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DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 204, 214 and 215

CIS No. 2432-07

Docket No. USCIS-2007-0058

RIN 1615-AB67

Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security is proposing to amend its regulations affecting temporary non-agricultural workers within the H-2B nonimmigrant classification and their U.S. employers. This proposed rule would modify current limitations with respect to petitions for unnamed H-2B workers and the period of time that an H-2B worker must remain outside the United States before he or she would be eligible to seek certain nonimmigrant status again. In addition, to better ensure the integrity of the H-2B program, this rule proposes to: require employer attestations; preclude the imposition of fees by employers on prospective H-2B workers; require reimbursement of fees paid by H-2B workers to recruiters; preclude the change of the employment start date after the grant of the temporary labor certification; eliminate the process whereby H-2B petitions may be approved notwithstanding the absence of a valid temporary labor certification; require employer notifications when H-2B workers fail to show up for work, are terminated, or abscond from the worksite; require certain H-2B workers departing the United States to participate in a temporary worker visa exit pilot program; delegate authority

to enforce the terms of the H-2B petition to the Secretary of Labor (in the event the Department and the Department of Labor (DOL) work out a mutually agreeable delegation of enforcement authority from the Department to DOL); and bar nationals of countries consistently refusing or unreasonably delaying repatriation of their nationals from obtaining H-2B status. This rule also proposes to change the definition of "temporary employment" to recognize that such employment could last up to three years. This proposed rule would encourage and facilitate the lawful employment of eligible foreign temporary non-agricultural workers, while continuing to safeguard the rights of workers.

DATES: Written comments must be submitted on or before [Insert date 30 days from the date of publication in the FEDERAL REGISTER] in order to be assured of consideration.

ADDRESSES: You may submit comments, identified by DHS Docket No. USCIS-2007-0058, by any of the following methods:

- Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.
- Mail: Chief, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW, Suite 3008, Washington, DC 20529. To ensure proper handling, please reference DHS Docket No. USCIS-2007-0058 on your correspondence. This mailing address may also be used for paper, disk, or CD-ROM submissions.
- Hand Delivery/Courier: Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3008, Washington, DC 20529. Contact Telephone Number (202) 272-8377.

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

SUPPLEMENTARY INFORMATION:

I. Public Participation.

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this proposed rule. Comments that will provide the most assistance to the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), and U.S. Customs and Border Protection (CBP) in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Instructions: All submissions received must include the agency name and DHS Docket No. USCIS-2007-0058 for this rulemaking. All comments received will be posted without change to http://www.regulations.gov, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to http://www.regulations.gov. Submitted comments may also be inspected at the Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., 3rd Floor, Washington, DC 20529.

II. Background.

U.S. employers in seasonal and certain other industries have, in the past, faced a shortage of U.S. workers who are able, willing, and qualified to fill temporary non-agricultural jobs, and who would be available at the time and place needed to perform the work. To meet this need,

U.S. employers have turned to hiring foreign workers. One avenue open to such employers is to petition for foreign workers who qualify within the H-2B nonimmigrant classification. Immigration and Nationality Act (Act or INA) sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 CFR 214.2(h)(1)(ii)(D) and (h)(6)(i). According to the DOL Employment and Training Administration, the top three occupations for which U.S. employers utilize the H-2B program are landscape laborers, housekeeping cleaners, and construction workers.

A. Description of H-2B nonimmigrant classification.

The H-2B nonimmigrant classification applies to foreign workers coming to the United States temporarily to perform temporary, non-agricultural labor or services. INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 CFR 214.1(a)(2) (H-2B classification designation). Such workers may not displace U.S. workers who are capable of performing such services or labor. 8 CFR 214.2(h)(6)(i). In addition, their employment may not adversely affect the wages and working conditions of U.S. workers. Id.

The total number of aliens who enter the United States pursuant to H-2B visas or who are accorded H-2B nonimmigrant status during either the first or last 6 months of a fiscal year is limited to 33,000, for a total of 66,000 for the entire fiscal year.[1] INA sec. 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). During the past several fiscal years, the demand for new H-2B workers has exceeded these limits. Moreover, the H-2B cap for each half of the fiscal year has been reached progressively earlier in recent years and prospective employers are thus increasingly anxious about their ability to secure necessary H-2B workers each year.

[1] Section 214(g)(9)(A) of the INA provided that an alien who has already been counted toward the numerical limitation during fiscal year 2004, 2005, or 2006 shall not again be counted toward such limitation during fiscal year 2007. The provision sunset on September 30, 2007. National Defense Authorization Act, sec. 1074, Pub. Law No. 109-364 (Oct. 17, 2006).

A USCIS-approved Form I-129, "Petition for Nonimmigrant Worker" (hereinafter, "H-2B petition") is required before a foreign worker may seek H-2B nonimmigrant status. 8 CFR 214.2(h)(2)(i)(A). Depending on the circumstances, the petitioner must be a U.S. employer, a U.S. agent, or a foreign employer filing through a U.S. agent. 8 CFR 214.2(h)(6)(iii)(B). With a limited exception, an employer currently may not file a petition for an H-2B temporary worker unless that employer has obtained a temporary labor certification from the Secretary of Labor (or the Governor of Guam for employment on Guam). 8 CFR 214.2(h)(6)(iv)(A) and (h)(6)(v)(A). To obtain a temporary labor certification, a prospective employer must test the U.S. labor market as to the availability of qualified U.S. workers and be willing to pay the alien a salary that will not adversely affect the wages and working conditions of similarly employed U.S. workers. 20 CFR 655.3(a); 8 CFR 214.2(h)(6)(iv)(A)(1). Based on the labor certification, the H-2B petitioner files the H-2B petition with the appropriate USCIS service center. See 8 CFR 214.2(h)(2)(i)(A). If, however, the petitioner receives notice from the Secretary of Labor that the certification cannot be made (referred to as a "Non Determination Notice"), the petitioner nevertheless may file the H-2B petition with USCIS, but must include countervailing evidence to overcome the lack of such certification. 8 CFR 214.2(h)(6)(iv)(D).

Under current regulations, an H-2B petitioner must, at the time of filing, include in its petition the names of all beneficiaries, except in emergent situations involving multiple beneficiaries. See 8 CFR 214.2(h)(2)(iii). The H-2B petition also must include documentation that each beneficiary qualifies for the job offer as specified in the labor certification, where such job requires any education, training, experience, or other special requirements. 8 CFR 214.2(h)(6)(vi)(C).

The H-2B petition must establish that the petitioner's need for the services or labor is temporary, regardless of whether the underlying job is permanent or temporary. 8 CFR 214.2(h)(6)(ii). The petitioner's need is considered temporary if it is a one-time occurrence, a seasonal need, a peak-load need, or an intermittent need. 8 CFR 214.2(h)(6)(ii)(B). One-time occurrence employment is where the employer has not employed workers to perform the services in the past and will not need workers to perform the services in the future, or where the employer has an employment situation that is otherwise permanent but a temporary event of short duration has created the need for a temporary worker. 8 CFR 214.2(h)(6)(ii)(B)(1). Employment of a seasonal nature is recurring employment that is tied to a certain time of year by a predictable event or pattern and requires labor levels far above those necessary for ongoing operations. 8 CFR 214.2(h)(6)(ii)(B)(2). Employment involving a peak-load need is where the employer regularly employs permanent workers to perform the services or labor at the place of employment and the employer needs to supplement the permanent staff on a temporary basis tied to a seasonal or short-term demand. 8 CFR 214.2(h)(6)(ii)(B)(3). Such temporary peak-load additions to staff may not become a part of the petitioner's regular operation. Id. Intermittent need is where an employer has not employed permanent or full-time workers to perform the services or labor, but occasionally or intermittently needs temporary workers to perform the services or labor for short periods. 8 CFR 214.2(h)(6)(ii)(B)(4).

As a general rule, the period of the petitioner's need must be less than one year, absent extraordinary circumstances. 8 CFR 214.2(h)(6)(ii)(B). With certain exceptions for commuters and workers who do not reside continually in the United States and whose employment is seasonal, intermittent or for six months or less per year, an H-2B nonimmigrant may hold H-2B nonimmigrant status for a maximum period of three years, following which he or she must depart

from the United States for at least six months before he or she may again be admitted in H-2B or any other status under section 101(a)(15)(H) or (L) of the INA. 8 CFR 214.2(h)(13)(iv) and (v).

B. Effective use of H-2B nonimmigrant classification.

The H-2B program is most intensively used among businesses in seasonal industries that frequently have a difficult time locating temporary workers. USCIS is aware, however, that the current H-2B program regulations do not accommodate as effectively as possible the needs of U.S. employers and alien workers who use, or want to use, the H-2B program. Therefore, USCIS is proposing a number of significant changes to the H-2B regulations to reduce or eliminate burdens and restrictions that hinder employers' ability to effectively use this visa category. In addition, USCIS proposes to enhance the protection of H-2B workers by curtailing abuses related to employment fees and visa selling that could lead to human trafficking and alien worker indenture. Additionally, worker protections are enhanced through strengthened revocation and debarment procedures and employer sanctions for a substantial or willful failure to meet the terms of the attestations.

III. Proposed Regulatory Changes.

A. Allowing unnamed beneficiaries.

USCIS is proposing to amend 8 CFR 214.2(h)(2)(iii) to allow employers petitioning for aliens to fill H-2B positions to specify only the number of positions sought and not name the individual alien(s), except where the alien is already present in the United States. The H-2B program is overseen by three Federal government agencies: The Department of Labor (DOL) issues the H-2B temporary labor certifications and oversees compliance with employment laws; USCIS adjudicates the H-2B petitions; and, if the petitions are approved, the Department of State issues the H-2B visas to the workers at consulates overseas. In the event that the Department and

DOL work out a mutually agreeable delegation of authority from DHS to DOL, enforcement of the terms of the petition will be the responsibility of DOL. As this entire process, from temporary labor certification to issuance of an H-2B visa, can take up to several months, many H-2B employers often start the temporary labor certification and petitioning processes several months ahead of the actual date of stated employment need. Having to name beneficiaries that far in advance increases the likelihood that those beneficiaries may ultimately be unavailable to fill the positions. By eliminating the requirement to name beneficiaries outside of the United States on the petition, USCIS believes that H-2B employers would have more flexibility to recruit foreign workers who are actually interested in and available on the date of stated need. Conforming amendments have been made to proposed 8 CFR 214.2(h)(6)(vi)(C).

B. Post-H-2B waiting period.

Once an H-2B worker has reached the three-year ceiling on H-2B nonimmigrant status, current regulations require the worker to wait six months outside the United States immediately prior to filing for an extension, change of status, or readmission to the United States in H-2B status or other status under section 101(a)(15)(H) or (L) of the INA. 8 CFR 214.2(h)(13)(iv). This rule proposes to reduce the required absence period to three months. This would reduce the amount of time employers would be required to be without the services of needed workers while not offending the fundamental temporary nature of employment under the H-2B program.

C. Prohibiting H-2B petitions or admissions for nationals of countries that consistently refuse or delay repatriation.

An alien worker who violates his or her status may be subject to administrative proceedings before an immigration judge to remove the alien from the United States. See INA sections 237(a)(1)(C), 239(a), 240(a); 8 U.S.C. 1227(a)(1)(C), 1229(a), 1229a(a). A removal

order typically includes the name of the country to which the alien is to be removed, which usually is the alien's country of nationality. In order to effectuate the removal order, DHS must ensure that the alien has the necessary travel documents (e.g., passport) to return to the named country and that the country agrees to receive the alien. DHS has faced an on-going problem of countries refusing to accept or unreasonably delaying the acceptance of their nationals who have been ordered removed. To combat this problem, Congress gave the Secretary of State the authority to discontinue the issuance of visas to citizens, subjects, nationals, and residents of a country upon notification by the Secretary of Homeland Security that the government of that country refuses to accept their return. INA sec. 243(d), 8 U.S.C. 1253(d); see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) sec. 307, Pub. L. No. 104-208, 110 Stat. 3456 (September 30, 1996).

In an effort to further address this problem, this rule proposes to preclude USCIS from approving a petition filed on behalf of one or more aliens from countries that the Secretary of Homeland Security has found to have consistently refused to accept or unreasonably delayed the prompt return of their citizens, subjects, nationals or residents. See proposed 8 CFR 214.2(h)(6)(i)(D); see also INA secs. 214(a)(1), 215(a)(1) and 243(d). The Secretary will periodically review determinations that countries have consistently refused to accept or unreasonably delayed accepting their nationals to ensure that the determinations are still justified. These provisions are intended to encourage more nations to promptly accept the return of nationals subject to a final order of removal.

DHS expects that the proposals in this rule will increase the flexibility and attractiveness of the H-2B visa program, together with the modernizing proposals the DOL is making in its H-2B rule. DHS hereby invites comments from the public on additional or

alternative approaches to the repatriation problem described above, such as restricting eligibility to nationals of countries that provide the most cooperation to the United States in administering the program, rather than excluding those whose governments provide the least cooperation. DHS is particularly interested in additional ways to promote cooperation by foreign governments in matters of security, particularly in connection with travel and immigration, such as the country's willingness to share passport information and criminal records of aliens who are seeking admission to, or are present in, the United States under this program.

D. Temporary labor certifications.

1. Consideration of petitions lacking an approved temporary labor certification.

Upon proper application by a prospective employer, a temporary labor certification is granted if the Secretary of Labor or the Governor of Guam (for employment on Guam) determines that the H-2B non-agricultural temporary worker will not displace U.S. workers and the H-2B employment will not adversely affect the wages and the working conditions of U.S. workers. Currently, if a petitioner receives a notice from the Secretary of Labor or the Governor of Guam that certification cannot be made, a petition containing countervailing evidence to overcome this lack of certification may be filed with USCIS. 8 CFR 214.2(h)(6)(iv)(D), (E), (h)(6)(v)(C), (D). In any case where USCIS decides that approval of the H-2B petition is warranted despite the issuance of a Non-Determination Notice by the Secretary of Labor or the Governor of Guam, the approval must be certified by the USCIS Administrative Appeals Office (AAO) pursuant to 8 CFR 103.4. 8 CFR 214.2(h)(9)(iii)(B)(2)(ii).

It is the view of DHS that, when the Secretary of Labor or the Governor of Guam decides that she cannot make such a labor certification determination, it would not be appropriate for USCIS to review that decision by adjudicating a petition that lacks an approved temporary labor

certification. Thus, this rule proposes to eliminate USCIS's current authority to adjudicate H-2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification. Under this proposed rule, an H-2B petition may not be filed with USCIS unless the Secretary of Labor or the Governor of Guam has granted a temporary labor certification. Accordingly, this rule proposes to make conforming amendments to 8 CFR 214.2(h)(1)(ii)(D), (h)(6)(iii)(C), (h)(6)(iii)(E), (h)(6)(iv)(A), (h)(6)(iv)(D), (h)(6)(iv)(E), (h)(6)(v)(A), (h)(6)(v)(A)(2), (h)(6)(v)(C), (h)(6)(v)(D), (h)(6)(vi)(A), (h)(6)(vi)(B), and (h)(9)(iii)(B)(2) to reflect elimination of this current practice.

2. Employment start date.

At present, USCIS allows employers to file a Form I-129 with a start date that is later than what is stated on the approved temporary labor certification, as long as the requested employment period on the petition is within the validity period of the approved temporary labor certification. This rule proposes to preclude this practice, as the unintended consequences of this policy are that it unfairly benefits employers with longer seasonal or temporary employment windows, invalidates the labor market test certified by DOL in the approved application for labor certification, and can be easily exploited by certain employers to gain an advantage in obtaining H-2B visas from the limited pool of 66,000 available each fiscal year. Under this proposed rule, petitioners, with a limited exception discussed below, would not be able to request an employment start date on Form I-129 that is different than the date of employment need listed on the accompanying approved temporary labor certification. Proposed 8 CFR 214.2(h)(6)(iv)(D).

USCIS has determined that the current practice of allowing employers to file a Form I-129 with a start date that is later than what is stated on the temporary labor certification unfairly benefits employers with longer seasonal or temporary employment windows as they have the

advantage of being able to file petitions before other employers with a shorter timeframe. An employer may, for example, submit a labor certification application requesting workers from January 1 to October 31; this labor certification could be filed as early as September 1 of the previous year, because the application for labor certification may be submitted to DOL as early as 120 days prior to the stated date of need. However, if the 33,000 cap for the first half of that fiscal year (i.e., October 1 – March 31) is reached before the employer has an opportunity to file a petition with USCIS (note that the cap for the first half of FY08 was reached on September 27, 2007), the earliest time when this employer will be able to receive H-2B workers is April, when an additional new 33,000 H-2B visas become available. Upon receipt of the approved labor certification for the employment from January 1 to October 31, the employer may currently file a Form I-129 petition with USCIS indicating that it will need a workforce from April 1 to October 31 in order to receive the necessary H-2B visa numbers allocated for the second half of the fiscal year. However, submission of a petition with a start date later than the start date of stated need on the approved labor certification in such a circumstance, and thus potentially receiving workers for at least the latter part of the employer's period of need, may currently only be undertaken by employers with a lengthy, multiple-month need for temporary workers. Employers in industries whose need for workers arises only during a very brief seasonal period or for any shorter period of time during the spring or summer cannot take advantage of this because their period of need is too short to allow them the same flexibility in shifting employment start dates. While such employers with shorter periods of need must wait until later to apply for a labor certification, employers with longer periods of need, as in the example above, are able to get a head start in requesting H-2B visas from the second half of the fiscal year. This does not ensure a fair and equitable distribution of the H-2B visa numbers among all H-2B employers throughout the year.

Furthermore, an appropriate labor market test must be conducted prior to the determination by the Secretary of Labor as to whether there are any U.S. workers available and capable of performing the temporary services or labor and whether the H-2B employment will adversely affect the wages and working conditions of U.S. workers. According to DOL, the labor market test will be invalidated if the employer changes the employment start date after the temporary labor certification is granted (e.g., due to qualified U.S. worker unavailability on the start date provided on the labor certification application). USCIS agrees with DOL on this issue.

The H-2B classification is defined to include nonimmigrant foreign workers who perform non-agricultural temporary services or labor if United States workers who are capable of performing such services or labor cannot be found. INA sec. 101(a)(15)(H)(ii)(B), 8 U.S.C. 1101(a)(15)(H)(ii)(b). The effect of a grant of a labor certification is to certify that qualified workers in the United States are not available "at the time and place needed to perform the work" for which H-2B workers are being requested and that the H-2B employment will not adversely affect the wages and working conditions of similarly employed United States workers. See 20 CFR 655.3(b). As the availability of temporary U.S. workers could change over short periods of time, the result of the labor market test could be different if the employment start date is changed after a labor certification is approved. Therefore, the grant of the H-2B status based on a petition which contains a later employment start date than what was stated on the approved labor certification could have the practical effect of precluding otherwise available United States workers from filling the position in question, which is in violation of the statute.

Allowing employers to file a Form I-129 with a date that is later than what is stated on the temporary labor certification, as long as the employment period is within the validity period of the approved temporary labor certification, also can be easily exploited by employers whose

period of need is actually shorter than the period stated in the labor certification application, but who state a longer need in order to move up the date on which they can file their H-2B petition. Given how quickly the H-2B cap for each half of the fiscal year has been reached in recent years (e.g., in FY 2008, the cap for the second half of the fiscal year was reached on January 2, 2008), the earlier an employer can file its petition the better are its chances of getting H-2B visas for its workers.

In order to ensure a fair and equitable distribution of the 33,000 H-2B visa numbers becoming available each half fiscal year, this rule proposes to generally preclude a change of the requested employment start date on a Form I-129 from the date of employment need listed on the accompanying temporary labor certification. See proposed 8 CFR 214.2(h)(6)(iv)(D). With the one limited exception stated below, if an employer has a reason to change the requested employment start date after a temporary labor certification was previously granted, it must obtain a new temporary labor certification with the new employment start date prior to filing a Form I-129 petition with USCIS. Id.

The exception to this prohibition on petitioners' requesting an employment start date on Form I-129 that is different than the date on the accompanying approved temporary labor certification would apply when an amended H-2B petition, accompanied by the previously approved temporary labor certification and a copy of the original petition approval notice, is filed at a later date due to the unavailability of the originally requested number of workers. The proposed rule would permit the amended H-2B petition securing the remaining number of workers that was originally approved in the labor certification to state an employment start date that is later than what is stated in the accompanying temporary labor certification. See Section L – Substitution of Beneficiaries and proposed 8 CFR 214.2(h)(6)(viii).

E. Payment of fees by beneficiaries to obtain H-2B employment.

1. Grounds for denial or revocation on notice.

USCIS has found that certain labor recruiters and U.S. employers are charging potential H-2B workers job placement fees in order to obtain H-2B employment. Such workers are coming to the United States to fill positions that U.S. workers are unwilling or unable to fill and are frequently doing so in order to improve their own difficult economic circumstances at home. USCIS has learned that payment by these workers of job placement-related fees not only results in further economic hardship for them, but also, in some instances, has resulted in their effective indenture. In an effort to protect H-2B workers from such abuses, this rule proposes to provide USCIS with the authority to deny or revoke upon notice any H-2B petition if it determines that the petitioner knows or reasonably should know that the alien beneficiary has paid or has agreed to pay any fee or other form of compensation, whether directly or indirectly, to the petitioner or the petitioner's agent, or to any facilitator, recruiter, or similar employment service, in connection with obtaining the H-2B employment. See proposed 8 CFR 214.2(h)(6)(i)(B); see also 8 CFR 214.2(h)(11)(iii)(A)(5) (revocation on notice). To further ensure that an alien in such a situation has not improperly incurred any expenses or debt in connection with obtaining employment in the United States under the H-2B program, the rule also proposes that an H-2B petitioner be required to demonstrate, as a precondition to approval of any subsequent H-2B petition, that it has reimbursed the alien beneficiary in full for any such fees or other form of compensation (other than those for which the petitioner may be reimbursed, as described in proposed 8 CFR 214.2(h)(6)(i)(B)(3)). Those fees or other form of compensation also include those paid to the petitioner, an agent, facilitator, or similar employment service whether directly or indirectly, in connection with obtaining H-2B employment, whether or not such alien has opted to seek H-2B

employment with another employer, as permitted under proposed 8 CFR 214.2(h)(6)(i)(B). For instance, the petitioner may submit a copy of the financial transaction record or a receipt signed by the beneficiary as evidence of reimbursement.

An H-2B employer will be subject to these provisions if it knows or reasonably should know that its H-2B employees have been charged a fee by anyone (other than those fees for which the petitioner may be reimbursed, as described in proposed 8 CFR 214.2(h)(6)(i)(B)(3)) related to their placement as an H-2B worker with the employer. For example, a recruiter advertises on the Internet or through other means to prospective H-2B employers that it can place temporary alien workers with such employers at no or minimal cost to the prospective employers. In such a case, if there is evidence that the prospective employer knew or reasonably should have known about the advertisement, it is reasonable to expect it to question the recruiter generally as to how it is able to provide such free services, and in particular, whether the alien workers it finds have been or will be charged any direct or indirect fee in connection with such placement. Failure to make such reasonable inquiries will not relieve the employer of its obligations under these provisions. Similarly, if an H-2B employer learns, directly or indirectly, that a prospective H-2B worker has been asked to pay a fee or other thing of value to a recruiter/facilitator or other downstream party in connection with his/her employment with the U.S. employer then the H-2B employer, in such a situation, will be deemed to be on notice that its prospective employees have been or may be asked to pay a job placement related fee by this recruiter/facilitator or other downstream party, and can be expected to take reasonable steps to ascertain whether this is in fact true.

USCIS believes that this proposal will help minimize immigration fraud and protect against other abuses that have occurred when such aliens have been required to pay such

employment fees, including petition padding (i.e., the filing of requests for more workers than needed), visa selling, and human trafficking. While this proposal would provide necessary protections against the alien worker's indenture, this proposal would not preclude the payment of any finder's or similar fee by the prospective employer to a recruiter or similar service, provided that such payment is not assessed directly or indirectly against the alien worker. Further, this reimbursement requirement would not apply to the actual cost of transportation to the United States, or payment of any government-specified fees required of persons seeking to travel to the United States, such as those required by a foreign government for issuance of passports and by the U.S. Department of State for issuance of visas, provided that any such costs incurred be the lower of the fair market value or the actual cost of the service (unless the prospective employer has agreed with the alien to pay such fees and/or transportation costs). The prospective employer would be responsible, however, for the payment of any related indirect fees, attorneys' fees, travel agent fees, and fees for assistance to prepare visa application forms.

To provide protection to H-2B workers who are in the United States based upon an approved petition that is later revoked pursuant to proposed 8 CFR 214.2(h)(6)(i)(B), this rule proposes a thirty-day grace period during which time such workers may apply for an extension of stay, depart the United States, or find new employment. During the thirty-day period, such workers, if they do not otherwise violate the terms and conditions of their nonimmigrant admission in H-2B classification, would not be unlawfully present in the United States, but, instead, would be in an authorized period of stay. See INA sec. 212(a)(9)(B), 8 U.S.C. 1182(a)(9)(B). This proposed rule, therefore, would prevent such persons from accruing a period of "unlawful presence" that might otherwise subject such persons to the statutory bar on admissibility under that section of the INA.

Further, to minimize the costs to H-2B workers who are affected by the revocation of a petition pursuant to proposed 8 CFR 214.2(h)(6)(i)(B), this rule also proposes to require employers who know or reasonably should know the payment by the beneficiary of any such job placement or related fees (other than those for which the petitioner may be reimbursed, as described in 8 CFR 214.2(h)(6)(i)(B)(3)), to pay such workers' reasonable transportation expenses to return to their last place of foreign residence, and, as described above, to reimburse the alien for any fees or other compensation of which the employer knew or reasonably should have known (other than, in certain cases, transportation costs and any government-mandated passport, visa and inspection fees) paid in connection with obtaining H-2B employment with the petitioner. Proposed 8 CFR 214.2(h)(6)(i)(B).

2. Employer attestation.

USCIS recognizes that some H-2B petitioners, particularly those petitioning for the first time and without the benefit of counsel, may not appreciate the limitations on H-2B employment imposed by the regulations or by the representations in the H-2B petition and the accompanying application for temporary labor certification. This rule proposes to require H-2B petitioners to include with their petitions an attestation, certified as true and accurate by the petitioner and signed under penalty of perjury, that during the period of intended employment for which the petition is approved, the petitioner will not materially change the information provided on the Form I-129 and the temporary labor certification, including, but not limited to, the alien workers' duties, place of employment, nor the entities for which the duties will be performed. Proposed 8 CFR 214.2(h)(6)(i)(C). USCIS believes that this requirement will apprise petitioners of their responsibilities and obligations, and, at the same time, help prevent the employment of H-2B alien workers in a manner that conflicts with the representations upon which approval of the

petition is based. In the event that a material change does occur in the terms and conditions of employment specified in the original petition, petitioners are currently obligated to file a new petition under 8 CFR 214.2(h)(2)(i)(E).

As an anti-fraud and worker protection measure to complement the proposed changes to 8 CFR 214.2(h)(6)(i)(B), USCIS is further proposing in 8 CFR 214.2(h)(6)(i)(C)(2) that the petitioning employer also include in its attestation a statement that it has not received, nor intends to receive, any fee, compensation, or any other form of remuneration from the workers it intends to hire or from any person, agency or other entity in connection with H-2B employment. The petitioner would also be required to attest to whether it has used a facilitator, recruiter, or any other similar employment service to locate foreign workers to fill the positions covered by the H-2B petition, and if so, to provide the names of such facilitators, recruiters, or placement services and whether it believes to the best of its knowledge, that any fees were paid or asked of its H-2B workers by such third parties. Finally, the petitioner would be required to attest to whether USCIS has previously determined that the H-2B petitioner knew, or reasonably should have known that any fee, compensation, or other form of remuneration has been collected, directly or indirectly, in connection with the filing by the petitioner of any previous H-2B petition on behalf of an alien, and if so, whether the petitioner has reimbursed that alien in full for any such fees, compensation, or other remuneration (other than, in certain cases described above, certain government-mandated passport, visa and inspection fees and/or transportation costs).

F. Denial of petition and revocation of approval of petition.

USCIS is proposing to revise 8 CFR 214.2(h)(10)(ii) and 8 CFR 214.2(h)(11)(iii)(A)(2) to clarify USCIS' authority to issue a notice of denial or revocation of a Form I-129 if USCIS

determines that the statements on the Form I-129 petition or application for labor certification are inaccurate, fraudulent, or misrepresented a material fact.

G. Employer notifications to DHS of H-2B no-show, termination, or abscondment.

USCIS also proposes to add 8 CFR 214.2(h)(6)(i)(E) to require petitioners to provide notification to DHS within 48 hours in the following instances: an H-2B worker fails to report to work within five days of the date of the employment start date on the H-2B petition or within five days of the start date established by his or her employer, whichever is later; the non-agricultural labor or services for which H-2B workers were hired is completed more than 30 days early; or an H-2B worker absconds from the worksite or is terminated prior to the completion of non-agricultural labor or services for which he or she was hired. This proposal would ensure that an approved H-2B petition filed by an employer is closed out when the basis for the alien's status terminates and that USCIS is made aware of the change in employment status. The rule also proposes that the petitioner notify DHS beginning on a date and in a manner specified via notice published in the **Federal Register**.

To enforce the notification provision, the rule proposes to require employers to retain evidence (e.g., a photocopy) of the notification for a one-year period. See proposed 8 CFR 214.2(h)(6)(i)(E). Additionally, the rule proposes to add a provision setting forth the circumstances in which an H-2B worker may be found to be an absconder, thus defining a term that would otherwise vary in interpretation from one employer to the next, possibly to the detriment of the alien worker. See proposed 8 CFR 214.2(h)(6)(i)(E). The definition employs the same five-day period used to trigger a notification requirement when the alien does not report to work at the beginning of the petition period.

H. Violations of H-2B status.

Currently, the regulations governing the H-2A classification include a provision regarding the consequences to aliens for violating H-2A status. See 8 CFR 214.2(h)(5)(viii)(A). The regulations governing the H-2B classification do not contain such a provision. USCIS has determined that there is no reason for this disparity. In order to further the integrity of the H-2B program, DHS is proposing to add a new provision in the H-2B regulations at 8 CFR 214.2(h)(6)(ix) that would preclude a new grant of H-2B status where the alien worker violated the conditions of H-2B status, other than through no fault of his or her own, within the five years prior to adjudication of the new H-2B petition by USCIS.

I. Temporary worker visa exit program pilot.

The Secretary of Homeland Security is authorized to prescribe conditions for the admission of nonimmigrant aliens under section 214 of the INA. Section 235 of the INA provides for the inspection of applicants for admission. Pursuant to 8 CFR 235.1(h)(1), nonimmigrant aliens who are admitted to the United States, unless otherwise exempt, are issued Form I-94, "Arrival/Departure Record," as evidence of the terms of admission. Once admitted into the United States, nonimmigrant aliens are required to comply with all the conditions of their stay, depart the United States before the expiration of the period of authorized stay, and surrender the departure portion of the Form I-94 upon departure from the United States. Section 215 of the INA provides the authority for departure control for any person departing from the United States. Additionally, 8 CFR part 215 provides the regulations for controls of aliens departing from the United States. Specifically, 8 CFR 215.2(a) allows for DHS, at its discretion, to require any alien departing from the United States to be examined under oath and to submit for official inspection all documents in the alien's possession.

Available statistics indicate that a significant number of nonimmigrant aliens either do not turn in their Form I-94 upon departure or overstay his or her authorized period of stay. DHS intends to strengthen its departure control record-keeping system. On August 10, 2007, the Administration announced that it would establish a new land-border exit system for guest workers, starting on a pilot basis.

In order to ensure that temporary agricultural workers depart the United States within the authorized period, on February 13, 2008, DHS published a notice of proposed rulemaking to amend its regulations regarding the H-2A nonimmigrant classification, in which it proposed to institute a temporary worker visa exit pilot program and to require certain H-2A temporary agricultural workers to participate in this program. 73 FR 8230. Under the proposed program, an H-2A alien admitted at a port of entry participating in the program must also depart through a port of entry participating in the program and present designated biographic and/or biometric information upon departure at the conclusion of their authorized period of stay.

This rule proposes to expand this temporary worker visa exit pilot program to the H-2B classification by requiring an H-2B alien admitted at a port of entry participating in the program to depart through a port of entry participating in the program and to present designated biographic and/or biometric information upon departure at the conclusion of the authorized period of stay. CBP would publish a Notice in the **Federal Register** designating which temporary workers must participate in the program, which ports of entry are participating in the program, which biographic and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers. The pilot program exit system would ensure that the designated temporary workers depart when their period of authorized stay expires and would provide a foundation for the comprehensive land

border exit system for guest workers proposed by the Administration in August 2007. DHS requests comments on the establishment of the proposed pilot program.

DHS previously conducted exit pilot programs at selected air and sea ports of entry through the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) Program. See 69 FR 46556. Those pilots began in August 2004 and concluded in May 2007. US-VISIT also conducted a limited pilot program at selected land borders to test radio frequency technology. See 70 FR 44934. That pilot did not collect information from aliens departing the United States.

The pilot program exit system proposed under this rule will utilize any applicable lessons learned from the US-VISIT pilot programs. DHS will continue to coordinate these screening programs to ensure both security and efficiency of the programs.

J. Temporary need.

Under current regulations the period of a petitioner's need for H-2B workers "must be a year or less although there may be extraordinary circumstances where the temporary services or labor might last longer than one year." 8 CFR 214.2(h)(6)(ii)(B). USCIS has determined that the general one-year limit contained in the current definition of a petitioner's temporary need for the services or labor performed by an H-2B alien, coupled with the "extraordinary circumstances" restriction on periods of need lasting longer than a year, is unnecessarily limiting on the employment opportunities that may otherwise qualify for H-2B classification. See 8 CFR 214.2(h)(6)(ii)(B). This rule therefore proposes to amend the current definition of "temporary services or labor." Under the proposed rule, a job would be defined to be temporary where the employer needs a worker to fill the job for a limited period of time. The term "limited period of time" is in turn defined as a period of need that will end in the near, definable future. As under

the current regulations, USCIS would generally consider a period of temporary need to be limited to one year or less, but the proposed rule eliminates the "extraordinary circumstances" restriction on periods longer than a year and explicitly provides that such a period could last up to three years.

USCIS is proposing this change because there are some employers who may need temporary workers for a specific project, such as the construction of a specific building, structure (e.g., bridge, power plant) or other development, which will have a definable end point but may require more than one year to complete. Under this proposal, an employer's need for the duties to be performed by H-2B workers can be considered temporary if it is a one-time occurrence and does not exceed three years. An employer with a multiple-year need is, however, required to retest the labor market annually and obtain a temporary labor certification annually. This contrasts with the nature of temporary work in the agricultural sector performed under the H-2A visa program, which generally is seasonal. USCIS believes that a more flexible rule that generally limits temporary work to one year but explicitly allows it to last up to three years better comports with the nature of temporary work in the H-2B context but is not at this time necessary in the H-2A context.

This rule also proposes to make a conforming amendment to 8 CFR 214.2(h)(9)(iii)(B)(1).

K. Interruptions in accrual towards 3-year maximum period of stay.

An alien's total period of stay in H-2B nonimmigrant status may not exceed three years. 8 CFR 214.2(h)(15)(ii)(C). In H-2A nonimmigrant status, there are certain periods of time spent outside the United States that are deemed to "stop the clock" towards the accrual of the three-year limit. 8 CFR 214.2(h)(5)(viii)(C). USCIS has determined to apply the same standard to H-

2B nonimmigrant status. This will also clarify what constitutes continuous presence in H-2B nonimmigrant status. See proposed 8 CFR 214.2(h)(13)(i)(B) and (h)(13)(v).

L. Substitution of beneficiaries.

USCIS understands that there are instances when an employer is not successful in finding and/or bringing from abroad the intended number of workers, as approved on the temporary labor certification and the Form I-129. In a continued and subsequent effort to fill vacant positions, an employer may be able to find workers it could hire who are currently legally in the United States. USCIS' current regulations regarding the substitution of H-2B beneficiaries do not provide a process for an employer to substitute beneficiaries with aliens who are currently in the United States. 8 CFR 214.2(h)(2)(iv). This rule proposes to re-designate this paragraph as paragraph (h)(6)(viii) and provides a clarified process based on possible situations that an H-2B employer may encounter. See proposed 8 CFR 214.2(h)(6)(viii).

M. Employer Sanctions.

Section 214(c)(14)(A)(i) of the INA provides DHS with the authority to impose certain administrative remedies (including civil monetary penalties) as it deems appropriate if DHS finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the H-2B petition or a willful misrepresentation of a material fact in such petition. Section 214(c)(14)(A)(ii) of the INA, in turn, provides DHS with the authority to deny petitions filed with respect to an offending employer under section 204 or 214(c)(1) of the INA during a period of at least one year, but not more than five years, if DHS finds, after notice and an opportunity for a hearing, a substantial failure to meet any of the conditions of the H-2B petition or a willful misrepresentation of a material fact in such petition. Under this provision, petitions for workers in the H (except for H-1B1), L, O and P-1 nonimmigrant visa classifications may be

barred. See INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1).

DHS interprets section 214(c)(14)(B) of the INA, in conjunction with 214(c)(14)(A) of the INA, to permit DHS to delegate to DOL the authority to make such a finding and impose the administrative remedies authorized by section 214(c)(14)(i) of the INA. DHS is currently in discussions with DOL concerning whether to delegate authority to DOL to establish an enforcement process to investigate employers' compliance with H-2B requirements, including new requirements in proposed 8 CFR 214.2(h)(6)(i)(B) and (C), and to seek remedies for violations disclosed by any resulting investigations. This proposed rule describes potential immigrant and nonimmigrant petition debarment procedures USCIS could institute in the event that DHS and DOL reach a mutually agreeable delegation of enforcement authority from DHS to DOL. See proposed 8 CFR 204.5(o) and 8 CFR 214.1(k).

USCIS seeks comment on other means to encourage employer compliance with the terms and conditions of petitions to DHS as well as filings with other governmental agencies.

N. Miscellaneous changes.

USCIS is proposing to amend 8 CFR 214.2(h)(6)(iii)(B), 214.2(h)(6)(v)(E)(2)(iii), and 214.2(h)(6)(vii) to correct typographical errors. USCIS is also proposing to amend 8 CFR 214.2(h)(8)(ii)(A) to codify the current numerical counting procedures for the H-2B classification.

IV. Rulemaking Requirements.

A. Unfunded Mandates Reform Act of 1995.

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not

significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

B. Small Business Regulatory Enforcement Fairness Act of 1996.

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

C. Executive Order 12866.

This rule has been designated as significant under Executive Order 12866. Thus, under section 6(a)(3)(C) of the Executive Order, USCIS is required to prepare an assessment of the benefits and costs anticipated to occur as a result of this regulatory action. A complete analysis of the costs and benefits of this rule is available in the docket for this rule at www.regulations.gov in rulemaking Docket No. USCIS-2007-0058. The impacts of the changes proposed in this rule are summarized as follows:

- Filing volumes. The number of petitions filed by H-2B employers is expected to increase, but the annual volume of petitions processed will not change because the maximum number of available visas will not change, absent action from Congress. Therefore, the increased volume will result in more petitions being returned without depositing their fee payment or reviewing the petition.
- Decreased processing times. The average USCIS processing time for an H-2B petition of around 60 days will decrease as a result of petitioners not being required to name the individual alien on initial H-2B petitions. USCIS will not have to perform an Interagency

Border Inspection System (IBIS) name check, removing the largest source of delays in the processing of H-2B petitions.

- Increased flexibility for longer-term projects. By eliminating the "extraordinary circumstances" restriction on periods longer than a year and explicitly providing that such a period could last up to three years, this proposed rule would benefit employers who need workers for a specific project that will take longer than one year to complete.
- No effect on labor pool. Because of the statutory maximum on the annual number of H-2B visas available, this rule will result in no increase in the availability of temporary seasonal workers. There may be some slight benefit from helping employers fill jobs and find workers more efficiently, but businesses will still be constrained by a limited labor supply.
- More attractive program. The administrative improvements proposed in this rule are intended to make employers more likely to participate in the program. This may cause some employers who currently hire seasonal workers who are not properly authorized to seek to replace those workers with lawful workers.
- Better control and monitoring of employees. By requiring an employer to notify USCIS quickly after the employer terminates an alien's employment, immigration authorities will have better information regarding the presence in the U.S. of an alien without legal immigration status to determine his or her whereabouts for enforcement measures.
- No changes in fee collections. Only those H-2B petitions received before the maximum annual number of H-2B visas is reached are adjudicated and the fee check deposited. Petitions not received before the maximum annual number is reached are rejected. Because the total number of H-2B visas available per year will not increase and the total

number of workers requested already greatly exceeds the number of H-2B visas available, fees will not increase because there will be no increase in Form I-129 filings that are processed.

- Increase in petitions filed. The administrative improvements proposed by this rule are expected to result in more petitions for H-2B workers being submitted to USCIS. Therefore, the aggregate burden imposed on the public may increase in relation to the additional respondents who will file a Form I-129 as a result of this rule's proposed changes. However, since the total number of workers requested already greatly exceeds the number of H-2B visas available, more petitions will not be processed and or approved.
- Repatriation provision effects will be slight. This rule proposes to prohibit approval of an H-2B petition for a worker from a country that consistently denies or unreasonably delays repatriation of its citizen, subjects, nationals, or residents. The current impact of this proposed change is expected to be negligible, since very few H-2B workers are from countries DHS believes may see an impact from this provision. In addition, since the total number of workers requested exceeds the number of H-2B visas available, such impacts as may occur would represent transfers from one country's workers to another.
- Costs of exit registration requirement is low. Under the proposed rule, certain aliens admitted on H-2B visas must comply with the DHS Biometric Exit Pilot. An alien admitted at a port of entry participating in the program must depart through a port of entry participating in the program and present designated biographic and or biometric information upon departure at the conclusion of their authorized period of stay. The

annual undiscounted costs of the time for H-2B employees to exit as required under this rule is estimated to be around $136,500.

- Restrictions on recruitment or placement fees - added compliance costs to petitioning firms. Petitioners must demonstrate that they have reimbursed alien beneficiaries in full for any such fees or other form of compensation (other than those for which the petitioners may be reimbursed) or risk denial of their petition. Most foreign worker recruiters charge each H-2B employee about $500.00 (inclusive of visa fees and some other fees) and USCIS believes most H-2B workers use a recruiter, or adviser of some sort in their home country. Some companies provide discounts to repeat customers for their placement fee and offer referral fees to workers who refer their friends and family to the program. Most of the recruiting companies refund or do not collect fees if the applicant's visa is denied at the embassy. An employer, on the other hand pays from $500 to $4,000, per H-2B employee, including expenses, depending on the complexity of the situation, the home country, and the skills needed for the position. By barring petitions when the alien has reimbursed the petitioner for recruitment or job placement fees or requiring a showing in a future petition that the petitioner has reimbursed the alien for such fees, this rule will effectively ban the payment of fees by the alien beneficiary above the visa fees, travel expenses and other normal expenses. Since the majority of H-2B employees are estimated to pay such fees, and such practices are expected to continue, this will result in a transfer of those costs to employers. If the entire $500 fee is considered a recruitment or placement fee, the estimated costs of this requirement is about $4,500 per employer, based on an average of 9 employees sponsored by each

participating employer, or about $33 million total for all 66,000 H-2B employees per year.

- Added transportation cost negligible. The impact of requiring employers to pay workers' transportation expenses to return to their last place of foreign residence when there is a determination that they knew or reasonably should have known about the payment by the beneficiary of any job placement or related fees is expected to be negligible, because employers would be expected to reimburse the alien before being subjected to this sanction.
- Ramifications for firms that collect a fee from the employee. This rule will have an impact on employee recruiters, although the exact effects are not certain. USCIS has no data on the number of firms that recruit workers in foreign countries to come to the United States as H-2B employees, but the majority of H-2B workers are believed to use such a service. The proposal to reject petitions where there have been such fees charged the employee could have substantial ramifications for these firms, because their collecting a fee from the employee will put the employee at risk of being determined ineligible for the benefit for which they are assisting the employee in obtaining.
- Reduced government burden and costs. This rule is expected to reduce costs for the government by terminating the review of petitions approved based on countervailing evidence and the related mandatory H-2B reviews. Employees handling these reviews will be able to focus on eliminating application and petition backlogs for other benefits.

D. Regulatory Flexibility Act - Initial Regulatory Flexibility Analysis.

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 – 612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), requires Federal

agencies to conduct a regulatory flexibility analysis which describes the impact of the proposed rule on small entities whenever an agency is publishing a notice of proposed rulemaking such as this one.

1. Description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

a. Regulated entities.

The four industries that are dominant users of the H-2B program are the landscaping, hotel, construction, and forestry industries, according to Department of Labor data on the participants in the employment-based visa program. The Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121 provide standards for how large a for-profit concern can be and still qualify as a small business for Federal Government programs, based on the firm's average annual receipts and or the average employment of a firm. The SBA standards indicate that firms in landscaping, forestry, and hotels with average gross annual sales below $6.5 million are small businesses. For building contractors, the small business size guideline is maximum sales of $31 million and 500 employees.

b. Number of small entities to which the proposed rule will apply.

Based on the above definitions, the U.S. Census Bureau's 2002 Economic Census reported that approximately 99.9 percent of employers in the construction industry, 95 percent in the forestry and landscaping industry, and 90.8 percent of those in the accommodation and food services industry were small businesses.[2] If the proportion of small employers participating in the H-2B program is similar to the overall market, these figures imply that, of the 15,000 Form I-

[2] U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau, at http://www.census.gov/prod/ec02/ec0223sg1t.pdf. Page 9.

129 filings per year for H-2B employees, at least 14,000 will be filed by small businesses looking to hire a seasonal worker. Therefore, this rule applies mainly to small businesses.

2. Description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

a. Paperwork Reduction Act.

The proposed rule adds a new "reporting" or "recordkeeping" requirement within the meaning of the Paperwork Reduction Act. The rule does not require professional skills for the preparation of "reports" or "records" under that Act.

The mechanism and parameters of the absconder reporting requirement are proposed in this rule at 8 CFR 214.2(h)(6)(i)(E)(1). The actual reporting requirements will be imposed when the Federal Register notice instructing approved petitioners on how, where, and what to report in accordance with that section is published. The Paperwork Reduction Act requirements will be complied with along with approval of that notice at that time after the remainder of the requirements of this rule have taken effect. DHS will obtain OMB approval and a new OMB control number of the requirements established at that time.

b. New Reporting Requirement.

Reporting requirements will under 8 CFR 214.2(h)(6)(i)(E)(1) of this rule be provided via notice published in the **Federal Register**. This rule also adds record keeping requirements, because the petitioner will also be required to retain evidence of notification for a one-year period beginning from the date of the notification. DHS has no basis for estimating the cost of this new requirement on H-2B employers at this time and requests further comment on the actual costs

or expenditures, if any, of the impact on firms as a result of this new reporting and record keeping requirement and how that impact may differ or vary for small entities.

3. Identification of federal rules that may duplicate, overlap or conflict with the proposed rule.

DHS is unaware of any duplicative, overlapping, or conflicting federal rules. However, there are areas of interplay and dependency between this rule and those of the U.S. Department of Labor (DOL). For example, a proposed rule was recently published by DOL proposing changes that comport with this rule and vice versa. 73 FR 29942 (May 22, 2008). As noted below, DHS seeks comments and information about duplicative rules, as well as any other state, local, or industry rules or policies that impose similar requirements as those in this proposed rule. Comments pointing out provisions of this rule that duplicate, contradict, or are better suited for inclusion in the regulations of another Federal agency are welcome.

4. Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including alternatives considered, such as: (1) establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; (4) any exemption from coverage of the rule, or any part thereof, for such small entities.

Alternatives considered. The proposal in this rule that provides that petitions where a recruitment or finder's fee paid by an employee will be denied, may have an impact on a substantial number of small entities engaged in the foreign worker recruiting business. As a result, to regulate the practice of charging the alien beneficiary a placement or finder's fee in the home country, DHS considered the following alternatives.

1. Prohibit the sponsoring employer from passing along any fees or expenses associated with finding, petitioning for, and hiring the employee through payroll deductions, or any other methods. This requirement would mirror the requirements proposed by DOL that would prohibit employers from passing any of the expenses associated with obtaining a labor certification on to the employee. This option was not proposed because USCIS felt that imposing this requirement would have no effect on the practice of charging H-2B employees in the home country, which is the practice that has been the subject of numerous fraud complaints that the change is intending to address. Further, USCIS research indicates that most employers do not pass their administrative costs for finding or hiring the employee on to the employee, thus that restriction would serve no purpose.
2. Establish a maximum allowable recruitment fee. This option was not adopted for the proposed rule because USCIS has insufficient data on which to base such a fee. The maximum or reasonable recruiting fee would need to be based on the market value for the services provided to the alien beneficiary. An informal guideline has been suggested that if the fee is so high that the applicant would be tempted to stay longer than the visa expiration to make it worth his while, then the

fee is exorbitant. However, defining a fee standard is not subjective. USCIS could not establish a valid fee amount without a thorough analysis, and the available information on the foreign worker recruiting industry is not sufficiently complete so as to afford such an analysis. USCIS feels that the employer would be in a stronger negotiating position than the alien to determine the proper fee. By establishing that the employer must reimburse the employee for the fee, or have the petition rejected or revoked, USCIS believes exorbitant fees will not be paid.

3. Maintain status quo, and propose no provisions regarding employee paid fees. USCIS has seen numerous reports recently of recruiters advertising that they can place temporary alien workers with such employers at no or minimal cost to the U.S. employers, and of employees being subjected to extortion or exorbitant fees. Therefore, some action was deemed necessary in the H-2B rulemaking context to provided added protections to workers while increasing the flexibility of the program for employers.

4. Fines. DHS considered promulgating regulatory authority to impose a fine of several thousand dollars against an agent or employer in the event that an agent and/or the employer were found to have knowledge of aliens being charged exorbitant fees or otherwise subject to abusive practices. The fine would depend upon the number of aliens involved. The agent or employer would be barred from being able to file any H-2B petitions with USCIS for two years. This option was not proposed because the level of the fine would be difficult to determine and the amount established could be viewed as arbitrary. Also, the level of fee to

consider as exorbitant and practices to be considered abusive would have to be researched considerably for this provision to be effective.

5. Questions For Comment To Assist Regulatory Flexibility Analysis

Please provide comment on any or all of the provisions in the proposed rule with regard to:

a. The impact of the provision(s) (including any benefits and costs), if any; and

b. What alternatives, if any, DHS should consider, as well as the costs and benefits of those alternatives, paying specific attention to the effect of the rule on small entities in light of the above analysis. In particular, please provide the above information with regard to the following sections of the proposed rule:

i. The new reporting requirements on H-2B employers, including the time frame for reporting in 8 CFR 214.2(h)(6)(i)(E).

ii. The requirement for petitioners to reimburse H-2B workers under 8 CFR 214.2(h)(6)(i)(B).

iii. Any other requirement not mentioned above.

c. Costs to "implement and comply" with the rule including expenditures of time and money for any employee training; attorney, computer programmer, or other professional time; preparing relevant materials; processing materials, including, materials or requests for access to information; and recordkeeping.

Please describe ways in which the rule could be modified to reduce any costs or burdens for small entities consistent with the Immigration and Nationality Act's requirements.

Please describe whether and how technological developments could reduce the costs of implementing and complying with the rule for small entities or other operators.

Please provide any information quantifying the economic benefits of:

a. Reducing delays in the petition, application, and approval process.

b. Reducing the time required for an H-2B worker to be out of the country.

c. Encouraging employers that currently hire temporary nonagricultural workers who are not properly authorized to work in the United States to replace those workers with legal workers.

d. Minimizing immigration fraud and protecting against abuses that occur when aliens are required to pay employment fees.

Please identify all relevant federal, state or local rules that may duplicate, overlap or conflict with the proposed rule. In addition, please identify any industry rules or policies that already require compliance with the requirements of the DHS proposed rule.

E. Provisions to Which the Regulatory Flexibility Act Does Not Apply

CBP is also seeking comments through this rule with respect to a pilot program that would require that aliens admitted on certain temporary worker visas at a port of entry must depart through a port of entry participating in the program. Although there may be costs associated with participation in this program, the aliens impacted by this portion of the rule are not considered "small entities," as that term is defined in 5 U.S.C. 601(6). Since the regulation will require the aliens to comply with the pilot program, rather than placing a requirement on the employers, the employers are not directly impacted by this provision of the proposed rule. Employers, including small entities, are free to offer assistance to their H-2B workers in complying with this requirement if they choose to do so. However, the employer's assumption of any costs inherent with complying with this requirement on behalf of their workers is voluntary and, therefore, not subject to the Regulatory Flexibility Act.

F. Executive Order 13132.

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

G. Executive Order 12988.

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

H. Paperwork Reduction Act.

This rule does not impose any new reporting or record-keeping requirements. This rule requires that a petitioner submit Form I-129, seeking to classify an alien as an H-2B nonimmigrant. This form has been previously approved for use by the Office of Management and Budget (OMB) under the Paperwork Reduction Act. The OMB control number for this collection is 1615-0009.

However, this rule requires that certain H-2B workers departing the United States participate in a temporary worker visa exit pilot program. This requirement will add to the number of respondents approved by OMB for the information collections in OMB control number 1600-0006, U.S. Visitor Immigrant Status and Indicator Technology (US-VISIT). When this rule is final, DHS will submit a request for a non-substantive change to OMB to account for this requirement's added burden.

List of Subjects

8 CFR Part 204

Administrative practice and procedure, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 214

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

8 CFR Part 215

Administrative practice and procedure, Aliens, Travel restrictions.

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

PART 204—IMMIGRANT PETITIONS

1. The authority citation for part 204 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1151, 1153, 1154, 1182, 1184, 1186a, 1255, 1641; 8 CFR part 2.

2. Section 204.5 is amended by adding paragraph (o) to read as follows:

§ 204.5 Petitions for employment-based immigrants.

* * * * *

(o) Denial of petitions under section 204 of the Act based on a finding by the Department of Labor. Upon a finding by the Department of Labor pursuant to section 214(c)(14)(A) of the Act that a petitioner substantially failed to meet any of the conditions of the H-2B petition or otherwise failed to provide H-2B status, or willfully misrepresented a material fact in such petition, USCIS may deny any employment-based immigrant petitions filed by that petitioner for a period of at least 1 year but not more than 5 years. The period of such bar to petition approval shall be based on the severity of the violation or violations. The decision to deny petitions, the

time period for the bar to petitions, and the reasons for the time period will be explained in a written notice to the petitioner.

PART 214—NONIMMIGRANT CLASSES

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

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1185 (pursuant to Executive Order 13323, published January 2, 2004), 1186a, 1187, 1221, 1281, 1282, 1301-1305; 1372; 1379; 1731-32; sec. 14006, Pub. L. 108-287; sec. 643, Pub. L. 104-208; 110 Stat. 3009-708; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931, note, respectively.

3. . Section 214.1 is amended by adding paragraph (k) to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(k) Denial of petitions under section 214(c) of the Act based on a finding by the Department of Labor. Upon a finding by the Department of Labor pursuant to section 214(c)(14)(A) and (B) of the Act that a petitioner substantially failed to meet any of the conditions of the H-2B petition or otherwise failed to provide H-2B status, or willfully misrepresented a material fact in such petition, USCIS may deny any petition filed by that petitioner for nonimmigrant status under section 101(a)(15)(H) (except for status under section 101(a)(15)(H)(i)(b1)), (L), (O), and (P)(i) of the Act for a period of at least 1 year but not more than 5 years. The period of such bar to petition approval shall be based on the severity of the violation or violations. The decision to deny petitions, the time period for the bar to petitions, and the reasons for the time period will be explained in a written notice to the petitioner.

4. Section 214.2 is amended by:

a. Revising paragraph (h)(1)(ii)(D);

b. Revising paragraph (h)(2)(iii);

c. Redesignating paragraph (h)(2)(iv) as paragraph (h)(6)(viii), and by reserving paragraph (h)(2)(iv);

d. Revising paragraph (h)(6)(i);

e. Revising paragraph (h)(6)(ii)(B) introductory text;

f. Revising the word "amendable" to read "amenable" in the second sentence in paragraph (h)(6)(iii)(B);

g. Adding the word "favorable" immediately after the phrase "has obtained a" in paragraph (h)(6)(iii)(C);

h. Adding the word "favorable" immediately after the phrase "After obtaining a" in paragraph (h)(6)(iii)(E);

i. Revising paragraph (h)(6)(iv)(A);

j. Revising paragraph (h)(6)(iv)(D);

k. Removing paragraph (h)(6)(iv)(E);

l. Revising paragraph (h)(6)(v)(A);

m. Removing and reserving paragraphs (h)(6)(v)(C) and (D);

n. Adding the word "States" immediately before "and" in the first sentence in paragraph (h)(6)(v)(E)(2)(iii);

o. Revising paragraph (h)(6)(vi)(A);

p. Removing and reserving paragraph (h)(6)(vi)(B);

q. Revising paragraph (h)(6)(vi)(C);

r. Removing the period at the end of paragraph (h)(6)(vi)(D), and adding a "; or" in its place;

s. Revising the word "or" to read "to" in the first sentence in paragraph (h)(6)(vii);

t. Revising newly designated paragraph (h)(6)(viii);

u. Adding new paragraph (h)(6)(ix);

v. Adding new paragraph (h)(6)(x);

w. Revising paragraph (h)(8)(ii)(A);

x. Revising paragraph (h)(9)(iii)(B)(1);

y. Revising paragraph (h)(10)(ii);

z. Revising paragraph (h)(11)(iii)(A)(2);

aa. Revising paragraph (h)(13)(i)(B);

bb. Revising paragraph (h)(13)(iv); and by

cc. Revising paragraph (h)(13)(v).

The revisions read as follows:

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

* * * * *

(h) * * *

(1) * * *

(ii) * * *

(D) An H-2B classification applies to an alien who is coming temporarily to the United States to perform non-agricultural work of a temporary or seasonal nature, if there are not sufficient workers who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such

services or labor. This classification does not apply to graduates of medical schools coming to the United States to perform services as members of the medical profession. The temporary or permanent nature of the services or labor to be performed must be determined by USCIS. This classification requires a temporary labor certification issued by the Secretary of Labor or the Governor of Guam prior to the filing of a petition with USCIS.

* * * * *

(2) * * *

(iii) Naming beneficiaries. H-1B, H-1C, and H-3 petitions must include the name of each beneficiary. Except as provided in this paragraph (h), all H-2A and H-2B petitions must include the name of each beneficiary who is currently in the United States, but need not name any beneficiary who is not currently in the United States. Unnamed beneficiaries must be shown on the petition by total number. If all of the beneficiaries covered by an H-2A or H-2B temporary labor certification have not been identified at the time a petition is filed, multiple petitions for subsequent beneficiaries may be filed at different times but must include a copy of the same temporary labor certification. Each petition must reference all previously filed petitions associated with that temporary labor certification.

(iv) Reserved.

* * * * *

(6) * * *

(i) Petition. (A) H-2B non-agricultural temporary worker. An H-2B non-agricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing qualified United States workers available to

perform such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.

(B) Prohibition on fee collection from alien beneficiaries.

(1) Denial or revocation of petition. No fee or other compensation (either direct or indirect) may be collected from a beneficiary of an H-2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service in connection with an offer or condition of H-2B employment (other than the lower of the actual transportation costs or fair market value of such transportation costs and any government-mandated passport, visa or inspection fees, if the employer has not agreed with the alien to pay such costs and fees). If USCIS determines that the petitioner has collected, or entered into an agreement to collect, such fee or compensation or that the petitioner knows or reasonably should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service in connection with obtaining the H-2B employment, the H-2B petition will be denied or revoked on notice.

(2) Effect of petition revocation. Upon revocation of an H-2B petition based upon paragraph (h)(6)(i)(B)(1) of this section, the alien beneficiary's stay will be authorized and the alien will not accrue any period of unlawful presence under section 212(a)(9) of the Act for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer shall be liable for the alien beneficiary's reasonable costs of return to his or her last place of foreign residence abroad, unless such alien obtains an extension of stay based on an approved H-2B petition filed by a different employer.

(3) Reimbursement as condition to approval of future H-2B petitions. Where it has been determined that a fee or other compensation (either direct or indirect) was collected from a

beneficiary of an H-2B petition by the petitioner, agent, facilitator, recruiter, or similar employment service in connection with an offer or condition of H-2B employment (other than the lower of the actual transportation costs or fair market value of such transportation costs and any government-mandated passport, visa or inspection fees, if the employer has not agreed with the alien to pay such costs and fees), and the H-2B petitioner knew, or reasonably should have known such payment by the beneficiary, the H-2B petitioner must demonstrate to the satisfaction of USCIS that the petitioner has reimbursed the alien in full for such fees, compensation, or other remuneration as a condition to approval of any subsequent H-2B petition filed by such petitioner.

(C) Petitioner's attestation. A petition must include an attestation by the petitioner, certified as true and accurate by an appropriate official of the petitioner, of the following:

(1) During the period of intended employment for which the petition is approved, neither the alien workers' duties, place of employment, nor the entities for which the duties will be performed will expand beyond the related information provided on the Form I-129 and labor certification.

(2) Whether it received, directly or indirectly, any fee or other form of compensation from any alien beneficiary or has any arrangement or intends to have an arrangement for remuneration, direct or indirect, from any recruiter, facilitator or similar employment service with which it coordinates employment of H-2B workers in connection with H-2B employment, and if so, the name of any recruiter, facilitator, or similar employment service used to locate H-2B workers.

(3) To the best of its knowledge, whether any alien beneficiary has provided, or intends to provide, any remuneration, direct or indirect, to any such recruiter, facilitator, or similar employment service in connection with his or her H-2B employment; and

(4) Whether there has been any previous determination by USCIS that any fee, compensation, or other form of remuneration has been collected, directly or indirectly, from an alien beneficiary of the current H-2B petition in connection with the filing by the petitioner of any previous H-2B petition, and if so, whether the petitioner has reimbursed the alien in full for any such fees, compensation, or other remuneration (other than the lower of the actual transportation costs or fair market value of such transportation costs and any government-mandated passport, visa or inspection fees, if the employer has not agreed with the alien to pay such costs and fees).

(D) Petitions for nationals of countries that refuse repatriation. No H-2B petition can be approved for a citizen, subject, national or resident of a country whose government the Secretary of Homeland Security has determined consistently denies or unreasonably delays accepting the return of citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. The Secretary will review such determinations periodically to evaluate if the subject country is accepting repatriated nationals.

(E) Petitioner agreements and notification requirements. (1) Agreements. The petitioner agrees to notify DHS, within 48 hours, and beginning on a date and in a manner specified in a notice published in the **Federal Register** if: an H-2B worker fails to report for work within 5 days after the employment start date stated on the petition or within five days of the start date established by his or her employer, whichever is later; the non-agricultural labor or services for which H-2B workers were hired is completed more than 30 days early; or an H-2B worker absconds from the worksite or is terminated prior to the completion of non-agricultural labor or services for which he or she was hired. The petitioner also agrees to retain evidence of

such notification and make it available for inspection by DHS officers for a one-year period beginning on the date of the notification.

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

(ii) * * *

(B) Nature of petitioner's need. Employment is of a temporary nature when the employer needs a worker for a limited period of time. That means the employer must establish that the need for the employee will end in the near, definable future. Generally, that period of time will be limited to one year or less, but in the case of a one-time occurrence event, could last longer than one year and up to three years. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peak load need, or an intermittent need.

* * * * *

(iv) * * *

(A) Secretary of Labor's determination. An H-2B petition for temporary employment in the United States, except for temporary employment on Guam, shall be accompanied by an approved labor certification from the Secretary of Labor stating that qualified workers in the United States are not available and that the alien's employment will not adversely affect wages and working conditions of similarly employed United States workers.

* * * * *

(D) Employment start date. An H-2B petition must state an employment start date that is the same as the date of employment need stated on the approved temporary labor certification. A petitioner filing an amended H-2B petition due to the unavailability of originally requested workers may state an employment start date that is later than the date of employment need stated

on the previously approved temporary labor certification that is accompanying the amended H-2B petition.

(v) * * *

(A) Governor of Guam's determination. An H-2B petition for temporary employment on Guam shall be accompanied by an approved labor certification determination from the Governor of Guam stating that qualified workers in the United States are not available to perform the required services, and that the alien's employment will not adversely affect the wages and working conditions of United States resident workers who are similarly employed on Guam.

(C) Reserved.

(D) Reserved.

* * * * *

(vi) * * *

(A) Labor certification. A temporary labor certification issued by the Secretary of Labor or the Governor of Guam, as appropriate;

(B) Reserved.

(C) Alien's qualifications. In petitions where the labor certification application requires certain education, training, experience, or special requirements of the beneficiary who is present in the United States, documentation that the alien qualifies for the job offer as specified in the application for labor certification,;

* * * * *

(viii) Substitution of beneficiaries. Beneficiaries in H-2B petitions that are approved for named or unnamed beneficiaries who have not been admitted may be substituted only if the employer can demonstrate that the total number of beneficiaries will not exceed the number of

beneficiaries certified in the original labor certification. Beneficiaries who have been admitted may not be substituted without a new petition accompanied by a newly approved labor certification.

(A) To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are outside of the United States, the petitioner shall, by letter and a copy of the petition approval notice, notify the consular office at which the alien will apply for a visa or the port of entry where the alien will apply for admission. The petitioner shall also submit evidence of qualifications of beneficiaries to the consular office or port of entry prior to issuance of a visa or admission, if applicable.

(B) To substitute beneficiaries who were previously approved for consular processing but have not been admitted with aliens who are currently in the United States, the petitioner shall file an amended petition with fees at the Service Center where the original petition was filed, with a copy of the original petition approval notice, a statement explaining why the substitution is necessary, evidence of the qualifications of beneficiaries, if applicable, evidence of the beneficiaries' current status in the United States, and evidence that the number of beneficiaries will not exceed the number allocated on the approved labor certification, such as employment records or other documentary evidence to establish that the number of visas sought in the amended petition were not already issued. The amended petition must retain a period of employment within the same half of the fiscal year as the original petition. Otherwise, a new labor certification and subsequent H-2B petition would be required.

(ix) Effect of violations of status. An alien may not be accorded H-2B status who USCIS finds to have, at any time during the past 5 years, violated, other than through no fault of his or her own, any of the terms or conditions of admission into the United States as an H-2B

nonimmigrant, including remaining beyond the specific period of authorized stay or engaging in unauthorized employment.

(x) Enforcement. The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition to admit or otherwise provide status to an H-2B worker.

* * * * *

(8) * * *

(ii) * * *

(A) Each alien issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b), 101(a)(15)(H)(i)(c), or 101(a)(15)(H)(ii) of the Act shall be counted for purposes of any applicable numerical limit, unless otherwise exempt from such numerical limit. The spouse and children of principal H aliens are classified as H-4 nonimmigrants and shall not be counted against numerical limits applicable to principals. In the event the U.S. Congress authorizes special provisions exempting certain H workers from numerical limits, such aliens shall not be counted against the applicable numerical limit, in accordance with such legislation.

* * * * *

(9) * * *

(iii) * * *

(B) H–2B petition. (1) The approval of the petition to accord an alien a classification under section 101(a)(15)(H)(ii)(b) of the Act shall be valid for the period of the approved labor certification.

* * * * *

(10) * * *

(ii) Notice of denial. The petitioner shall be notified of the reasons for the denial, and of his or her right to appeal the denial of the petition under 8 CFR part 103. A determination that the statements on the petition were inaccurate, fraudulent, or misrepresented a material fact will result in denial of the petition. There is no appeal from a decision to deny an extension of stay to the alien.

(11) * * *

(iii) * * *

(A) * * *

(2) The statement of facts contained in the petition or on the application for a labor certification was not true and correct, inaccurate, fraudulent, or misrepresented a material fact: or

* * * * *

(13) * * *

(i) * * *

(B) When an alien in an H classification has spent the maximum allowable period of stay in the United States, a new petition under sections 101(a)(15)(H) or (L) of the Act may not be approved unless that alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the time limit imposed on the particular H classification. Brief trips to the United States for business or pleasure during the required time abroad are not interruptive, but do not count towards fulfillment of the required time abroad. A certain period of absence from the United States of H-2A and H-2B aliens can interrupt the accrual of time spent in such status against the three-year limit. The petitioner shall provide

information about the alien's employment, place of residence, and the dates and purposes of any trips to the United States during the period that the alien was required to spend time abroad.

* * * * *

(iv) H-2B and H-3 limitation on admission. An H-2B alien who has spent 3 years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 3 months. An H-3 alien participant in a special education program who has spent 18 months in the United States under section 101(a)(15)(H) and/or (L) of the Act; and an H-3 alien trainee who has spent 24 months in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) and/or (L) of the Act unless the alien has resided and been physically present outside the United States for the immediate prior 6 months.

(v) Exceptions. The limitations in paragraph (h)(13)(iii) through (h)(13)(iv) of this section shall not apply to H-1B, H-2B, and H-3 aliens who did not reside continually in the United States and whose employment in the United States was seasonal or intermittent or was for an aggregate of six months or less per year. In addition, the limitations shall not apply to aliens who reside abroad and regularly commute to the United States to engage in part-time employment. An absence from the United States can interrupt the accrual of time spent as an H-2B nonimmigrant against the three-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it last for at least two months. To qualify for this exception, the petitioner and the alien must provide clear and convincing proof that the alien qualifies for

such an exception. Such proof shall consist of evidence such as arrival and departure records, copies of tax returns, and records of employment abroad.

* * * * *

PART 215—CONTROLS OF ALIENS DEPARTING FROM THE UNITED STATES

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

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

6. Section 215.9 is added to read as follows:

§ 215.9 Temporary Worker Visa Exit Program.

An alien admitted on certain temporary worker visas at a port of entry participating in the Temporary Worker Visa Exit Program must also depart at the end of their authorized period of stay through a port of entry participating in the program and present designated biographic and/or biometric information upon departure. U.S. Customs and Border Protection will publish a Notice in the **Federal Register** designating which temporary workers must participate in the Temporary Worker Visa Exit Program, which ports of entry are participating in the program, which biographical and/or biometric information would be required, and the format for submission of that information by the departing designated temporary workers.

8/11/08
Dated:

Michael Chertoff,
Secretary.