filing Form I–907 ranges from $127,533 to $190,255, depending on the filer. The estimated cost for late season employers to file Form ETA–9142B ranges from $63,347 to $94,469 depending on the filer. The estimated total cost of filing and complying with Form ETA–9142–B–CAA–9 is $1,992,995. The estimated total cost of conducting additional recruitment is $296,968. The estimated cost of the portability provision ranges from $169,305 to $256,551, depending on the filer. The estimated total cost for employers to comply with audits is $159,090. The estimated total costs for petitioners or their representatives to familiarize themselves with this rule ranges from $4,031,694 to $6,014,981, depending on the filer. The estimated total cost of additional scrutiny is $20,740. The total estimated cost to petitioners ranges from $8,798,321 to $11,964,750, depending on the filer.[290]

c. Cost to the Federal Government

USCIS will incur costs related to the adjudication of petitions as a result of this TFR. DHS expects USCIS to recover these costs by the fees associated with the forms, which have been accounted for as a transfer from petitioners to USCIS and serve as a proxy for the costs to the agency. The total filing fees associated with Form I–129 H–2B petitions are $4,817,740, and the total filing fees associated with premium processing are $7,270,775.[291] Total transfers from petitioners to the Government are $12,088,515.[292]

The INA provides USCIS with the authority to collect fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs, and services provided without charge to certain applicants and petitioners.[293] DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. USCIS establishes fees at an amount that is necessary to recover these assigned costs, such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (for example, facility rent, IT equipment and systems among other expenses) and immigration benefits provided without a fee charged. Consequently, since USCIS immigration fees are primarily based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS anticipates some additional costs in adjudicating the additional petitions submitted because of the increase in cap limitation for H–2B visas.

Both DOL and DHS intend to conduct a significant number of audits during the period of temporary need to verify compliance with H–2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.[294] While fees fund most USCIS activities and appropriations fund DOL, we expect both agencies will be able to shift resources to conduct these audits without incurring additional costs. As previously mentioned, the agencies intend to conduct a total of 250 audits, and we expect each audit to take 12 hours. This results in a total time burden of 3,000 hours.[295] USCIS anticipates that a Federal employee at a GS–13 Step 5 salary will typically conduct these audits for each agency. The base hourly pay for a GS–13 Step 5 in the Washington, DC locality area is $64.06.[296] To estimate the total hourly compensation for these positions, we multiply the hourly wage ($64.06) by the Federal benefits to wage multiplier of 1.41.[297] This results in an hourly opportunity cost of time of $90.32 for GS–13 Step 5 Federal employees in the Washington, DC locality pay area.[298] The total opportunity costs of time for Federal workers to conduct audits is estimated to be $270,960.[299]

This final rule implements changes to the DOL's mechanisms to receive complaints from advocates, unions, and other stakeholders about jobs posted on seasonaljobs.gov. DOL expects that the changes to the DOL's mechanisms to receive complaints may result in some additional costs to DOL. However, DOL is unable to quantify such costs due to lack of data.

d. Benefits to Petitioners

The Departments assume that employers will incur the costs of this rule and other costs associated with hiring H–2B workers if the expected benefits of those workers exceed the expected costs. We assume that employers expect some level of net benefit from being able to hire additional H–2B workers. However, the Departments do not collect or require data from H–2B employers on the profits from hiring these additional workers to estimate this increase in net benefits.

The inability to access H–2B workers for some entities is currently causing irreparable harm or will cause their

[288] Calculation for in-house lawyers: $578.19 opportunity cost of * 4,737 = $2,738,886 (rounded).

Calculation for outsourced lawyers: $996.87 opportunity cost of time * 4,737 = $4,722,173 (rounded).

[289] Calculation: $1,292,808 + $2,738,886 = $4,031,694.

Calculation: $1,292,808 + $4,722,173 = $6,014,981.

[290] Calculation of lower range: $1,936,649 + $127,533 + $63,347 + $1,992,995 + $296,968 + $169,305 + $159,090 + $4,031,694 + $20,740 = $8,798,321.

Calculation of upper range: $2,938,701 + $190,255 + $94,469 + $1,992,995 + $296,968 + $256,551 + $159,090 + $6,014,981 + $20,740 = $11,964,750.

[291] Calculation: (3,988 + 327 Forms I–907) * $1,685 per form = $7,270,775.

[292] Calculation: $4,817,740 + $7,270,775 = $12,088,515.

[293] *See* INA section 286(m), 8 U.S.C. 1356(m).

[294] These audits are distinct from the WHD's authority to perform investigations regarding employers' compliance with the requirements of the H–2B program.

[295] Calculation: 12 hours to conduct an audit * 250 audits = 3,000 total hours to conduct audits.

[296] *See* U.S. Office of Personnel Management, Pay and Leave, Salaries and Wages, For the Locality Pay area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA, 2024, Hourly Basic Rate, *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2024/DCB_h.pdf* (accessed August 22, 2024).

[297] Calculation, Step 1: $2,382,167 Full-time Permanent Salaries + $983,370 Civilian Personnel Benefits = $3,365,537 Compensation.

Calculation, Step 2: $3,365,537 Compensation/$2,382,167 Full-time Permanent Salaries = 1.41 (rounded) Federal employee benefits to wage ratio. *See https://www.dhs.gov/sites/default/files/2024-04/2024_0325_us_citizenship_and_immigration_services.pdf* (accessed August 22, 2024).

[298] Calculation: $64.06 hourly wage for a GS 13–5 in the Washington, DC locality area * 1.41 Federal employee benefits to wage ratio = $90.32 hourly opportunity cost of time for a GS 13–5 federal employee in the Washington, DC locality area.

[299] Calculation: 3,000 hours to conduct audits * $90.32 hourly opportunity cost of time = $270,960 total opportunity costs of time for Federal employees to conduct audits.

businesses to suffer irreparable harm in the near future. Temporarily increasing the number of available H–2B visas for this fiscal year may result in a benefit, because it will allow some businesses to hire the additional labor resources necessary to avoid such harm. Preventing such harm may also result in cost savings by ultimately preserve the jobs of other employees (including U.S. workers) at that establishment. Additionally, returning workers are likely to be very familiar with the H–2B process and requirements, and may be positioned to begin work more expeditiously with these employers. Moreover, employers may already be familiar with returning workers as they have trained, vetted, and worked with some of these returning workers in past years. As such, limiting the supplemental visas to returning workers will assist employers that are suffering irreparable harm or will suffer impending irreparable harm.

e. Benefits to Workers

The Departments assume that workers will only incur the costs of this rule and other costs associated with obtaining a H–2B position if the expected benefits of that position exceed the expected costs. We assume that H–2B workers expect some level of net benefit from being able to work for H–2B employers. However, the Departments do not have sufficient data to estimate this increase in net benefits and lack the necessary resources to investigate this in a timely manner. This rule is not expected to impact wages because DOL prevailing wage regulations apply to all H–2B workers covered by this rule. Additionally, this analysis shows that employers incur costs in conducting additional recruitment of U.S. workers and attesting to irreparable harm from current labor shortfall. These costs suggest employers are not taking advantage of a large supply of foreign labor at the expense of domestic workers.

The existence of this rule will benefit the workers who receive H–2B visas. According to Brodbeck et al. (2018):

> Participation in the H–2B guest worker program has become a vital part of the livelihood strategies of rural Guatemalan families and has had a positive impact on the quality of life in the communities where they live. Migrant workers who were landless, lived in isolated rural areas, had few economic opportunities, and who had limited access to education or adequate health care, now are investing in small trucks, building roads, schools, and homes, and providing employment for others in their home communities. . . .The impact has been transformative and positive.[300]

Some provisions of this rule will benefit such workers in particular ways. The portability provision of this rule will allow nonimmigrants with valid H–2B visas who are present in the United States to transfer to a new employer more quickly and potentially extend their stay in the United States and, therefore, earn additional wages.

DHS recognizes that some of the effects of these provisions may occur beyond the borders of the United States. The current analysis does not seek to quantify or monetize costs or benefits that occur outside of the United States.

U.S. workers will also benefit from this rule in multiple ways. For example, the additional round of recruitment and U.S. worker referrals required by the provisions of this rule will ensure that a nonimmigrant worker does not displace a U.S. worker who is willing and able to fill the position and may result in some U.S. workers being hired. As noted, the avoidance of current or impending irreparable harm made possible through the granting of supplemental visas in this rule could ensure that U.S. workers—who otherwise may be vulnerable if H–2B workers were not given visas—do not lose their jobs.

C. 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 temporary 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 temporary final rule. Accordingly, the Departments are not required to either certify that the temporary final rule would not have a significant economic impact on a substantial number of small entities nor conduct a regulatory flexibility analysis.

D. 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 rule, or final rule for which the agency published a proposed rule that includes any Federal mandate 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.[301] This rule is exempt from the written statement requirement because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, this rule does not exceed the $100 million in 1995 expenditure in any 1 year when adjusted for inflation ($200 million in 2023 dollars based on the Consumer Price Index for All Urban Consumers (CPI–U)),[302] and this rulemaking does not contain such a Federal mandate as the term is defined under UMRA.[303] The requirements of Title II of the Act, therefore, do not apply, and the Departments have not prepared a statement under the Act.

E. 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 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.

F. Executive Order 12988 (Civil Justice Reform)

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, 61 FR 4729 (Feb. 5, 1996).

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[300] *See* Arnold Brodbeck et al. (2018), Seasonal Migrant Labor in the Forest Industry of the United States: The Impact of H–2B Employment on Guatemalan Livelihoods, 31 Society & Natural Resources 1012.

[301] *See* 2 U.S.C. 1532(a)

[302] *See* U.S. Department of Labor, BLS, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' available at *https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202402.pdf,* last accessed September 3, 2024). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2023 − Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)] * 100 = [(304.702 − 152.4)/152.4] * 100 = (152.302/152.4) * 100 = 0.9994 (rounded) * 100 = 99.94 percent = 100 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars * 2.00 = $200 million in 2023 dollars.

[303] The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6).

G. National Environmental Policy Act

DHS and its components analyze their proposed 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 and Instruction Manual 023–01–001–01 Rev. 01 (Instruction Manual) establish 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.

NEPA and the CEQ regulations allow Federal agencies to establish categories of actions (''categorical exclusions'') that normally do not significantly affect the quality of the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 42 U.S.C. 4336e(1), 42 U.S.C. 4336(a)(2); 40 CFR 1501.4, 40 CFR 1508.1(d). The Instruction Manual, Appendix A, Table 1 lists Categorical Exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must 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. Instruction Manual, section V.B.2(a–c).

This rule temporarily amends the regulations implementing the H–2B nonimmigrant visa program to increase the numerical limitation on H–2B nonimmigrant visas for FY 2025, based on the Secretary of Homeland Security's determination, in consultation with the Secretary of Labor, consistent with the FY 2024 Omnibus and Public Law 118–83. It also allows H–2B beneficiaries who are in the United States to change employers upon the filing of a new H–2B petition and begin to work for the new employer for a period generally not to exceed 60 days before the H–2B petition is approved by USCIS.

DHS has considered in accordance with its NEPA implementing procedures and has determined that this temporary final rule clearly fits within categorical exclusion A3(d) because it interprets or amends a regulation without changing its environmental effect. The amendments to 8 CFR part 214 would authorize up to an additional 64,716 visas for noncitizens who may receive H–2B nonimmigrant visas, of which 44,716 are for returning workers (persons issued H–2B visas or were otherwise granted H–2B status in Fiscal Years 2022, 2023, or 2024). The proposed amendments would also facilitate H–2B nonimmigrants to move to new employment faster than they could if they had to wait for a petition to be approved. The amendment's operative provisions approving H–2B petitions under the supplemental allocation would effectively terminate after September 30, 2025 for the cap increase, and at the end of January 24, 2026 for the portability provision. DHS believes amending applicable regulations to authorize up to an additional 64,716 H–2B nonimmigrant visas will not result in reasonably foreseeable effects that would necessitate an environmental assessment or environmental impact statement with respect to the current H–2B limit or in the context of a current U.S. population exceeding 334,914,895 (maximum temporary increase of 0.0193 percent).[304] DHS has also considered and determined that this action would not have extraordinary circumstances that would require the preparation of an environmental assessment or environmental impact statement.

The amendment to applicable regulations is a stand-alone temporary authorization and not a part of any larger action, and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this action is categorically excluded and no further NEPA analysis is required.

H. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this temporary final rule is a ''major rule'' as defined by the Congressional Review Act (''CRA'') in 5 U.S.C. 804(2)(a) and is subject to both the CRA's reporting requirement and the delayed effective date requirement, pursuant to 5 U.S.C. 801. However, as stated in section IV.A of this rule, the Departments have good cause to forgo APA's requirements for notice and public comment (and a delayed effective date), pursuant to 5 U.S.C. 553. Therefore, the Departments also have good cause to forgo the CRA's 60-day delayed effective date requirement, pursuant to 5 U.S.C. 808(2). This rule is effective upon publication. DHS has complied with the CRA's reporting requirements and has sent this rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1).

I. Paperwork Reduction Act

Attestation for Employers Seeking to Employ H–2B Nonimmigrants Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, Form ETA–9142–B–CAA–9

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 of a new form, Form ETA–9142B–CAA–9, 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 provided by employers in response to this information collection.

Petitioners will use the new Form ETA–9142B–CAA–9 to make attestations regarding, for example, irreparable harm and the returning worker requirement (unless exempt because the H–2B worker is a national of one of the countries included in the country-specific allocation who is counted against the 20,000 returning worker exemption cap) described above. Petitioners will need to file the attestation with DHS until it announces that the supplemental H–2B cap has been reached. In addition, the petitioner will need to retain all documentation demonstrating compliance with this implementing rule, and must provide it to DHS or DOL in the event of an audit or investigation.

In addition to obtaining immediate emergency approval pursuant to 5 CFR 1320.13, DOL is seeking comments on this information collection pursuant to 44 U.S.C. 3506(c)(2)(A). Comments on the information collection must be received by January 31, 2025. This process of engaging the public and other

[304] *See* U.S. Census Bureau Quick Facts, available at *https://www.census.gov/quickfacts/US* (accessed September 9, 2024).

Calculation: 64,716 additional visas/334,914,895 million people in the United States = 0.0193 (rounded) percent temporary increase in the population.

Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA 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. *See* 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to a penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

In accordance with the PRA, DOL is affording the public with notice and an opportunity to comment on the new information collection, which is necessary to implement the requirements of this rule. The information collection activities covered under a newly granted OMB Control Number 1205–NEW are required under section 105 of Division G of the FY 2024 Omnibus as extended by Public Law 118–83, which 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 . . . with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,'' may increase the total number of noncitizens who may receive an H–2B visa 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. As previously discussed in the preamble of this rule, 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, but not more than, an additional 64,716 visas for FY 2025 for certain H–2B workers, for U.S. businesses that attest that they are suffering irreparable harm or will suffer impending irreparable harm. As with the previous supplemental rules, the Secretary has determined that the additional visas will only be available for returning workers, that is workers who were issued H–2B visas or otherwise granted H–2B status in FY 2022, 2023, or 2024, unless the worker is one of the 20,000 nationals of one of the countries included in the country-specific allocation who are exempt from the returning worker requirement.

Commenters are encouraged to discuss the following:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information to be collected; and
- The burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

The aforementioned information collection requirements are summarized as follows:

Agency: DOL–ETA.

Type of Information Collection: Extension of an existing information collection.

Title of the Collection: Attestation for Employers Seeking to Employ H–2B Nonimmigrants Workers Under Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83.

Agency Form Number: Form ETA–9142–B–CAA–9.

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

Total Estimated Number of Respondents: 4,373.

Average Responses per Year per Respondent: 1.

Total Estimated Number of Responses: 4,373.

Average Time per Response: 10.17 hours per application.

Total Estimated Annual Time Burden: 32,581 hours.

Total Estimated Other Costs Burden: $2,289,811.

Request for Premium Processing Service, Form I–907

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. Form I–907, Request for Premium Processing Service, has been approved by OMB and assigned OMB control number 1615–0048. DHS is making no changes to the Form I–907 in connection with this temporary rule implementing the time-limited authority pursuant to Section 105 of Division G, Title I of the Further Consolidated Appropriations Act, 2024, Public Law 118–47, as extended by Public Law 118–83 (which expires on December 20, 2024). However, DHS estimates that this temporary rule may result in approximately 4,325 additional filings of Form I–907 in fiscal year 2025. The current OMB-approved estimate of the number of annual respondents filing a Form I–907 is 815,773. DHS has determined that the OMB-approved estimate is sufficient to fully encompass the additional respondents who will be filing Form I–907 in connection with this temporary rule, which represents a small fraction of the overall Form I–907 population. Therefore, DHS is not changing the collection instrument or increasing its burden estimates in connection with this temporary rule and is not publishing a notice under the PRA or making revisions to the currently approved burden for OMB control number 1615–0048.

List of Subjects

8 CFR Part 214

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

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, 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.

For the reasons discussed in the joint preamble, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

DEPARTMENT OF HOMELAND SECURITY

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, 1357, 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; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Effective December 2, 2024, through December 2, 2027, amend § 214.2 by:

■ a. In table 3 to paragraph (h), adding an entry for ''32''; and

■ b. Adding paragraphs (h)(6)(xv) and (h)(32).

The additions read as follows:

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

* * * * *

(h) * * *

TABLE 3 TO PARAGRAPH (h)—PARAGRAPH CONTENTS

* * * * * * *
(32) Change of employers and portability for H–2B workers (January 25, 2025 through January 24, 2026).

* * * * *

(6) * * *

(xv) *Special requirements for additional cap allocations under Public Laws 118–47 and 118–83*—(A) *Public Law 118–47 and sections 101(6) and 106, Division A, Title I of Public Law 118–83*—(*1*) *Supplemental allocation for returning workers.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2025 only, the Secretary has authorized up to an additional 64,716 visas for aliens who may receive H–2B nonimmigrant visas pursuant to section 105 of Division G, Title I of Public Law 118–47, the Further Consolidated Appropriations Act, 2024, and sections 101(6) and 106, Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83. An alien may be eligible to receive an H–2B nonimmigrant visa under this paragraph (h)(6)(xv)(A)(*1*) if she or he is a returning worker. The term ''returning worker'' under this paragraph (h)(6)(xv)(A)(*1*) means a person who was issued an H–2B visa or was otherwise granted H–2B status in fiscal year 2022, 2023, or 2024. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xv)(A)(*1*). The additional H–2B visas authorized under this paragraph will be made available to returning workers as follows:

(*i*) Up to an additional 20,716 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2025 employment start dates on or before March 31, 2025.

(*ii*) Up to an additional 19,000 visas for aliens who may receive H–2B nonimmigrant visas based on petitions requesting FY 2025 employment start dates from April 1, 2025 to May 14, 2025.

(*iii*) Up to an additional 5,000 visas available for aliens with employment start dates from May 15, 2025 to September 30, 2025.

(*2*) *Supplemental allocation for nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2025 only, and in addition to the allocation described in paragraph (h)(6)(xv)(A)(*1*) of this section, the Secretary has authorized up to an additional 20,000 visas for aliens who are nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica, who may receive H–2B nonimmigrant visas pursuant to section 105 of Division G, Title I of Public Law 118–47, the Further Consolidated Appropriations Act, 2024, and sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, based on petitions with FY 2025 employment start dates. Such workers are not subject to the returning worker requirement in paragraph (h)(6)(xv)(A)(*1*). Petitioners must request such workers in an H–2B petition that is separate from H–2B petitions that request returning workers under paragraph (h)(6)(xv)(A)(*1*) and must declare that they are requesting these workers in the attestation Form ETA–9142–B–CAA–9 required under 20 CFR 655.68(a)(1). A petition requesting returning workers under paragraph (h)(6)(xv)(A)(*1*), which is accompanied by an attestation indicating that the petitioner is requesting nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica, will be rejected, denied or, in the case of a non-frivolous petition, approved solely for the number of beneficiaries that are from Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(xv)(A)(*2*).

(B) *Eligibility.* In order to file a petition with USCIS under this paragraph (h)(6)(xv), 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 20 CFR part 655 and 29 CFR part 503; and (*2*) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with this section and 20 CFR 655.64, evidencing that:

(*i*) Its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to this paragraph (h)(6)(xv);

(*ii*) All workers requested and/or instructed to apply for a visa have been issued an H–2B visa or otherwise granted H–2B status in fiscal year 2022, 2023, or 2024, unless the H–2B worker is a national of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica who is counted towards the 20,000 cap described in paragraph (h)(6)(xv)(A)(*2*) of this section;

(*iii*) The employer will comply with obligations and additional recruitment requirements outlined in 20 CFR 655.64(a)(3) through (5);

(*iv*) The employer will provide documentary evidence of the facts in paragraphs (h)(6)(xv)(B)(*2*)(*i*) through

(*iii*) of this section to DHS and/or DOL upon request; and

(*v*) The employer will agree to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with immigration laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2025 supplemental allocations outlined in paragraph (h)(6)(xv)(B) of this section, as a condition for the approval of the petition.

(*vi*) The employer will fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2025 supplemental allocations outlined in 20 CFR 655.64(a) and 655.68(a), as a condition for the approval of the H–2B petition. The employer must attest to this on Form ETA–9142–B–CAA–9 and must further attest on Form ETA–9142–B–CAA–9 that it will not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority pursuant to 20 CFR part 655, subpart A, and 29 CFR 503.25.

(C) *Processing—(1) Petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(i) of this section requesting FY 2025 employment start dates on or before March 31, 2025.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(*1*)(*i*) of this section requesting employment start dates on or before March 31, 2025 that are received after the applicable numerical limitation has been reached or after September 15, 2025.

(*2*) *Petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(ii) of this section requesting FY 2025 employment start dates from April 1, 2025 to May 14, 2025.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(*1*)(*ii*) of this section requesting employment start dates from April 1, 2025 to May 14, 2025 that are received earlier than 15 days after the INA section 214(g) cap for the second half FY 2024 has been met, or after the applicable numerical limitation has been reached or after September 15, 2025.

(*3*) *Petitions filed pursuant to paragraph (h)(6)(xv)(A)(1)(iii) of this section requesting FY 2025 employment start dates from May 15, 2025 and September 30, 2025.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(*1*)(*iii*) of this section requesting employment start dates from May 15, 2025 to September 30, 2025 that are received earlier than 45 days after the INA section 214(g) cap for the second half FY 2025 has been met, or after the applicable numerical limitation has been reached or after September 15, 2025.

(*4*) *Petitions filed pursuant to paragraph (h)(6)(xv)(A)(2) requesting nationals of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica with FY 2025 employment start dates.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(xv)(A)(*2*) of this section that have a date of need on or after April 1, 2025, and are received earlier than 15 days after the INA section 214(g) cap for the second half of FY 2025 is met, or after the applicable numerical limitation has been reached or after September 15, 2025.

(*5*) USCIS will not approve a petition filed pursuant to this paragraph (h)(6)(xv) on or after October 1, 2025.

(D) *Numerical limitations under paragraphs (h)(6)(xv)(A)(1) and (2) of this section.* When calculating the numerical limitations under paragraphs (h)(6)(xv)(A)(*1*) and (*2*) of this section as authorized under section 105 of Division G, Title I of Public Law 118–47, the Further Consolidated Appropriations Act, 2024, and sections 101(6) and 106 of Division A, Title I of the Continuing Appropriations and Extensions Act, 2025, Public Law 118–83, USCIS will make numbers for each allocation available to petitions in the order in which the petitions subject to the respective limitation are received. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions received (including the number of workers requested when necessary) and will notify the public of the dates that USCIS has received the necessary number of petitions (the ''final receipt dates'') under paragraph (h)(6)(xv)(A)(*1*) or (*2*). The day the public is notified will not control the final receipt dates. When necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations in paragraphs (h)(6)(xv)(A)(*1*) and (*2*), USCIS may randomly select from among the petitions received on the final receipt dates the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt dates that may be applicable under paragraph (h)(6)(xv)(A)(*1*) or (*2*) will be rejected. If the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limits described in paragraph (h)(6)(xv)(A)(*1*) or (*2*) may be received (in other words, if either of the numerical limits described in paragraph (h)(6)(xv)(A)(*1*) or (*2*) is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

(E) *Sunset.* This paragraph (h)(6)(xv) expires on October 1, 2025.

(F) *Non-severability.* The requirement to file an attestation under paragraph (h)(6)(xv)(B)(*2*) of this section is intended to be non-severable from the remainder of this paragraph (h)(6)(xv), including, but not limited to, the entirety of the numerical allocation provisions at paragraphs (h)(6)(xv)(A)(*1*) and (*2*) of this section. In the event that any part of this paragraph (h)(6)(xv) is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this paragraph (h)(6)(xv) 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 paragraph (h)(6)(xv), as consistent with law.

* * * * *

(32) *Change of employers and portability for H–2B workers.* (i) This paragraph (h)(32) relates to H–2B workers seeking to change employers during the time period specified in paragraph (h)(32)(iv) of this section. Notwithstanding paragraph (h)(2)(i)(D) of this section:

(A) An alien in valid H–2B nonimmigrant status whose new petitioner files a non-frivolous H–2B petition requesting an extension of the alien's stay on or after January 25, 2025, is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(32) is received by USCIS and before the new H–2B petition is approved, but no

earlier than the start date indicated in the new H–2B petition; or

(B) An alien whose new petitioner filed a non-frivolous H–2B petition requesting an extension of the alien's stay before January 25, 2025, that remains pending on January 25, 2025, is authorized to begin employment with the new petitioner before the new H–2B petition is approved, but no earlier than the start date of employment indicated on the new H–2B petition.

(ii)(A) With respect to a new petition described in paragraph (h)(32)(i)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(35), the new period of employment described in paragraph (h)(32)(i) of this section may last for up to 60 days beginning on the Received Date on Form I–797 (Notice of Action) or, if the start date of employment occurs after the I–797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H–2B petition.

(B) With respect to a new petition described in paragraph (h)(32)(i)(B) of this section, the new period of employment described in paragraph (h)(32)(i) of this section may last for up to 60 days beginning on the later of either January 25, 2025, or the start date of employment indicated in the H–2B petition.

(C) With respect to either type of new petition, if USCIS adjudicates the new petition before the expiration of this 60-day period and denies the petition, or if the new petition is withdrawn by the petitioner before the expiration of the 60-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(35) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the new petition is withdrawn. Nothing in this paragraph (h)(32) is intended to alter the availability of employment authorization related to professional H–2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iii) In addition to meeting all other requirements in paragraph (h)(6) of this section for the H–2B classification, to commence employment under this paragraph (h)(32):

(A) The alien must either:

(*1*) Have been in valid H–2B nonimmigrant status on or after January 25, 2025 and be the beneficiary of a non-frivolous H–2B petition requesting an extension of the alien's stay that is received on or after January 25, 2025, but no later than January 24, 2026; or

(*2*) Be the beneficiary of a non-frivolous H–2B petition requesting an extension of the alien's stay that is pending as of January 25, 2025; and

(B) The petitioner may not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority under 20 CFR part 655, subpart A, and 29 CFR 503.25.

(iv) Authorization to initiate employment changes pursuant to this paragraph (h)(32) begins at 12 a.m. on January 25, 2025, and ends at the end of January 24, 2026.

* * * * *

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

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

Authority: 8 U.S.C. 1101, 1103, 1105a, 1324a; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 101–410, 104 Stat. 890, as amended by Pub. L. 114–74, 129 Stat. 599.

■ 4. Effective December 2, 2024, through December 2, 2027, amend § 274a.12 by adding paragraph (b)(35) to read as follows:

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

* * * * *

(b) * * *

(35)(i) Pursuant to 8 CFR 214.2(h)(32) and notwithstanding 8 CFR 214.2(h)(2)(i)(D), an alien is authorized to be employed no earlier than the start date of employment indicated in the H–2B petition and no earlier than January 25, 2025, by a new employer that has filed an H–2B petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 60 days beginning on:

(A) The later of the ''Received Date'' on Form I–797 (Notice of Action) acknowledging receipt of the petition, or the start date of employment indicated on the new H–2B petition, for petitions filed on or after January 25, 2025; or

(B) The later of January 25, 2025, or the start date of employment indicated on the new H–2B petition, for petitions that are pending as of January 25, 2025.

(ii) If USCIS adjudicates the new petition prior to the expiration of the 60-day period in paragraph (b)(35)(i) of this section and denies the new petition for extension of stay, or if the petitioner withdraws the new petition before the expiration of the 60-day period, the employment authorization under this paragraph (b)(35) will automatically terminate upon 15 days after the date of the denial decision or the date on which the new petition is withdrawn. Nothing in this section is intended to alter the availability of employment authorization related to professional H–2B athletes who are traded between organizations pursuant to paragraph (b)(9) of this section and 8 CFR 214.2(h)(6)(vii).

(iii) Authorization to initiate employment changes pursuant to 8 CFR 214.2(h)(32) and paragraph (b)(35)(i) of this section begins at 12 a.m. on January 25, 2025, and ends at the end of January 24, 2026.

* * * * *

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

■ 5. 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); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

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).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 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), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 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), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 6. Effective December 2, 2024, through September 30, 2025, add § 655.64 to read as follows:

§ 655.64 Special application filing and eligibility provisions for Fiscal Year 2025 under the December 2, 2024, supplemental cap increase.

(a) An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(xv) to request H–2B workers with FY 2025 employment start dates on or before September 30, 2025, must meet the following requirements:

(1) The employer must attest on the Form ETA–9142–B–CAA–9 that its business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xv). The employer's attestation must identify the types of evidence the employer is relying on and will retain to meet the irreparable harm standard. The employer must attest that it has created a detailed written statement describing how it is suffering irreparable harm or will suffer impending irreparable harm and describing how such evidence demonstrates irreparable harm. In addition, the employer must attest that it will provide to DHS and/or DOL upon request all of the documentation it relied upon and retained as evidence that it meets the irreparable harm standard, including all of the supporting documentation the employer committed to retain at the time of filing on the employer's attestation form by selecting a checkbox next to the applicable type of documentation in section C, and the written statement describing how such evidence demonstrates irreparable harm.

(2) The employer must attest on Form ETA–9142–B–CAA–9 that each of the workers requested and/or instructed to apply for a visa, whether named or unnamed, on a petition filed pursuant to 8 CFR 214.2(h)(6)(xv), have been issued an H–2B visa or otherwise granted H–2B status during one of the last three (3) fiscal years (fiscal year 2022, 2023, or 2024), unless the H–2B worker is a national of Guatemala, El Salvador, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap described in 8 CFR 214.2(h)(6)(xv)(A)(*2*).

(3) The employer must attest on Form ETA–9142–B–CAA–9 that the employer will comply with all the assurances, obligations, and conditions of employment set forth on its approved *Application for Temporary Employment Certification.*

(4) An employer that submits Form ETA–9142B–CAA–9 and the I–129 petition 30 or more days after the certified start date of work, as shown on its approved Form ETA–9142B, *Final Determination: H–2B Temporary Labor Certification Approval,* must conduct additional recruitment of U.S. workers as follows:

(i) Not later than the next business day after submitting the I–129 petition for H–2B worker(s), 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 employer must follow all applicable SWA instructions for posting job orders, concurrently inform the SWA and NPC that the job order is being placed in connection with a previously certified *Application for Temporary Employment Certification* for H–2B workers by providing the unique temporary labor certification (TLC) identification number, and receive applications in all forms allowed by the SWA, including online applications (sometimes known as ''self-referrals''). The job order must contain the job assurances and contents set forth in § 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days;

(ii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact, by email or other available electronic means, the nearest comprehensive American Job Center (AJC) serving the area of intended employment where work will commence, request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and provide the AJC with the unique identification number associated with the job order placed with the SWA or, if unavailable, a copy of the job order. If a comprehensive AJC is not available, the employer must contact the nearest affiliate AJC serving the area of intended employment where work will commence to satisfy the requirements of this paragraph (a)(4)(ii);

(iii) Where the occupation or industry is traditionally or customarily unionized, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail, email or other effective means) the nearest American Federation of Labor and Congress of Industrial Organizations office covering the area of intended employment and provide written notice of the job opportunity, by providing a copy of the job order placed pursuant to (a)(4)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job;

(iv) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective means) its former U.S. workers, including those who have been furloughed or laid off, during the period beginning January 1, 2023, until the date the I–129 petition required under 8 CFR 214.2(h)(6)(xv) is submitted, who were employed by the employer in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite), disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and solicit their return to the job. The contact and disclosures required by this paragraph (a)(4)(iv) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

(v) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must engage in the recruitment of U.S. workers as provided in § 655.45(a) and (b). The contact and disclosures required by this paragraph (a)(4)(v) must be provided in a language understood by the worker, as necessary or reasonable, in writing; and

(vi) During the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective written means) all U.S. workers currently employed at the place of employment, disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and request assistance in recruiting qualified U.S. workers for the job. The contact, disclosure, and request for assistance required by this paragraph (a)(4)(vi) must be provided in a language understood by the worker, as necessary or reasonable, and in writing;

(vii) Where the employer maintains a website for its business operations, during the period of time the SWA is actively circulating the job order described in paragraph (a)(4)(i) of this section for intrastate clearance, the employer must post the job opportunity in a conspicuous location on the website. The job opportunity posted on the website must disclose the terms of the job order placed pursuant to (a)(4)(i) of this section, and remain posted for at least 15 calendar days;

(viii) The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until the date on which the last H–2B worker departs for the place of employment, or 30 days after the last date on which the

SWA job order is posted, whichever is later. Consistent with § 655.40(a), applicants can be rejected only for lawful job-related reasons.

(5) The employer must attest on Form ETA–9142–B–CAA–9 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2025 supplemental allocations outlined in this paragraph (a) and § 655.68(a), as a condition for the approval of the H–2B petition. Pursuant to this subpart A at § 655.73 and 29 CFR 503.25, the employer will not impede, interfere, or refuse to cooperate with an employee of the Secretary who is exercising or attempting to exercise DOL's audit or investigative authority. DOL may consider the failure to respond to and/or comply with an investigation or audit to be a willful misrepresentation of material fact or a substantial failure to meet the terms and conditions of the *H–2B Application for Prevailing Wage Determination,* or *Application for Temporary Employment Certification,* resulting in an adverse agency action on the employer, agent, or attorney, including assessment of a civil money penalty, revocation of the temporary labor certification, and/or program debarment for not less than 1 year or more than 5 years from the date of the final agency decision under 20 CFR 655.70, 655.72, 655.73 or 29 CFR part 503. A debarred party will be disqualified from filing any labor certification applications or labor condition applications with the Department of Labor by, or on behalf of, the debarred party for the same period of time set forth in the final debarment decision.

(b) This section expires on October 1, 2025.

(c) The requirements under paragraph (a) of this section are intended to be non-severable from the remainder of this section; in the event that paragraph (a)(1), (2), (3), (4), or (5) of this section 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 part, as consistent with law.

■ 7. Effective December 2, 2024, through September 30, 2028, add § 655.68 to read as follows:

§ 655.68 Special document retention provisions for Fiscal Years 2025 through 2028 under the Further Consolidated Appropriations Act, 2024, as extended by Public Law 118–83.

(a) An employer that files a petition with USCIS to employ H–2B workers in fiscal year 2025 under authority of the temporary increase in the numerical limitation under section 105 of Division G, Public Law 118–47, as extended by Public Law 118–83 must maintain for a period of three (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 the regulations in 8 CFR 214.2 governing that temporary increase;

(2) Evidence establishing, at the time of filing the I–129 petition and as attested to in the attestation form, that the employer's business is suffering irreparable harm or will suffer impending irreparable harm (that is, permanent and severe financial loss) without the ability to employ all of the H–2B workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(xv), including a detailed written statement describing the irreparable harm and how such evidence shows irreparable harm;

(3) Documentary evidence establishing that each of the workers the employer requested and/or instructed to apply for a visa, whether named or unnamed on a petition filed pursuant to 8 CFR 214.2(h)(6)(xv), have been issued an H–2B visa or otherwise granted H–2B status during one of the last three (3) fiscal years (fiscal year 2022, 2023, or 2024), unless the H–2B worker(s) is a national of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica and is counted towards the 20,000 cap described in 8 CFR 214.2(h)(6)(xv)(A)(*2*). Alternatively, if applicable, employers must maintain documentary evidence that the workers the employer requested and/or instructed to apply for visas are eligible nationals of El Salvador, Guatemala, Honduras, Haiti, Colombia, Ecuador, or Costa Rica as defined in 8 CFR 214.2(h)(6)(xv)(A)(*2*); and

(4) If applicable, proof of recruitment efforts set forth in § 655.64(a)(4)(i) through (vii) and a recruitment report that meets the requirements set forth in § 655.48(a)(1) through (4) and (7), and maintained throughout the recruitment period set forth in § 655.64(a)(4)(viii).

(b) DOL and/or DHS may inspect the documents in paragraphs (a)(1) through (4) of this section upon request.

(c) This section expires on October 1, 2028.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

Julie A. Su,

Acting Secretary, U.S. Department of Labor.

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