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## 8 CFR Parts 204, 214 and 215

## Changes to Requirements Affecting H–2B Nonimmigrants and Their Employers; Final Rule

**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:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security (DHS) regulations regarding temporary nonagricultural workers, and their U.S. employers, within the H–2B nonimmigrant classification. The final rule removes certain limitations on H–2B employers and adopts streamlining measures in order to facilitate the lawful employment of foreign temporary nonagricultural workers. The final rule also addresses concerns regarding the integrity of the H–2B program and sets forth several conditions to prevent fraud and protect laborers' rights. The final rule will benefit U.S. businesses by facilitating a timely flow of legal workers while ensuring the integrity of the program.

The rule generally removes the requirement for H–2B petitioners to state on petitions the names of prospective H–2B workers who are outside the United States and reduces the existing obligatory waiting period from 6 months to 3 months for an H–2B worker who has reached his or her maximum three-year period of stay in H–2B nonimmigrant status before such person may seek an extension of nonimmigrant stay, change of status, or readmission to the United States in any H or L nonimmigrant status. The rule provides a more flexible definition of ''temporary services or labor,'' which is generally defined as a period of one year but could be for a specific one-time need of up to 3 years.

To better ensure the integrity of the H–2B program, this rule eliminates DHS's current practice of adjudicating H–2B petitions where the Secretary of Labor or the Governor of Guam has not granted a temporary labor certification. The rule also prohibits H–2B petitioners from requesting an employment start date on the Form I–129, Petition for a Nonimmigrant Worker, that is different than the date of need listed on the approved temporary labor certification. The final rule requires H–2B petitioners to notify DHS when the H–2B worker fails to report for work, is terminated prior to the completion of the work for which he was hired, or absconds from the worksite. This rule also precludes employers from passing the cost of recruiter fees charged by a petitioner, agent, facilitator, recruiter, or similar employment service to prospective H–2B workers as a condition of an offer of H–2B employment. Under this rule, employers and H–2B workers may agree that certain transportation costs and government-imposed fees be borne by H–2B workers, if the passing of such costs to these workers is not prohibited under the Fair Labor Standards Act or any other statute. Moreover, the rule enforces the existing penalties at section 214(c)(14) of the Immigration and Nationality Act (INA) in the case of an employer who fails to meet any of the conditions of the H–2B petition, or who willfully misrepresented a material fact in the H–2B petition. Employers who fail to meet the H–2B conditions or who willfully make material misrepresentations on an H–2B petition may, under the statute, be precluded from approval for a period of up to 5 years of any H (except H–1B1), L, O, or P–1 nonimmigrant visa petition, or any immigrant visa petition described in section 204 of the INA, they may file with DHS.

This rule also provides that DHS will publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B program. Finally, this rule establishes a pilot exit control program for certain H–2B workers, by requiring them to report their departure at designated ports of entry. U.S. Customs and Border Protection (CBP) will publish a notice in the **Federal Register** describing the procedures and requirements for participation in this pilot program.

**DATES:** This rule is effective January 18, 2009.

**FOR FURTHER INFORMATION CONTACT:** Hiroko Witherow, Service Center Operations, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2060, telephone (202) 272–8410.

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

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## I. Background

### *A. Proposed Rule*

The H–2B nonimmigrant classification applies to aliens seeking to perform nonagricultural labor or services of a temporary nature in the United States. Immigration and Nationality Act (the Act or INA) sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); *see* 8 CFR 214.1(a)(2) (designation for H–2B classification). The H–2B program is most frequently used by businesses in seasonal industries that have a difficult time locating temporary workers. DHS is aware, however, that the current H–2B program regulations do not effectively accommodate the needs of U.S. employers and alien workers who use, or want to use, the H–2B program. Therefore, on August 20, 2008, DHS published a notice of proposed rulemaking seeking to amend its H–2B regulations. 73 FR 49109. On May 20, 2008, the Department of Labor (DOL) also published a notice of proposed rulemaking to amend its regulations regarding the temporary labor certification process and enforcement for temporary employment in occupations other than agriculture or registered nursing in the United States. 73 FR 29942.

Some of the changes that DHS proposed in its rule included provisions that:

- Relax the limitations on naming beneficiaries on the H–2B petition, if such beneficiaries are outside of the United States;
- Require DHS to deny or revoke any H–2B petition if DHS determines that the petitioner knows, or reasonably should know, that the alien beneficiary paid, or agreed to pay, any fee or other form of compensation to the petitioner, the petitioner's agent, or to any facilitator, recruiter, or similar employment service, in connection with the H–2B employment;
- Require H–2B petitioners: (a) To attest that they will not materially change the facts as represented on the Form I–129 and the approved temporary labor certification; (b) to attest that they have not received and do not intend to

receive any fee, compensation, or any other form of remuneration from prospective H–2B workers; and (c) to identify any facilitator, recruiter, or other similar employment service that the petitioner used to locate foreign workers;

• Require H–2B petitioners to provide written notification to DHS within 48 hours if: (a) An H–2B worker fails to report to work within 5 days of the date of the employment start date on the H–2B petition or within 5 days of the start date established by his or her employer, whichever is later; (b) the nonagricultural labor or services for which H–2B workers were hired is completed more than 30 days early; or (c) an H–2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired;

• Clarify that any violation of a condition of H–2B nonimmigrant status, within the previous 5 years, will preclude an alien from being accorded H–2B nonimmigrant status, unless the alien can establish that such violation occurred through no fault of the alien;

• Discontinue DHS's current practice of accepting and adjudicating an H–2B petition that lacks an approved temporary labor certification from DOL;

• Preclude the employer from using a different employment start date on the H–2B petition than the date of need stated on the temporary labor certification approved by DOL;

• Preclude DHS from approving H–2B petitions filed on behalf of beneficiaries from countries determined by DHS to consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents;

• Set forth the minimum period spent outside of the United States that will stop the H–2B worker from accruing time towards the 3-year overall limit on H–2B status;

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

• Amend the current definition of ''temporary services or labor'' by defining them to be services or labor that will be needed by the employer for a limited period of time, *i.e.*, where the job will end in the near, definable future; and

• Authorize the establishment of a temporary worker exit program on a pilot basis that would require certain H–2B workers to register with DHS at the time of departure from the United States.

DHS provided a 30-day comment period in the proposed rule, which ended on September 19, 2008. During this comment period, DHS received 119 comments. DHS received comments from a broad spectrum of individuals and organizations, including: Business owners in the hospitality industry; landscape companies; agents that work with H–2B employers; job placement companies; trade associations; labor organizations; an H–2B worker; Chambers of Commerce; a political group; private attorneys; state government agencies; an independent office to a federal government agency; members of Congress; and other interested organizations and individuals.

DHS considered the comments received and all other materials contained in the docket in preparing this final rule. The final rule does not address comments seeking changes in regulations unrelated to, or not addressed by, the proposed rule; changes in procedures of other components within DHS or other agencies; or the resolution of any other issues not within the scope of the rulemaking or the authority of DHS.

All comments and other docket materials may be viewed at the Federal Docket Management System (FDMS) at *http://www.regulations.gov,* docket number USCIS–2007–0058.

*B. Discussion of the Final Rule*

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

1. Payment of Fees by Aliens To Obtain H–2B Employment

To address some commenters' concerns about the proposed provisions related to the payment of fees by beneficiaries to obtain H–2B employment, the final rule makes several changes.

First, the final rule offers petitioners a means by which to avoid denial or revocation (following notice to the petitioner) of the H–2B petition in cases where DHS determines that the petitioner knows or should reasonably know that the worker has paid or agreed to pay prohibited fees as a condition of an offer of H–2B employment. In cases where prohibited fees were collected prior to the petition filing date and in cases where prohibited fees were collected by the labor recruiter or agent after petition filing, DHS will not deny or revoke the petition if the petitioner demonstrates that:

• The beneficiary has been reimbursed in full for fees paid or,

• The agreement for the beneficiary to pay such fees has been terminated, if the fees have not yet been paid. New 8 CFR 214.2(h)(6)(i)(B)(*1*) and (*2*).

Additionally, as an alternative to reimbursement where the prohibition is violated by the recruiter or agent after the petition is filed, the petitioner may avoid denial or revocation of the petition by notifying DHS of the improper payments, or agreement to make such payments, within two work days of learning of them. New 8 CFR 214.2(h)(6)(i)(B)(*4*). Where the beneficiary has paid the petitioner the prohibited fees after the filing of the H–2B petition, the petition will be denied or revoked. New 8 CFR 214.2(h)(6)(i)(B)(*3*). If DHS revokes or denies an H–2B petition as a result of the collection of prohibited fees, then, as a condition of approval of future H–2B petitions filed within one year of the denial or revocation, the petitioner must demonstrate that the beneficiary of the denied or revoked petition from whom prohibited fees were collected has been reimbursed or that the beneficiary cannot be located despite the petitioner's reasonable efforts. New 8 CFR 214.2(h)(6)(i)(D).

Further, the final rule does not include the proposed requirement that the petitioner make a separate attestation regarding the reliance upon employment services to locate H–2B workers and the acceptance or knowledge of the beneficiary's payment of prohibited recruitment fees. DHS is not including a separate attestation requirement in the final rule, because it has determined that would increase petitioners' administrative burdens and be duplicative. DHS will instead amend the Form I–129 to include the attestation requirement.

2. H–2B No-Show, Termination, or Abscondment Notification Requirements

The final rule requires petitioners to provide notification to DHS, within two work days, beginning on a date and in a manner specified in a notice published in the **Federal Register**, in the following instances: (a) When an H–2B worker fails to report to work within 5 work days of the employment start date on the H–2B petition; (b) when the temporary labor or services for which H–2B workers were hired is completed more than 30 days earlier than the date

specified by the petitioner in its H–2B petition; or (c) when the H–2B worker absconds from the worksite or is terminated prior to the completion of the temporary nonagricultural labor or services for which he or she was hired. 8 CFR 214.2(h)(6)(i)(E). The final rule clarifies that the H–2B worker must report to work within 5 ''work days'' of the employment start date, rather than the proposed 5 days. The H–2B petitioner must report a violation to DHS within two work days, rather than the proposed 48 hours. The final rule adopts the term ''work days'' to ensure that the reporting deadlines are clear to H–2B petitioners. ''Work day,'' in general, means the period between the time on any particular day when such employee commences his or her principal activity or activities and the time on that day at which he or she ceases such principal activity or activities. Also, for purposes of clarity, the final rule amends 8 CFR 214.2(h)(11)(i)(A) to cross-reference the notification provision.

In addition, the final rule does not include the proposal that the employer may establish an employment start date that is different from the start date stated on the H–2B petition for purposes of determining when the notification requirement is triggered where the H–2B worker fails to report for work. *See* new 8 CFR 214.2(h)(6)(i)(F)(*1*). This ability to change the employment start date is inconsistent with the requirement from the proposed rule, adopted by this final rule, that the employment start date must be the same as the date of need stated on the temporary labor certification approved by the Secretary of Labor, and therefore, cannot be changed thereafter by the petitioner. The final rule corrects this inconsistency.

3. Petition Filing Period

This final rule modifies the current regulations governing the filing period for H petitions to provide for a separate filing period for H–2B petitions. *See* 8 CFR 214.2(h)(9)(i)(B). This procedural change is necessary to ensure parity between DHS and related DOL regulations. Under the new DOL regulations, an employer cannot start recruiting (initiate advertising) for the nonagricultural positions any earlier than 120 days ahead of the date of stated employment need. However, under current DHS regulations, an employer must file an H–2B petition along with a DOL-approved temporary labor certification, yet may file the petition up to 6 months ahead of the date of actual employment need. 8 CFR 214.2(h)(9)(i)(B). This final rule adopts the proposed requirement that an H–2B petition identify an employment start date that is the same as the date of employment need stated on the approved temporary labor certification. New 8 CFR 214.2(h)(6)(iv)(D). Considering this requirement, it would be procedurally impossible for a petitioner to file an H–2B petition any sooner than the earliest date upon which it is able to start recruiting for a nonagricultural position. Therefore, this final rule modifies 8 CFR 214.2(h)(9)(i)(B) to provide that an employer may not file, and USCIS may not approve, an H–2B petition more than 120 days before the date of the employer's actual need for the beneficiary's temporary nonagricultural worker services, as identified on the temporary labor certification.

4. Naming Beneficiaries Exempt From the Numerical Limits

The final rule retains the proposal to allow certain H–2B petitioners to specify only the number of positions sought, without naming individual H–2B workers, unless they are already in the United States. A few commenters were concerned about how the provision allowing petitioners to include unnamed beneficiaries in the H–2B petition would be impacted by a possible reauthorization of the ''returning worker'' provisions. New 8 CFR 214.2(h)(2)(iii) and 8 CFR 214.2(h)(6)(vi)(C). The returning worker provisions expired September 30, 2007. INA sec. 214(g)(9), 8 U.S.C. 1184(g)(9) (2007). Under these provisions, H–2B aliens who were already counted towards the H–2B numerical limit during one of the 3 fiscal years preceding the fiscal year of the requested employment start date were not counted again against the numerical limit. While the returning worker provisions have expired, their future reauthorization is possible. To ensure that DHS is able to implement any future reauthorization of these provisions, this final rule provides DHS the flexibility to collect information needed about the alien beneficiary to establish eligibility as a returning worker.

5. Numerical Limits and Petition Extensions or Extension of an Alien's Stay

The final rule adopts the proposed modifications to 8 CFR 214.2(h)(8)(ii)(A), which provide for the application of the annual numerical limitations on H nonimmigrant classifications. However, the proposed rule inadvertently omitted a sentence that is in the current regulations. This sentence provides that requests for petition extension or extension of an alien's stay may not be counted towards the annual numerical limits on H nonimmigrant classifications. DHS acknowledges this error made in the proposed rule and retains the sentence in the provision. *See* new 8 CFR 214.2(h)(8)(ii)(A).

6. Effect of Violations of H–2B Status

The final rule does not adopt the proposed addition of a new provision that would have precluded an alien from being accorded H–2B status if USCIS finds that the alien has, at any time during the past 5 years, violated any of the terms or conditions of the current or previously accorded H–2B status, other than through no fault of the alien. Several commenters opposed the addition of the proposed provision. DHS has determined that it is not necessary to add the proposed provision to the regulations at this time given the remaining improvements that this rule makes to the H–2B program. DHS may revisit this issue in a future rulemaking if necessary to further enhance the integrity of the H–2B program. DHS notes, however, that the fact that the proposed provision is not adopted in the final rule does not change existing requirements for change of status, extension of stay, or any other immigration benefit requiring proper maintenance of status, nor would it preclude a consular officer from exercising his or her authority with respect to the issuance or validity of visas under the immigration laws.

7. Permitting H–2B Petitions for Nationals of Participating Countries

The final rule modifies the proposal to preclude DHS from approving an H–2B petition filed on behalf of aliens from countries that consistently deny or unreasonable delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final order of removal from the United States. Instead of publishing a list of countries that refuse repatriation, DHS will publish in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B program. In designating countries to allow the participation of their nationals in the H–2B program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals, and

residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. Initially, the list will be composed of countries that are important for the operation of the H–2B program and are cooperative in the repatriation of their nationals. The countries included on the list are the countries whose nationals contributed the vast majority of the total beneficiaries of the H–2B program during the last three fiscal years. Additional details on how this list will be administered are included in the discussion in response to comments received on this proposed provision below.

8. Employment Start Date

The final rule retains the provision in the proposed rule prohibiting the employer from requesting an employment start date on Form I–129 that is different from the date of need listed on the accompanying approved temporary labor certification. *See* new 8 CFR 214.2(h)(6)(iv)(D). As noted below, to ease the initial difficulties in administering this provision, it will take effect starting with the filing period for the first half of fiscal year (FY) 2010.

9. Conforming Amendments and Non-Substantive Changes

The final rule includes non-substantive structural or wording changes from the proposed rule for purposes of clarity and readability.

## II. Public Comments on the Proposed Rule

### *A. Summary of Comments*

DHS received 119 comments on the proposed rule. Most commenters generally supported the streamlining measures in the proposed rule, such as: Removing the requirement to name the beneficiaries who are outside of the United States; reducing the required time abroad once an H–2B worker has reached the maximum period of stay before filing for an extension, change of status, or readmission to the United States in the H or L nonimmigrant status; and clarification of the process for substituting beneficiaries. Many commenters, however, were opposed to several changes that they believe will create additional burdens on and costs to U.S. businesses. They suggested that some of the proposed changes would prevent certain U.S. businesses from utilizing the H–2B program, such as: Prohibiting the current practice of approving H–2B petitions that are filed with denied temporary labor certifications; prohibiting a change of the employment start date on the Form I–129 from what is stated on the approved temporary labor certification; providing DHS with the authority to deny or revoke on 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 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; and requiring petitioners to notify DHS of H–2B workers' no-show, early completion of work, termination, or abscondment. Many commenters also were concerned about the proposal to preclude DHS 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 who are subject to a final order of removal from the United States. Commenters also objected to the proposed amendment to the definition of ''temporary services or labor.''

The concerns of the commenters are addressed below organized by subject area.

### *B. General Comments*

1. Comments About the Congressionally Mandated Numerical Limit for the H–2B Program

*Comment:* The majority of commenters stated that the biggest problem with the H–2B program is the lack of Congressional action to increase the numerical limit or to reauthorize the returning worker provisions. They believed that all the proposals that DHS suggested would not be necessary if the numerical limit were lifted. Many U.S. businesses also expressed their frustration with the fact that they are not able to use the program because the program is oversubscribed.

*Response:* DHS is fully aware that the H–2B program is oversubscribed. However, as many commenters pointed out, the numerical limit and the authorization of the returning worker provisions are a matter entirely within the discretion of Congress and cannot be altered by DHS. DHS has thus made no change to the final rule to reflect these comments. Additionally, the value of and necessity for the streamlining and other improvements to the H–2B program included in this final rule would not be vitiated by any change in the number of H–2B workers Congress allows to be admitted each year.

2. Protections for U.S. Workers

*Comment:* DHS received some comments that urged the withdrawal of the proposed rule, questioning the need for the H–2B program and the need to streamline the program at a time when the nation is experiencing such a high unemployment rate.

*Response:* DHS disagrees that the proposed rule should be withdrawn. DHS is aware of its responsibility to help maintain the careful balance between protecting U.S. workers from adverse affect and administering nonimmigrant programs designed to invite foreign workers to the United States. The Department of Labor's temporary labor certification process, which requires employers to perform a labor market test, is the principal means by which U.S. workers are protected from adverse affect due to foreign competition for temporary jobs with U.S. employers. Only if the labor market test establishes the unavailability of U.S. workers and that there is no adverse affect will DOL approve the H–2B employer's application for temporary labor certification. The final rule contains two major revisions to the regulations designed to further protect U.S. workers while at the same time provide a streamlined petitioning process: (1) Precluding DHS from approving H–2B petitions filed without an approved temporary labor certification issued by DOL, thus avoiding the current need for DHS in certain cases to delve into the merits of the sufficiency of the employer's market test; and (2) prohibiting employers from changing the employment start date identified on the Form I–129 from that identified on the DOL-approved temporary labor certification. Both of these changes help strengthen the integrity of the DOL temporary labor certification process Furthermore, the streamlining measures provided in the proposed rule (which allows employers to file for unnamed beneficiaries outside of the United States and more easily substitute workers who are already in the United States) occur toward the end of the H–2B process, only after the DOL has certified that U.S. workers are not available and will not be harmed by the employment of workers using the H–2B program.

3. Lack of Enforcement Against the Employment of Unauthorized Aliens

*Comment:* A few commenters criticized this proposed rule for imposing stiffer requirements and increased costs on employers who are trying to hire a legal workforce through the H–2B program, while at the same time failing to provide a sound method for strong enforcement against employers that hire unauthorized aliens.

*Response:* DHS recognizes these concerns; however, compliance measures included in this rulemaking are necessary to ensure the integrity of the H–2B program and to protect workers' rights. The purpose of this rule is to strengthen the integrity and efficiency of the H–2B program so that employers will be encouraged to obtain temporary workers through the program, rather than resort to unlawful means.

*C. Specific Comments*

1. Allowing Unnamed Beneficiaries

*Comment:* Twenty-seven out of 36 commenters supported the proposal to allow H–2B petitioners 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. They agreed that the proposal would give employers far greater flexibility to recruit workers who are interested and available to start on the date needed but were unsure of how this proposal would be affected by a possible re-authorization of the returning worker provisions.

*Response:* Based on the support from the commenters, the final rule adopts the proposal to allow certain unnamed beneficiaries on the H–2B petition. New 8 CFR 214.2(h)(2)(iii). As discussed below, there is also a change concerning the naming of beneficiaries from countries that have not been designated as participating countries. In response to comments, however, the final rule provides the flexibility to require H–2B petitioners to name beneficiaries, if located outside the United States, in the event that Congress re-authorizes the returning worker provisions or enacts similar legislation exempting certain H nonimmigrants from the numerical limits. The adjudication of an H–2B petition for such workers would require DHS to identify eligible aliens and verify their previous status. Inclusion in this rule of the requirement to name affected workers in H–2B petitions, even though not currently applicable, would facilitate implementation of the returning worker provisions or similar amendments should they be enacted.

The final rule retains the requirement that the petition include the names of those beneficiaries who are present in the United States. The granting of an H–2B petition on behalf of beneficiaries in the United States will serve to either confer a new immigration status or extend the status of a particular alien immediately upon approval. Since such an approval, unlike a nonimmigrant admission from outside the country, does not afford, as in the case of alien beneficiaries abroad, the United States Government the opportunity to first inspect and/or interview the H–2B beneficiary (either by the State Department at a consular office abroad or by CBP at a U.S. port of entry) before the granting of H–2B nonimmigrant status to the alien, it is essential that DHS have the names of the beneficiaries already present in the United States.

*Comment:* Some commenters suggested that DHS will need to establish a mechanism for calculating the number of new workers, as opposed to the number of returning workers when the returning worker provisions are reauthorized. Another commenter stated that this provision should be extended further to capture returning workers.

*Response:* As stated above, the final rule gives DHS the flexibility to require the names of ''returning worker'' as that term is currently defined in section 214(g)(9)(A) of the INA, 8 U.S.C. 1184(g)(9)(A), whether or not such workers would be in the United States, should Congress choose to enact special provisions once again exempting such H–2B returning workers from the numerical limits. Although Congress has not, to date, extended section 214(g)(9) to cover H–2B returning workers beyond fiscal year 2007, or enacted similar legislation to cover such persons beyond that date, the final rule would ensure an accurate count of workers exempt from the cap if Congress were to enact such legislation.

*Comment:* Several commenters opposed this provision allowing unnamed beneficiaries, because it will make it easier for some employers to inflate the number of workers they need, and that as a result, employers requesting the legitimate number of workers would be unable to secure a legal workforce through the H–2B program.

*Response:* DHS disagrees with these commenters' concerns. Prior to filing an H–2B petition with DHS, a prospective employer must obtain a temporary labor certification from DOL. When it deems necessary, DOL will verify the employer's need for the number of temporary workers requested at the time it adjudicates the temporary labor certification application or thereafter on a post audit basis. Once an employer obtains an approved temporary labor certification and files an H–2B petition with DHS, DHS evaluates whether there is an actual need for the work itself and whether there is a genuine job offer. This evaluation would include verifying, based on the petition and accompanying documentation, whether the employer, as a matter of fact, has a need for the number of temporary workers described on the approved temporary labor certification. In short, both DHS and DOL must ensure compliance with the statutory requirements for the H–2B classification, including shared responsibility for assessing the temporary nature of the services or labor to be performed. INA sec. 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b); INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 103.2(b)(1); 20 CFR 655.6. DHS may request additional evidence from the petitioner in those cases where questions arise regarding the legitimate number of H–2B workers requested on the H–2B petition.

*Comment:* One commenter further asked how the unnamed beneficiaries will be tracked to ensure that they will not exceed the 3-year limit on H–2B status.

*Response:* The final rule removes the requirement to name beneficiaries, but only if they are outside of the United States or H–2B returning workers. Upon approval of the H–2B petition, these prospective beneficiaries must generally undergo a visa interview at a U.S. consulate, unless they are visa exempt (*e.g.*, Canadians). All individuals seeking admission to the United States must undergo inspection by a U.S. Customs and Border Protection officer upon arrival at a U.S. port of entry. During this visa application and/or admission process, the necessary screening will be conducted to ensure that the H–2B worker will not be granted any benefit exceeding the 3-year ceiling.

*Comment:* One commenter further asked how the unnamed beneficiaries will be tracked in case the petitioner must request substitutions of beneficiaries.

*Response:* DHS tracks the number of H–2B workers approved for the H–2B employer. As a result, DHS will know how many substitutions the petitioner has requested.

2. Post H–2B Waiting Period

*Comment:* Sixteen out of 22 commenters supported the proposed rule suggesting the reduction of the waiting period from 6 months to 3

months for an H–2B worker who has reached the 3-year maximum period of stay on H–2B nonimmigrant status prior to seeking an application for extension of nonimmigrant stay, change of status, or readmission to the United States in H–2B status or other nonimmigrant status under section 101(a)(15)(H) or (L) of the INA, 8 U.S.C. 1101(a)(15)(H) or (L). These commenters supported this proposal stating that it will make the H–2B process more efficient for the users.

*Response:* DHS finds that the adoption of this proposal will reduce the amount of time employers would be required to be without the services of needed workers while not offending the fundamentally temporary nature of employment under the H–2B program. Accordingly, the final rule adopts the proposed reduction in waiting time without change. New 8 CFR 214.2(h)(13)(iv).

*Comment:* Several commenters argued that the post-H–2B waiting period provisions contained in the proposed rule may harm domestic workers in seasonal industries that may slow down or come to a stop during the winter months. A commenter suggested that this change gives an advantage to employers in the construction markets, as it gives them the ability to address their hiring needs with H–2B workers throughout the seasons, which in turn, reduces the incentives to train and recruit domestic workers. Another commenter stated that this proposed rule offends the fundamentally temporary nature of employment under the H–2B program.

*Response:* DHS disagrees that a reduction in the waiting period will result in the displacement of domestic workers. The law requires H–2B employers to obtain a temporary labor certification certifying that there are insufficient U.S. workers who are able, willing, qualified, and available to perform the nonagricultural temporary labor or services required by the employer, and that the H–2B employment will not adversely affect the wages and working conditions of similarly employed U.S. workers. Whether the prospective worker is a first-time H–2B worker or an H–2B worker who has previously worked in the United States but is eligible to receive H–2B status anew, the requirement that the unavailability of U.S. workers be established, as determined by DOL, remains unchanged by this rule. When filing the application for temporary labor certification with DOL, H–2B employers are required to establish that the temporary job for which the H–2B workers are sought is not permanent and ongoing.

*Comment:* Those who opposed this provision expressed concern that it will allow employers to create a long-term workforce comprising H–2B workers who reside in the U.S. for 3 years and then take a relatively short trip to their home country before re-entering to resume employment.

*Response:* USCIS disagrees that this provision will undermine the U.S. workforce. The H–2B program requires employers to obtain temporary labor certification from DOL to cover the period of employment need. This process requires a labor market test, which certifies that no U.S. workers are available for employment or will be harmed by the employment of nonimmigrant workers.

3. Prohibiting H–2B Petitions or Admissions for Nationals of Countries That Consistently Refuse or Delay Repatriation

*Comment:* Five out of 14 commenters supported the proposal to include a new provision at 8 CFR 214.2(h)(6)(i)(E) precluding DHS from approving an H–2B petition filed on behalf of one or more aliens from a country that the Secretary of Homeland Security has found to have consistently refused to accept or unreasonably delayed the prompt return of its citizens, subjects, nationals, or residents. They thought that this would be a fair and logical provision. One commenter supported this provision, stating that it will help limit the problem of H–2B workers who overstay their visas.

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

Instead of publishing a list of countries that consistently deny or unreasonably delay the prompt return of their citizens, subjects, nationals, or residents who are subject to a final removal order, DHS is publishing in a notice in the **Federal Register** a list of countries that the Secretary of Homeland Security has designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B temporary nonagricultural worker program. DHS is making this modification to the rule in consideration of public comments received recommending DHS rework the proposal in order to make the process more positive and to encourage countries to improve cooperation in the repatriation of their nationals.

In designating countries to allow the participation of their nationals in the H–2B program, DHS, with the concurrence of the Department of State, will take into account factors including, but not limited to, the following: (1) The country's cooperation with respect to the issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest.

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

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

The Secretary of Homeland Security may allow a national from a country not on the list to be named as a beneficiary on an H–2B petition and to participate in the H–2B program based on a determination that such participation is in the U.S. interest. The Secretary's determination of such a U.S. interest will take into account a variety of factors, including but not limited to consideration of: (1) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among workers from a country currently on the list of eligible countries for participation in the program; (2) evidence that the beneficiary has been admitted to the United States previously in H–2B status; (3) the potential for abuse, fraud, or other harm to the integrity of the H–2B visa program through the potential admission of a beneficiary from a country not currently on the list of eligible countries for participation in the program; and (4) such other factors as may serve the U.S. interest. Therefore, DHS is requiring petitioners for beneficiaries who are nationals of countries not designated as participating countries to name each beneficiary. New 8 CFR 214.2(h)(2)(iii). In addition, petitions for beneficiaries

from designated countries and undesignated countries are to be filed separately. 8 CFR 214.2(h)(2)(ii). These changes will permit DHS to more easily adjudicate H–2B petitions involving nationals of countries not named on the list by permitting DHS to properly evaluate the factors used to make a determination of U.S. interest, discussed above, without slowing the adjudication of petitions on behalf of nationals of designated countries.

As discussed in the proposed rule, DHS expects that the provisions in this rule intended to increase the flexibility of the H–2B program, complemented by the streamlining proposals the Department of Labor is making in its H–2B rule, will increase the appeal of the H–2B program with U.S. employers. While the statutory maximum number of H–2B workers will remain 66,000, the program is enhanced by countries accepting the return of their nationals.

This rule provides that petitions may only be filed and approved on behalf of beneficiaries who are nationals of a country that is included in the list of participating countries published by notice in the **Federal Register** or, in the case of an individual beneficiary, an alien whose participation in the H–2B program has been determined by the Secretary of Homeland Security to be in the U.S. interest. *See* new 8 CFR 214.2(h)(6)(i)(E). Likewise, in order to be admitted as an H–2B, aliens must be nationals of countries included on the list of participating countries or, in the case of an individual beneficiary, an alien whose participation in the H–2B program has been determined by the Secretary of Homeland Security to be in the U.S. interest. To ensure program integrity, such petitioners must state the nationality of all beneficiaries on the petition, even if there are beneficiaries from more than one country. *See* new 8 CFR 214.2(h)(2)(iii).

*Comment:* Several commenters argued that this provision would unnecessarily penalize potential H–2B workers who are seeking to improve their standard of living, due to the actions of their government. These commenters also stated that it is not fair to U.S. employers who will be denied willing and able workers.

*Response:* Though it appreciates these concerns, DHS notes that all nonimmigrants, including H–2B temporary workers, must abide by the terms and conditions of their nonimmigrant admission. This final rule will encourage countries to work collaboratively with the United States to ensure the timely return of their nationals who have been subject to a final order of removal, in order to ensure that the H–2B program will be available to other nationals of their countries in the future.

*Comment:* A few commenters also stated that they would not support any provisions that restrict eligibility to nationals of countries that provide the most cooperation to the United States in administering the program. They stated that such preference could harm the effectiveness of the H–2B program and adversely impact industries that rely heavily on workers from particular countries.

*Response:* DHS strongly believes the success of the program is enhanced by countries accepting the return of their nationals. However, as discussed in response to the comment above, this rule provides an alternative approach to address the repatriation problem. DHS will publish a list of participating countries based on factors which include, but are not limited to, the country's cooperation in the repatriation of its nationals, citizens, subjects, or residents who are subject to a final removal order. Therefore, the commenters' suggestion is not adopted.

*Comment:* One commenter objected to this proposal, stating that this provision may cause H–2B aliens from such countries who are already present in the United States (knowing that they would not be able to obtain an H–2B visa again) to overstay their visas if/when their requests for an extension are denied, with the full knowledge that they would not be eligible for any subsequent H–2B visa issuance, and therefore, if they overstayed, DHS would not have the means to remove them.

*Response:* Each alien is required to depart the United States once his or her authorized period of stay has expired. Additionally, this proposal, as modified in this final rule, will create an incentive for countries to better cooperate with the United States regarding the timely repatriation of aliens who are subject to a final order of removal.

*Comments:* Two commenters stated that this regulatory provision is unnecessary because the authority to deny visa issuance to nationals of these countries already exists in the statute.

*Response:* DHS finds that this change as modified in this final rule is needed in order to preclude DHS from approving a petition filed on behalf of one or more aliens from such countries at the start of the process. Adopting this change will save DHS from the unnecessary allotment of the limited number of H–2B visas to aliens who will be found by the Department of State to be ineligible for H–2B visas pursuant to INA section 243(d), 8 U.S.C. 1253(d).

*Comment:* A few commenters requested that a list of such countries should be provided to the public as it may impact some employers' ability to use the program.

*Response:* DHS will publish a notice in the **Federal Register** listing eligible countries and expects to publish a new list prior to the expiration of the previous designation.

4. Temporary Labor Certifications

a. Consideration of Petitions Lacking an Approved Temporary Labor Certification

*Comment:* Fifty-two out of 57 commenters objected to the elimination of DHS'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.

*Response:* After considering the commenters' objections, DHS nevertheless retains this proposal in this final rule, as discussed in the comments and responses below. 8 CFR 214.2(h)(6)(iv)(D), (E), (h)(6)(v)(C), and (D).

*Comment:* Some commenters suggested that the INA does not support this provision because the INA vests the authority for the admission of H–2B workers with DHS, not DOL, and only requires consultation with appropriate agencies of the Government.

*Response:* DHS is vested with the statutory authority to approve a petition for H–2B workers after consultation with DOL. INA sec. 214(c)(1), 8 U.S.C. 1184(c)(1). DHS, however, does not have the expertise needed to make any labor market determinations, independent of those already made by DOL. For this reason, DHS finds that it is in the best interests of U.S. workers and the public that DHS not approve H–2B petitions when DOL has denied an employer's application for temporary labor certification.

*Comment:* Many commenters were concerned that this provision has the potential do serious harm to employers by barring recourse for them when human errors occur in the temporary labor certification process. They suggested that DHS should not eliminate the fundamental right to appeal.

*Response:* In its final H–2B rule, DOL establishes an appeal process for an employer whose temporary labor certification is denied. DHS believes that this DOL provision addresses these commenters' concerns. Therefore, under this final rule, DHS removes the provisions allowing the approval of H–

2B petitions that are filed with denied temporary labor certifications.

*Comment:* A few commenters suggested that DHS should accept and process petitions for H–2B workers based upon an appealed temporary labor certification with the U.S. Department of Labor, whether the current statutory limitation on H–2B visas has been met or not.

*Response:* The final rule does not adopt this suggestion because DHS cannot accept H–2B petitions once the statutory limitation on H–2B visas has been reached. INA sec. 214(g)(1)(B) and 214(g)(10), 8 U.S.C. 1184(g)(1)(B) and 8 U.S.C. 1184(g)(10). Petitioners would derive no advantage by filing an H–2B petition with a pending DOL appeal, as there are no provisions authorizing DHS to set aside an H–2B visa number. Moreover, all applicants and petitioners must establish eligibility at the time of filing. 8 CFR 103.2(b)(1). USCIS has also determined that it would be an inappropriate intrusion into the DOL appeal process if DHS were to accept petitions before that process is complete.

b. Employment Start Date

*Comment:* Sixty-four out of 69 commenters opposed the proposal to prohibit H–2B petitioners from requesting an employment start date on the Form I–129 that is different from the date of need listed on the approved temporary labor certification. Many commenters stated that start dates have become problematic due to an unrealistic numeric cap imposed by Congress. Of those, the majority of commenters stated that this change would allow only employers who have a need for temporary H–2B workers beginning on October 1 or April 1 to obtain H–2B visas due to the fact that, in recent years, allocation of the 66,000 annual H–2B visas has become increasingly competitive, causing the numeric cap of 33,000 visas in each half of the fiscal year to be reached within a few weeks of each filing period. Employers, particularly small business owners, with seasonal needs beginning in later months expressed concern that this change will effectively leave them ''shut out'' of the H–2B visa program. Furthermore, a number of commenters stated that the only way the proposed regulation can be fair to all employers is if the 66,000 H–2B visas are allocated evenly each month.

Four commenters expressed support for this proposed change. One commenter who supported this change expressed concern that the practice of altering the employment start date for H–2B workers would result in depriving recently unemployed domestic workers of job opportunities.

*Response:* The final rule retains the provision prohibiting the employer from requesting an employment start date on Form I–129 that is different from the date of need listed on the accompanying approved temporary labor certification. *See* new 8 CFR 214.2(h)(6)(iv)(D). However, H–2B employers who have already started the labor certification process as of the date of publication of this rule and wish to change their stated employment start dates would be required to apply for new temporary labor certifications using a new employment start date to comply with this change. Further, DHS believes it would be confusing to employers if DHS implemented this new process to reject petitions that do not comply with this provision during the anticipated surge in the number of petitions for the second half of FY 2009. Therefore, DHS has determined that this provision will take effect for the FY 2010 filing and will not apply to H–2B petitions that are being filed for the second half of the FY 2009 cap.

DHS recognizes the concerns of the commenters that requiring the petition start date to reflect that of the temporary labor certification may have the effect of disadvantaging certain filers whose employment start date begins more than four months after the beginning of the first or second half of the fiscal year. Congress's intent in requiring the biannual allocation of the H–2B annual numerical limitation (*see* section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10)) was to provide relief to seasonal employers who might not otherwise be able to use the H–2B program. With respect to the comments urging that DHS change its method of allocating H–2B numbers to address this concern, we note, preliminarily that it is unclear whether Congress, in enacting section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10), contemplated further divisions of allocations during specific periods of the year (such as on a monthly or quarterly basis), or that such allocations would adequately address the problem identified by the commenters. However, DHS did not provide for any such allocation in its proposed rule. The public, therefore, has not had an adequate opportunity to express its views as to the desirability of changing to a monthly or other type of H–2B number allocation system, as suggested by these commenters. DHS recognizes, however, that even if certain seasonal employers might derive benefit from a change in the current allocation methodology, there nevertheless exists the possibility that, given the lack of sufficient numbers in previous years based on high demand for H–2B numbers, other seasonal employers would still face being cut.

In any event, there are strong arguments in favor of adopting the same employment start date requirement in this final rule. As noted in the **SUPPLEMENTARY INFORMATION** section of the proposed rule, the purpose of this requirement is to preclude certain petitioners from competing unfairly with other prospective employers for the limited number of H–2B visa numbers available by using a fictitious employment start date in order to be considered in the semi-annual allocation process. Additionally, the proposed rule is intended to ensure compliance with section 101(a)(15)(H)(ii)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(b), regarding unavailability of U.S. workers. Requiring that an employer adhere to the start date stated in the approved temporary labor certification will ensure that U.S. workers are able to make an informed decision as to their availability to fill the position in question on the actual employment start date. For these reasons, the final rule retains the same employment start date requirement. *See* new 8 CFR 214.2(h)(6)(iv)(D).

*Comment:* Many commenters expressed concern that the provision to prohibit the employer from changing the employment start date will have a severe negative effect on employers who have made every effort to comply with H–2B visa requirements. Under this provision, employers unable to obtain H–2B workers for the first half of the fiscal year (due to the numeric cap), will need to begin an entirely new recruitment process by filing a new temporary labor certification with DOL 120 days prior to the filing period for the second half of the fiscal year.

*Response:* The final rule retains the provision prohibiting the employer from requesting an employment start date on Form I–129 that is different from the date of need listed on the accompanying approved temporary labor certification. *See* new 8 CFR 214.2(h)(6)(iv)(D). DHS recognizes the efforts employers make to file H–2B petitions in a timely manner and the frustration experienced by the lack of available visa numbers. The commenters should be aware, however, that such unavailability of visa numbers is a result of the statutorily-imposed numerical limitations on the H–2B category and the heavy demand for such numbers by prospective employers rather than any action on the part of DHS. Moreover, in administering the H–2B program, DHS is under a mandate to ensure compliance with section

101(a)(15)(H)(ii)(b) of the INA, 8 U.S.C. 1101(a)(15)(ii)(b), which requires that willing U.S. workers be unavailable to fill the position in question. As discussed above, the only way DHS can satisfy itself that there has been a fair and accurate labor market test and that there is in fact a shortage of U.S. workers is by receiving a temporary labor certification from DOL covering the employment period set forth in the petition, including the same employment start date. Accordingly, if an employer is not able to obtain the needed number of H–2B workers in the first half of the fiscal year, and remains eligible to file a petition in the second half of the year, then that employer must submit a new approved temporary labor certification from DOL covering the new employment period.

*Comment:* Some commenters asked for clarification regarding the one exception to the prohibition on the change of the employment start date.

*Response:* The exception is described in new 8 CFR 214.2(h)(6)(viii)(B). The sole exception is designed to be used by employers when they need to substitute beneficiaries who were previously approved for consular processing but not admitted with aliens who are currently in the United States. As new 8 CFR 214.2(h)(6)(viii)(B) provides, such an amended petition must retain a period of employment within the same half of the fiscal year as the original petition.

*Comment:* Several commenters stated that employers need the flexibility to write a different start date in the petition when unforeseen circumstances occur. Although employers prefer that their petitions reflect the full period of need, since the allocation of the 66,000 annual H–2B visas has become increasingly competitive, the fact that employers can salvage at least part of the period of H–2B employment authorized on the temporary labor certification is important for companies. For example, if an H–2B employer is unable to receive the H–2B workers authorized by the Secretary of Labor at the start date specified on its temporary labor certification and there are no more H–2B visas available, the employer would need the flexibility to apply again for H–2B workers for the second half of the year. If denied an H–2B visa during the first filing period, the employer will unfairly have to restart the entire filing process from the beginning. Another commenter similarly responded that the ability of the program to cover graduated increases in workload is important and that it is imperative that employers be able to manage the start date of their H–2B employees.

*Response:* As the ability to change the date of employment on the Form I–129 from that of the temporary labor certification has been exploited, DHS finds that this change is needed to curtail abuses and ensure the integrity of the H–2B temporary worker program. While there may be rare instances when an employer would need flexibility to change the date of employment due to an unforeseen circumstance, DHS finds that, in practice, an increasingly disproportionate number of H–2B employers have changed the date of H–2B employment on the Form I–129 in order to gain an unfair advantage in obtaining H–2B visas from the limited pool of 66,000 available H–2B visas.

5. Payment of Fees by Beneficiaries To Obtain H–2B Employment

a. Grounds for Denial or Revocation on Notice

*Comment:* Forty-seven out of 57 commenters opposed the proposal to authorize the denial or revocation of an H–2B petition if DHS determines that the petitioner knows or 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, to the petitioner's agent, or to any facilitator, recruiter, or similar employment service in connection with obtaining H–2B employment.

*Response:* After carefully considering these comments, for the reasons stated in the paragraphs below, the final rule retains the proposal. DHS has the authority to deny or revoke an H–2B petition (following notice and an opportunity to respond) if DHS determines that the petitioner has collected, or entered into an agreement to collect, a fee or compensation as a condition of obtaining the offer of H–2B employment, or that the petitioner knows or should know that the beneficiary has paid or agreed to pay any facilitator, recruiter, or similar employment service to obtain H–2B employment. *See* new 8 CFR 214.2(h)(6)(i)(B). However, the final rule includes provisions to allow H–2B employers to avoid denial or revocation if one of 3 exceptions applies: (1) Prior to the filing of the petition, the alien beneficiary has been reimbursed for any prohibited fees the alien paid; (2) before the filing of the petition and payment of any prohibited fees, the agreement for the alien to pay such fees has been terminated; or (3) where an agent or recruiter violates the prohibition on collecting or agreeing to collect a fee without the petitioner's knowledge or reason to know, the petitioner notifies DHS of the prohibited payments or agreement within two work days of learning of such payments or agreement. A petitioner will not be able to avoid denial or revocation of the petition if DHS determines that the beneficiary paid the petitioner the prohibited fees after the petition was filed. It is contemplated that a petitioner who avoids denial or revocation of a petition based on timely notification of a recruiter or agent violation will be on notice to take precautions to ensure that its workers will not be required to make such prohibited payments in the future.

DHS has determined that a prohibition on any payment made by a foreign worker in connection with the offer of H–2B employment is more restrictive than necessary to address the problem of worker exploitation by unscrupulous employers, recruiters, or facilitators imposing costs on workers as a condition of selection for the offer of H–2B employment. Accordingly, DHS has not included in the final rule the prohibition on payments made in connection with the offer of H–2B employment, but retains the prohibition on payments made to an employer, recruiter, facilitator, or other employment service by the foreign worker that are a condition of obtaining the offer of H–B employment.

*Comment:* Some commenters who supported this proposal recognized this provision as an important step to deter petition padding, visa selling, and human trafficking schemes that lead to the effective indenture of H–2B workers. Another commenter stated that, rather than attestation from employers, DHS should instead propose meaningful enforcement measures that will empower guest workers. This commenter further suggested that the violation of this provision should result in debarment from the H–2B and other visa programs.

*Response:* DHS has reached agreement with DOL regarding the delegation by DHS of statutory authority to DOL to establish an enforcement process to investigate compliance with the H–2B requirements and to remedy violations uncovered as a result by imposing fines or debarment. INA sec. 214(c)(14), 8 U.S.C. 1184(c)(14)(A). DHS and DOL have reached a mutually agreeable delegation of such enforcement authority. Appropriate debarment procedures will be instituted to implement new 8 CFR 204.5(o) and 214.1(k). Specifically, upon a debarment determination by DOL under 20 CFR 655.31, and exhaustion of an employer's administrative remedies provided under

DOL's H–2B regulations challenging such a DOL debarment determination, DHS may, under the authority provided DHS in section 214(a)(14)(A)(ii) of the INA, 8 U.S.C. 1184(a)(14)(A)(ii), deny both immigrant and nonimmigrant visa petitions for a period of one to five years, depending on the severity of the employer's violation leading to such DOL-debarment action. With regard to the H–2B program on Guam, it should be noted that, although the Governor of Guam, as opposed to DOL, continues to have the authority under 8 CFR 214.2(h)(6)(iii)(D) to establish procedures for administering the H–2B temporary labor certification program in the Territory of Guam, DHS retains its ultimate authority to invalidate a temporary labor certification issued by the Governor of Guam. 8 CFR 214.2(h)(6)(v)(H). Further, the authority of the Governor of Guam to issue temporary labor certifications in that territory does not in any way limit the authority of DHS to take any action it deems necessary under section 214(a)(14)(A)(i) or (ii) of the INA, 8 U.S.C. 1184(a)(14)(A)(i) or (ii).

*Comment:* One commenter, stating that small businesses can do little to curb malicious behavior/practice in foreign countries, requested that DHS change the legal standard so that an employer would only be liable for actually ''knowing'' that a worker paid a recruiter or labor contractor, which may decrease employer confusion and liability.

*Response:* DHS does not believe that including ''should know'' in addition to the ''knowing'' standard that was contained in the proposed rule imposes excessive risks of a violation or liability on the employer. The employer is responsible for initiating the recruitment process and chooses whom it will use to obtain foreign labor. The U.S. employer has control over whether to use recruiters and the terms and conditions of any recruitment arrangement, including the costs of such services. The employer can comply with this requirement by making reasonable arrangements and inquiries as to whether its employees have paid or will be required to pay a fee.

*Comment:* Many commenters argued that this proposal is unreasonable and that it does not afford any protections to the employer. They stated that overseas recruiters are engaged in actions beyond the employer's control and that the employer is not involved in, and has no knowledge of, any agreements made between an overseas recruiter and the temporary worker. Some commenters also raised concerns about workers who may abandon their employment after making a false claim about the payment of prohibited fees, resulting in reimbursement by the employer.

*Response:* DHS recognizes this concern and notes that it will serve notice of intent to revoke on a petitioner before revoking an H–2B petition. The employer will be provided with an opportunity to respond and submit documentation responding to the notice. To protect a petitioner who discovers, after the filing of the petition, that the alien worker paid or agreed to pay an employment service the prohibited fees, the final rule provides that the petitioner can avoid denial or revocation by notifying DHS within two work days of obtaining this knowledge as an alternative to reimbursing the alien or terminating the agreement. New 8 CFR 214.2(h)(6)(i)(B)(*4*). DHS will publish a notice in the **Federal Register** to describe the manner in which the notification must be provided.

DHS does not believe that it is appropriate to impose the same adverse consequence on petitioners who discover a post-filing violation by a labor recruiter that is imposed on more culpable petitioners who themselves violate the prohibition on collection of fees from H–2B workers, nor should petitioners have to pay for the recruiter's violation by reimbursing the alien. Petitioners should be encouraged to report information about post-filing wrongdoing by labor recruiters, even if reimbursement is not possible. In this way, DHS can help provide further protections to H–2B workers against unscrupulous recruiter practices.

Further, where the petitioner does not reimburse the beneficiary and DHS denies or revokes the H–2B petition, the final rule provides that a condition of approval of subsequent H–2B petitions filed within one year of the denial or revocation is reimbursement to the beneficiary of the denied or revoked petition or a demonstration that the petitioner could not locate the beneficiary despite reasonable efforts to do so. New 8 CFR 214.2(h)(6)(i)(D)(*1*). This requirement is intended to balance the commenters' concerns that an H–2B alien worker should not be required to pay fees as a condition of the offer of obtaining H–2B employment with the legitimate concern that petitioners who run afoul of new 8 CFR 214.2(h)(6)(i)(B) but have attempted in good faith to remedy their noncompliance continue to have access to the H–2B program. The question of whether a petitioner will be able to demonstrate to DHS that it has exercised reasonable efforts to locate the alien worker will depend on the specific facts and circumstances presented. In this regard, DHS will take into consideration the amount of time and effort the petitioner expended in attempting to locate the beneficiary and will require, at a minimum, that the petitioner have attempted to locate the worker at all of the alien's known addresses. The final rule also clarifies that the one-year condition on petition approval will apply anew each time an H–2B petition is denied or revoked on the basis of new 8 CFR 214.2(h)(6)(i)(D)(*2*).

*Comment:* A few commenters suggested that DHS should target its foreign worker abuse provisions toward foreign labor contractors and recruiters that are responsible for the abuses of the H–2B program. Another commenter suggested that DHS work with the Department of State to develop a list of good and bad foreign recruiters and foreign labor contractors so that those that have been found to engage in undesirable practices with regard to H–2B workers would not be allowed to continue recruiting workers from abroad.

*Response:* DHS has no authority to enforce the labor laws of any foreign country nor can it specifically regulate the business practices of recruiters in any foreign country. Since no program for foreign recruiter accreditation was proposed, the establishment of such a program exceeds what can be provided for in this final rule. Also, DHS cannot limit the use of recruiters and facilitators for H–2B purposes to those that maintain an office in the United States and have a license to do business in the United States according to Federal and State laws. However, DHS finds merit in the suggestion and will discuss this matter with the Department of State in the future to determine the feasibility of monitoring foreign recruiters so as to be able to provide information on recruiters and their practices to the affected public.

*Comment:* Many commenters who objected to this proposal suggested that it increases the burden on U.S. employers and makes the cost of the program, which is already expensive, more prohibitive.

*Response:* While DHS understands that this rule requires employers to bear these costs, this provision is necessary to ensure that the actual wages specified on the temporary labor certification will, in fact, be paid to the H–2B worker, thereby ensuring the validity of the labor market test and compliance with section 101(a)(15)(H)(ii)(B) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(B). The choice whether to use recruiters or facilitators and the terms and costs for such services is left entirely to the employer.

*Comment:* A number of commenters stated that they could not effectively run their businesses if they did not use their international agents and recruiters. Similarly, a few commenters objected, stating that there is no statutory authority in the INA for DHS to prohibit prospective workers from paying a recruiter or facilitator. They stated that it is a longstanding practice that foreign agents collect fees from those who wish to find work in the United States and who need assistance with their visa applications and/or the admission process, and in fact, such services have become essential with constant changes in the visa application procedures at U.S. consulates abroad. A few commenters expressed concerns that this provision will disadvantage workers who need help with the process (*e.g.*, who are illiterate, unable to use computers, etc.).

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

*Comment:* Several commenters asked DHS to distinguish between fees for recruitment, and DOL and DHS processes with fees, imposed by the employer or a third party, associated with helping prospective workers to complete visa application forms. They further stated that a fee of $60 should be allowed to be paid by the potential worker to gain assistance. A commenter suggested that DHS should initiate a reasonable cap on what fees can be charged to the prospective workers. Another commenter stated that the term ''indirect fees'' is of particular concern, as it is overly broad and will likely increase litigation.

*Response:* The types of fees that petitioners and recruiters will be prohibited from passing onto H–2B workers include recruitment fees, attorneys' fees, and fees for preparation of visa applications. The final rule does not provide a list of prohibited fees, so that the prohibition against impermissible fees remains general, covering any money paid by the beneficiary to a third party as a condition of the offer of H–2B employment. However, the final rule provides that prohibited fees do not include the lower of the fair market value of or actual costs for transportation to the United States, or payment of any government-specified fees required of persons seeking to travel to the United States, such as fees required by a foreign government for issuance of passports and by the U.S. Department of State for the issuance of visas, to the extent that the passing of such costs to the worker is not prohibited by statute. As such costs would have to be assumed by any alien intending to travel to the United States, DHS believes that each alien should be responsible for them, (except where the passing of such costs to the worker is prohibited by statute). New 8 CFR 214.2(h)(6)(i)(B)(*3*).

*Comment:* Some commenters found that this provision is unclear as to how, in practice, employers will be able to demonstrate reimbursement of any fees, compensation, or other remuneration not related to transportation costs or government-specific fees, particularly for H–2B workers who are only present in the United States for short periods of time and may work at remote worksites.

*Response:* DHS finds that there can be many ways that proof of payment can be established, regardless of the location of a worksite or the length of an employment, with evidence such as copies of receipts, signed contracts, etc. Where a worker is only present for a short period of time, the petitioner may be able to reach the alien by using the alien's known address abroad, etc. As such, DHS finds that any further clarification is unnecessary in the final rule.

*Comment:* One commenter stated that foreign workers should not be given more labor protections than U.S. workers. Since employers are not currently required to pay for U.S. employees' relocation costs or job search costs, they should not be expected to cover such costs for H–2B workers. Another commenter stated that it is not the place of DHS or DOL to dictate the terms and conditions of foreign worker recruitment.

*Response:* DHS has a responsibility not only to protect U.S. workers, but also the foreign workers who are admitted into the H–2B program. As discussed above, DHS will retain in this final rule a provision eliminating the current practice of approving, in certain circumstances, H–2B petitions that are filed with denied or non-determination temporary labor certifications. This significant change will ensure that no H–2B petition is ever approved without a certification from the Department of Labor that an employer has performed adequate recruitment for U.S. workers to fill the temporary positions. The H–2B temporary nonimmigrant program often is a place of last resort for U.S. employers who cannot find sufficient U.S. workers. As such, use of this program may incur additional burdens on the employer. As the agency granted the authority to oversee the H–2B visa program, it is the duty and responsibility of DHS to prevent and protect H–2B workers from improper labor practices and abuse. DHS finds that this provision is necessary in order to ensure that H–2B workers are not charged excessive fees.

*Comment:* One commenter suggested that the definition of the term ''agent'' be modified to exclude attorneys and other representatives as defined in 8 CFR 292.2, arguing that DHS should more directly target abusive recruiters, facilitators, or similar employment facilitators without unintentionally impacting the attorney-client relationship or inhibiting an employer's and H–2B worker's rights to seek counsel.

*Response:* DHS disagrees with the commenter's concern that, with respect to the collection of fees from H–2B workers, the current definition of ''agent'' should exclude attorneys and other representatives. This rule is intended to prohibit the collection of fees or other compensation from a prospective or actual H–2B worker by anyone or any entity as a condition of an offer or condition of H–2B employment. The rule is not intended to limit the employer's or H–2B worker's right to seek counsel, but would prohibit imposition of petitioner's agent/attorney fees on an alien. Furthermore, it is not intended to have any impact on the attorney-client relationship or on an alien's ability to secure his or her own counsel at his or her own volition and not as an express or implicit condition to securing the H–2B employment. DHS believes that it is appropriate to consider an attorney to be an agent, as it does in other

circumstances. 8 CFR 214.2(h)(2)(i)(F). When an attorney or other representative files a petition, it stands in the shoes of the employer and appropriately is charged with ensuring compliance with that the statements made in the petition, and the responsibilities assigned to petitioners and employers, including regarding the alien worker reimbursement provisions of the regulations.

b. Employer Attestation

*Comment:* Eight out of 13 commenters opposed the attestation requirement for H–2B petitioners. One commenter suggested that the employer's attestation should be added as part of the Form I–129. A few commenters were concerned about the undue burdens being placed on the H–2B employer by this additional requirement.

*Response:* DHS has carefully considered the attestation requirement and has determined that a separate attestation requirement is not necessary. A proposed separate attestation requirement in the regulations would be duplicative. However, an attestation relates to eligibility requirements that the petitioner must demonstrate on the H–2B petition that the petitioner must sign as being true and correct. DHS will amend the Form I–129 to include the attestation requirements to minimize the burdens on the H–2B petitioner.

*Comment:* Six commenters responded negatively to this proposal, questioning the effectiveness of the employer's attestation. A few commenters also stated that the employer's attestation would have only a marginal impact if DHS enters into an agreement to delegate auditing and enforcement of petitions to DOL. Another commenter suggested that a certain degree of employer attestation in the current regulations is seldom verified by DHS.

*Response:* DHS has reached agreement with DOL concerning the delegation of authority under section 214(c)(14) of the INA, 8 U.S.C. 1184(c)(14), to establish an enforcement process to investigate compliance with H–2B petition requirements, including violations of the requirements of the temporary labor certification process, and to impose certain administrative sanctions for violations disclosed by any resulting investigations. DHS notes that the attestations made by petitioners, under penalty of perjury, would not be rendered superfluous by the delegation of authority under section 214(c)(14) of the INA, 8 U.S.C. 1184(c), as the information would be of use to DHS in its own investigations of petition violations.

6. Denial of Petition and Revocation of Approval of Petition

*Comment:* DHS received seven comments on the proposal to amend 8 CFR 214.2(h)(10)(ii) and (h)(11)(iii)(A)(*2*) to provide for the denial or revocation of petitions on notice where statements on the petition (or temporary labor certification in the case of revocation) are untrue, inaccurate, fraudulent or misrepresented a material fact. Five out of seven comments opposed the provision. A couple of commenters recommended that the rule allow for an appeals process within DHS.

*Response:* After considering the comments, the final rule adopts the proposal. DHS already has in place procedures which provide petitioners with the opportunity to appeal the denial or revocation of a petition for this nonimmigrant classification. See 8 CFR 103.3(a)(1)(ii).

*Comment:* Commenters questioned DHS's authority to make determinations on whether the facts were inaccurate, fraudulent, or misrepresented on a previously approved temporary labor certification.

*Response:* In reviewing whether a petition is approvable, DHS reviews all of the necessary documentation that is required to be submitted with the petition, including the underlying temporary labor certification and any accompanying documentation. In so doing, DHS may examine elements that are presented not only on the petition, but on the temporary labor certification as well for consistency such as stated wages, the nature of the job offered, the location, and other factors common to both petition and temporary labor certification. It is not new to DHS to make determinations, often upon further inquiry, as to misrepresentations, material omissions, discrepancies and the like. While DHS will not go into the merits of the determination previously made by DOL, DHS is responsible for ensuring the integrity of the H–2B program, that the facts presented in the entire petition package are true and verifiable. Where it is established on notice and with opportunity to respond, that the statement of facts contained in the petition or on the application for a temporary labor certification was inaccurate, fraudulent, or misrepresented, DHS acts completely within its authority to deny or revoke a petition. In other words, DHS disagrees with the commenters that it must simply ignore misrepresentation or fraud solely because such appears more prevalently on the temporary labor certification document. It is inevitable that any material misrepresentations or fraud at any stage of the H–2B process will taint the entire process.

7. Employer Notifications to DHS of H–2B No-Shows, Terminations, or Abscondments

*Comment:* Eight out of 20 commenters objected to the requirement of notifying DHS in three instances within 48 hours for a variety of reasons as explained fully below.

*Response:* After careful consideration of the comments, the final rule adopts this provision with minor modifications. The final rule requires H–2B petitioners to notify DHS within two work days in the following instances: Where an H–2B worker fails to report to work within 5 work days of the date of the employment start date on the H–2B petition; where the nonagricultural labor or services for which H–2B workers were hired were completed more than 30 days early; or where an H–2B worker absconds from the worksite or is terminated prior to the completion of nonagricultural labor or services for which he or she was hired. New 8 CFR 214.2(h)(6)(i)(F)(*1*). The final rule clarifies that the H–2B worker must report to work within 5 ''work days'' of the employment start date, rather than the proposed 5 days. The H–2B employer must report a violation to DHS within two work days, rather than the proposed 48 hours. The final rule adopts the term ''work days'' to clarify the reporting deadlines for H–2B employers. As discussed previously, the final rule does not include the proposal that the employer may establish an employment start date that is different than the start date stated on the H–2B petition for purposes of determining when the notification requirement is triggered where the H–2B worker fails to report for work. This change from the proposed rule is necessary to be consistent with the requirement in this rule that petitioners retain the same employment start date on the H–2B petition as the date of employment need stated on the temporary labor certification approved by the Secretary of Labor.

*Comment:* Several commenters suggested that this provision represents a significant administrative burden on employers. They stated that a notification within 48 hours would be burdensome because it may be impossible for the employer to know with certainty that the H–2B worker absconded from the worksite.

*Response:* DHS disagrees with the commenters' concerns on these points, because the proposed rule defined the circumstances causing an H–2B worker

to be an absconder. An absconder is defined as a worker who has not reported to work for 5 consecutive work days without the consent of the employer. New 8 CFR 214.2(h)(6)(i)(F)(*2*). Therefore, the employer will know whether the H–2B worker has absconded, and whether the regulatory requirement to report this incident to DHS has been triggered. Once the H–2B worker is deemed to be an absconder in accordance with the regulatory definition of absconder, the employer has two additional work days to report this event to DHS.

*Comment:* Some commenters requested that DHS create a simple reporting method via the Internet and/or over the phone to comply with the notification requirements.

*Response:* A notice outlining the notification requirements will be published in the **Federal Register**. In that notice, DHS will provide a designated e-mail address and alternate mail address for employers to send notifications. DHS believes that establishing a dedicated e-mail address for notification purposes will reduce the burden on employers. As H–2B petitioners are required to retain evidence of notifications and make such evidence available for inspection by DHS officers for a one-year period, the final rule does not adopt the suggestion that notification be available by telephone, because that suggestion would interfere with the retention requirement.

*Comment:* One commenter asked how the employer is expected to handle the situation where an H–2B worker is hospitalized due to an accidental injury and is unable to communicate, then at a later date contacts the employer and returns to work upon completion of the treatment for the injury.

*Response:* In the event that an H–2B employer encounters a situation where it chooses to reinstate an absconded employee who has been reported, DHS strongly suggests that the employer notify DHS in the same manner as the original notification. The information will be updated accordingly; however, the employer should document such an incident to support a claim during any future inspection.

*Comment:* A few commenters were concerned that, together with the new provision to preclude a new grant of H–2B status where the alien worker violated the conditions of H–2B status within the 5 years prior to adjudication of the new H–2B petition, this notification is not fair to a worker who absconds but returns home promptly and to a worker who is reported as having absconded but really has left to pursue other H–2B employment.

*Response:* Once an employee absconds, there is no truly effective way for the employer or DHS to verify such employee's whereabouts. The employee could have left the country or could have been working for another employer. If the employee left the United States, he or she should have evidence to establish he or she departed the United States. If an employee is approved and does work for another U.S. employer, he or she should be able to present such documentation to DHS in case of an inspection. This provision is intended to ensure that all H–2B workers maintain legal immigration status. DHS has no intention of imposing adverse consequences on workers who leave the United States or start working for another employer as long as they do so legally.

*Comment:* A few commenters stated that it is a complex legal issue to determine an alien's status and the reporting requirements will force H–2B employers to make such a determination and thus potentially expose them to legal liability from the employees.

*Response:* DHS disagrees with the commenter because DHS does not expect an H–2B employer to make any determination on any alien worker's legal status outside of the requirements to verify employment eligibility pursuant to section 274A of the INA, 8 U.S.C. 1324a. Once DHS receives a notification from the employer that an alien has not shown up, has been terminated, or has absconded, DHS will review the notification, make a determination regarding the alien worker's status, and decide on any further action, as appropriate. DHS, not the employer, will make any determination regarding the alien worker's status.

*Comment:* One commenter suggested that DHS should allow standard arbitration language as part of the foreign worker placement process and the employee should be allowed to agree to mediation or arbitration of any issues. The employer should be relieved of further responsibility to the worker if he or she disappears without attempting arbitration.

*Response:* DHS does not specifically regulate the business practices between private parties under existing authorities. Thus, the final rule does not adopt this suggestion, as it is beyond the scope of this rulemaking.

*Comment:* One commenter recommended that DHS reconcile its requirements for employers to notify DHS of an H–2B worker no-show, termination, or abscondment with those proposed by DOL for their H–2B regulations.

*Response:* DHS shares the commenter's concerns that employers should not be confused by inconsistencies between the two agencies' reporting requirements. Therefore, in developing the final rule DHS has worked with DOL to ensure that the agencies' requirements for reporting H–2B employee no-shows, early terminations, and abscondments are consistent with each other.

*Comment:* There were several comments that pointed out the lack of resources at DHS and therefore the lack of enforcement. They suggested that, given the fact that DHS is unlikely to use its limited resources to pursue these reported alien workers, the notification requirements will accomplish little while imposing burdens on employers.

*Response:* DHS disagrees with the commenters' concerns. All notifications will be reviewed and enforcement actions will be taken, as appropriate.

*Comment:* One commenter opposed this provision, stating that H–2B employers will likely abuse the reporting process to threaten workers, such as workers who leave their jobs because of unlawful conditions, because promised work is not available to them, or because they have been injured on the job.

*Response:* The purpose of the reporting requirement is to enable DHS to keep track of H–2B workers while they are in the United States and take appropriate enforcement action where DHS determines that the H–2B workers have violated the terms and conditions of their nonimmigrant stay. The reporting requirement is not, however, intended to be used by employers as a threat against their alien workers to keep them in an abusive work situation. Allegations of improper reporting, abuse and/or intimidation are subject to investigation and enforcement action by DHS and other government agencies. If DHS determines that an employer is engaging in worker intimidation or other abuses, such employer will be, at a minimum, in violation of the terms and conditions of its H–2B petition and therefore subject to having its petition revoked on notice under 8 CFR 214.2(h)(11)(iii)(A)(3). For this reason, DHS disagrees with the commenter's concerns and will adopt the proposed provision.

8. Violations of H–2B Status

*Comment:* Four out of seven commenters opposed the proposal to add a new provision to the regulations (proposed 8 CFR 214.2(h)(6)(ix)) that would preclude a new grant of H–2B

status within five years of an alien worker's having violated the conditions of H–2B status, other than through no fault of his or her own. One commenter argued that DHS lacks the authority to impose additional or more restrictive grounds of inadmissibility on applicants. Another commenter stated that although DHS justifies the proposed 5-year bar for H–2B workers by comparing it to the existing bar in the H–2A agricultural temporary worker program, there are multiple disparities between the H–2A and H–2B programs. The commenter noted that the H–2B program does not require the H–2A program's Adverse Effect Wage Rate, worker's compensation insurance, free housing, free transportation, free tools, 75 percent work guarantee, 50 percent U.S.-worker hiring rule, and other benefits and protections, all of which could be promulgated by regulation in the H–2B program. Moreover, H–2A workers qualify for Legal Services Corporation (LSC)-funded legal representation whereas H–2B workers do not.

*Response:* DHS carefully considered the comments and has decided not to adopt the proposed provision to 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 5 years prior to adjudication of the new H–2B petition by DHS. In light of the comments opposing the proposal, DHS finds that the provisions it has adopted in this final rule that are intended to enforce the terms and conditions of an alien's admission and compliance with H–2B program requirements are sufficient at this time. However, DHS may consider the proposal in the future. Note that DHS's decision not to impose the 5-year bar does not alter existing requirements regarding maintenance of status.

*Comment:* A few commenters suggested that there should be a process whereby a worker can request a review and reinstatement based on previous experience where the workers were improperly detained and deported by U.S. Immigration and Customs Enforcement (ICE) while they were actually in status.

*Response:* ICE is charged with enforcing the laws against the employment of unauthorized aliens and with detaining and removing aliens. ICE's policies and authorities are outside of the scope of this rulemaking.

9. Temporary Worker Visa Exit Program Pilot

*Comment:* Five out of thirteen commenters expressed support for the proposal to add a new provision at 8 CFR 215.9 that establishes the Temporary Worker Visa Exit Program Pilot. The commenters are in favor of the Temporary Worker Visa Exit Program Pilot because it will improve the exit control system at the U.S. border and will also provide data that accurately reflects the number of H–2B workers that remain in the U.S. illegally.

*Response:* DHS carefully considered all of the comments and appreciates those that are in favor of the Temporary Worker Visa Exit Program Pilot and adopts the proposed provision at 8 CFR 215.9. Those comments that are not favorable or express concerns about the program are discussed more fully below.

*Comment:* Several commenters requested additional information regarding the Temporary Worker Visa Exit Program Pilot and the ports of entry that will participate in the program.

*Response:* CBP will publish a notice in the **Federal Register** to provide further details about the program pilot including the ports of entry that will participate in the pilot. The notice will also provide the biographic and biometric information that will need to be provided by those H–2B workers and the means by which they can provide the information upon departure.

*Comment:* Some commenters expressed concern that it is currently very difficult for H–2B workers to submit the Form I–94, Arrival-Departure Record, to CBP and have the CBP agent note they are leaving the United States. These commenters note that this is especially true if the H–2B workers leave the United States at a land port via bus. The commenters suggest that CBP make it a rule that all buses need to stop and allow the passengers to cancel their I–94 when they leave the United States.

*Response:* The Temporary Worker Visa Exit Program Pilot will facilitate the exit process by providing kiosks that allow for easy scanning of H–2B workers' travel documents and the deposit of their I–94. While the commenters' suggestion that CBP should require all buses that travel across the border to stop for immigration purposes is appreciated, the comment is beyond the scope of this rule.

*Comment:* Some commenters expressed concerns regarding the re-admission of H–2B workers who depart the United States during their term of admission in the United States.

*Response:* The implementation of the Temporary Worker Visa Exit Program Pilot does not change the documentary requirements or the terms of admission or re-admission to the United States after a brief departure for H–2B workers admitted under H–2B classifications. Additionally, the requirement that an H–2B worker depart through one of the participating ports of entry and present designated biographic and biometric information applies only to the alien's final departure, at the end of his or her authorized period of stay.

*Comment:* Several commenters expressed concern that, if there are insufficient ports of entry participating in the program (*e.g.*, there are no participating ports in the geographical vicinity of the H–2B employer), it will impose an undue burden on those H–2B workers that must depart through a port participating in the program.

*Response:* The Temporary Worker Visa Exit Program Pilot is being initiated at two ports of entry. Only those H–2B workers that enter the United States at one of the two ports participating in the program pilot will be required to depart from one of the participating ports. Moreover, most H–2B workers generally are admitted at the port of entry that is most convenient to their residence. Therefore, it would generally be expected that H–2B workers would depart from the port of entry that is most convenient to their residence in their home country. By initially conducting the program pilot at two ports, CBP is minimizing the impact of the program pilot while at the same time collecting the data and information necessary to make determinations regarding expansion of the program in the future.

*Comment:* One commenter suggested that when H–2B workers leave their employers early, DHS should be informed so that DHS can stay in contact with the H–2B workers and the Temporary Worker Visa Exit Program can know which H–2B workers have left the country.

*Response:* Pursuant to 8 CFR 214.2(h)(6)(i)(F), employers are required to notify DHS if an H–2B worker fails to report for work within 5 work days of the employment start date stated on the petition, absconds from the worksite, or is terminated prior to the completion of the services for which he or she was hired.

*Comment:* Some commenters questioned whether H–2B workers would be allowed to depart only through ports of entry participating in the program.

*Response:* Only those H–2B workers who enter the United States at one of the two ports participating in the program pilot will be required to depart at the end of their authorized period of stay from either one of the participating ports.

*Comment:* One commenter requested the opportunity to have stakeholder input through notice and comment on the implementation process for the Temporary Worker Visa Exit Program Pilot.

*Response:* DHS believes that stakeholders have been given the opportunity to provide input on the program pilot through this rulemaking.

*Comment:* One commenter expressed concern that H–2B workers will not receive sufficient notice of their responsibilities under the Temporary Worker Visa Exit Program Pilot.

*Response:* DHS agrees that H–2B workers must be given sufficient notice of their responsibilities under the program. Accordingly, CBP will publish a **Federal Register** notice that will provide further details about the program pilot including the ports of entry that will participate in the pilot. The notice will also provide the biographic and biometric information that will need to be provided by those H–2B workers and the means by which they can provide the information upon departure. Additionally, upon admission into the United States, CBP will explain their obligations under this program, which is to register their final departure from the United States before or upon expiration of their work authorization. This explanation will include both verbal instructions and written walk-away materials (in both English and Spanish) to fully explain the pilot program to the participants.

*Comment:* One commenter expressed concern that the Temporary Worker Visa Exit Program Pilot will facilitate illegal immigration. Specifically, the commenter expresses concern that unless biographic and biometric information are collected at arrival, departure procedures will not be effective.

*Response:* The Temporary Worker Visa Exit Program Pilot will increase the ability of CBP to monitor the departure of workers admitted on H–2B visas. Currently, as part of the arrival process for most aliens, H–2B workers must submit both biographical (passport/visa) and biometric (fingerprints) information. The pilot program is designed to positively record the departure of H–2B workers by utilizing the biographic and biometric information submitted at the time of entry and departure. Thus, the pilot program is designed to reduce, not facilitate, illegal immigration.

*Comment:* One commenter expressed concern that the proposed rule does not state the consequences for H–2B workers who fail to comply with the exit requirements. The commenter further states that if non-compliance with the pilot program requirements results in H–2B workers being denied H–2B status in the future, then the sanction would be unduly severe and would have a negative impact on employers who would be prevented from utilizing the services of H–2B workers in future years.

*Response:* DHS recognizes these concerns. As discussed above, the final rule does not include the proposed provision to preclude aliens from being granted H–2B status based on a prior violation of the conditions of H–2B status, other than through no fault of their own, within the 5 years prior to adjudication of the new H–2B petition by DHS.

10. Temporary Need

*Comment:* Seven out of 26 commenters supported the proposed rule amending the current definition of ''temporary services or labor.'' Under the proposed rule, a job would be defined as temporary where the employer needs a worker to fill a specific need that will end in the near definable future. The proposed rule would eliminate the ''extraordinary circumstances'' restriction for validity periods of more than one year and explicitly provided that such a validity period could last up to 3 years. A few commenters indicated that they supported these provisions without any additional changes.

*Response:* DHS appreciates the comments received from the public in favor of the modified and more flexible definition of ''temporary,'' which is generally defined as a period of duration of one year, but could be for a specific one-time need of up to 3 years. This more flexible definition of ''temporary'' will allow U.S. employers and eligible foreign workers the maximum flexibility allowed under this program to complete projects with a definable end that require H–2B workers when U.S. workers are otherwise unavailable. For this and the other reasons stated in the proposed rule, DHS is retaining the proposed rule's amendment to the current definition of ''temporary services or labor.'' While a petitioner need no longer demonstrate ''extraordinary circumstances'' to justify an H–2B petition validity period of longer than one year, the 3-year maximum validity period is not intended to be a default, but would be available only where the petitioner can demonstrate a specific and typically one-time need for the worker's services for that period of time. Under the final rule, the validity period of an H–2B petition will therefore be tied to the nature and period of the employer's temporary need and not to any specific period of time.

*Comment:* Several commenters stated that the amended definition of ''temporary services or labor,'' which could be for as long as 3 years based on a one-time need, will have a disproportionately adverse impact on domestic workers in the construction industry, which DHS singled out as the illustrative example justifying the changes. These commenters further stated that the requirement that employers must re-test the labor market each year does not represent a meaningful safeguard for current and future domestic construction workers, if DOL adopts the attestation-based system it proposed in their corresponding proposed rule. These commenters also proposed that DHS keep the H–2B program congruent with the H–2A program, which defines temporary to be a duration of generally one year or less.

*Response:* DHS recognizes these concerns regarding the amended definition of ''temporary services or labor,'' but notes the following. First, while a ''temporary period of time'' is defined in the proposed rule as a period of up to 3 years, H–2B status will not necessarily be granted for the maximum 3-year period in every case. Three years is the maximum period of time permissible, but not necessarily the actual period of time needed for the specific job described on the temporary labor certification and in the H–2B petition. Therefore, each application for temporary labor certification will be evaluated on a case-by-case basis, considering the nature and specific needs of the job to be performed to determine if it is temporary. In cases where the H–2B employer requires the services of H–2B workers for more than one year, the H–2B employer is required to each year apply for and receive an approved temporary labor certification from DOL that re-tests the labor market and contains an accurate and current prevailing wage determination. DOL only grants another temporary labor certification to enable an extension of stay for the H–2B workers if that labor market test has been satisfied, and there are no able and qualified U.S. workers available to fill the positions in question and the employment of the foreign workers will not adversely affect the wage and working conditions of similarly employed U.S. workers. Lastly, in response to the comment that DHS keep the H–2B program congruent with the H–2A program, there are many similarities between the H–2A and H–2B programs; however, the H–2A program is specifically geared towards

the agricultural industry. Typically, an agricultural growing season is, by its very nature, a duration of less than one year. By contrast, the H–2B program covers a broad spectrum of industries, each representing divergent circumstances. An H–2B petitioner might be able to provide verifiable evidence of a one-time need for workers to complete a particular project within a specific period of time not to exceed 3 years. Therefore, DHS will retain without change the definition of ''temporary,'' as stated in the proposed H–2B rule.

*Comment:* Several commenters stated that the period of time described in the proposed rule, longer than one year but shorter than the maximum 3-year period, would allow employers to bypass the former requirement that employers show extraordinary circumstances justifying a one-time need, and that it appears to coincide with the length of time required to complete most domestic construction projects.

*Response:* DHS appreciates the concerns raised; however, the amended definition of ''temporary,'' which is generally one year but could last as long as 3 years based on a one-time need, is not geared to any one industry, nor is it intended to change the basic requirement that an employer's need in fact be temporary—rather than permanent—in nature. While it is true, therefore, that a petitioner need not establish the existence of extraordinary circumstances justifying a one-time need of duration longer than one year, this amended definition of the term temporary is still tied to an employer's specific needs, and is not intended to create as a default a validity period of greater than one year in duration. Instead, this amended definition of ''temporary'' accounts for circumstances that may necessitate the need for H–2B temporary workers for a period of more than one year. As a further protection for U.S. workers, this regulation also requires that, in cases where the employer's need exceeds one year, the employer submit to DHS a petition extension request, together with a newly approved labor certification issued by DOL covering the requested extension period.

*Comment:* A few commenters inquired about how this rule could justify H–2B visas lasting up to a period of 3 years, noting that a job of 3 years is not temporary.

*Response:* This rule defines the term ''temporary service or labor'' to be employment for which there is a need lasting a finite, specific period, generally defined as one year, but possibly as long as 3 years if there is a specific one-time need. The employer must establish that the need for the employee will end in the near, definable future. H–2B petitions will be granted for the period authorized on the temporary labor certification. As noted, each petition must be evaluated on its own merits, on a case-by-case basis. In this regard, the regulation contemplates a double-check system to ensure that the job in question is in fact temporary in nature. First, when seeking a temporary labor certification with DOL, the employer must not only describe to DOL the nature, scope, and duration of the temporary job, but also justify the need for temporary workers to fill those jobs for which U.S. workers are not available. USCIS will approve the H–2B petition for the validity period endorsed by the DOL on the approved temporary labor certification. If the temporary labor certification is not endorsed for the full validity period requested by the employer on the H–2B petition, USCIS will require an extension petition to be filed with a current temporary labor certification covering the extended validity period.

Second, DHS retains the authority, even after DOL approves the temporary labor certification, to determine, at the time it adjudicates the H–2B petition, whether the petitioner's need is in fact temporary, that is, of a limited, finite nature. Similarly, DHS has the authority to revoke such a petition if it determines that the job is in fact not temporary in nature.

Finally, it is important to understand that the changes in this rule to the definition of ''temporary labor or services'' do not alter what have always been the outer limits of permissible H–2B employment; even under current regulations it would be possible to demonstrate a temporary need of more than one year and possibly up to 3 years in duration, provided extraordinary circumstances were demonstrated.

*Comment:* Two commenters opposed this provision, concerned that the change would allow employers in industries that in the past have relied heavily on the H–1B specialty occupation worker program (including the high-tech and construction industries) to now be eligible for the H–2B program (for types of employment for which the H–2B program was never intended) and overrun the limited supply of H–2B visas. One such commenter was concerned that H–1B employers and lawyers will seize upon this change and instantly ruin this program for employers in industries that have traditionally relied upon the H–2B visa program.

*Response:* While DHS appreciates the concerns regarding numerical limitations on the H–1B and H–2B nonimmigrant programs, DHS believes that the requirement that H–2B employers establish that both the nature of the employment and the job itself are temporary sufficiently reduces the likelihood that foreign workers who would otherwise apply for H–1B visas will consume all the H–2B visas. Many types of H–1B employment do not satisfy the first requirement that the job itself be temporary. DHS disagrees with the commenters that admission of greater numbers of higher skilled qualified workers in the H–2B classification would ''instantly ruin'' the program for traditional H–2B petitioners. First, other than providing that the H–2B category be available to temporary nonagricultural workers, Congress generally did not specify or limit the types of jobs which an alien might fill in H–2B classification. The H–2B category is available to both professional and nonprofessional workers, provided that such persons meet the other requirements for H–2B classification. That said, unlike the H–2B category, which requires that the employer's need be temporary in nature, the H–1B category allows petitioners to fill, on a temporary basis, specialty occupation positions that themselves are permanent in nature, that is, jobs for which the H–1B employer has a permanent need. For this reason, many persons who might qualify for H–1B classification would not be able to obtain H–2B status. Second, as an additional safeguard, Congress established numerical limitations on the total numbers of persons who may be granted H–2B status each year; those limitations do not favor any one industry over another. In short, in situations where the H–2B petitioner could in fact establish that its need for a worker is temporary in nature in a profession common to the H–1B classification (*e.g.*, programmer analyst), that the alien would in fact be coming to the United States as an H–2B temporarily, and that all other requirements for H–2B classification have been satisfied, there is nothing in existing law that would preclude DHS from approving an H–2B petition on such a person's behalf.

*Comment:* A few commenters expressed concern with requiring employers to retest the labor market for prevailing wage rates. These commenters indicated that this process was not only burdensome, but also time-consuming and expensive for employers, costing anywhere between

$500 and $1850. They also mentioned the concern that an H–2B worker employed on a multi-year visa might have to be fired if the labor test results in the employer being prevented from employing some or all of the previously approved H–2B workers (even if the U.S. Government approved such workers for H–2B classification erroneously). Finally, one commenter mentioned that re-testing the labor market for prevailing wage rates did not represent a meaningful safeguard for current and future construction workers if DOL were to adopt the attestation based system described in its proposed rule.

*Response:* The requirement for employers to retest the labor market provides the safeguards needed to ensure that the amended definition of temporary work, which is generally one year, but potentially up to 3 years if there is a specific one-time need, and does not adversely impact the U.S. job market. Notwithstanding the costs of retesting the labor market each year, this system is geared towards ensuring that the employer is offering the prevailing wage rate, which is an inherent requirement mandated by section 101(a)(15)(H)(ii)(b) of the INA, 8 U.S.C. 1101(a)(15)(H)(ii)(b), and therefore, a legitimate cost of participating in the H–2B program.

*Comment:* One commenter suggested that a new visa classification be created for skilled workers and workers who are coming to jobs that will last longer than one year to facilitate more specific and far reaching tests of the U.S. labor market, thereby ensuring that temporary foreign workers filling these longer term jobs are not displacing U.S. workers.

*Response:* DHS appreciates this suggestion for a new and more flexible visa classification, but only Congress has the authority to create new or to modify existing visa classifications. Absent a statutory amendment, DHS lacks the authority to create a classification for the types of workers referred to by the commenter. We note, however, that some of these workers might be eligible for H–2B classification under this rule, while others might be eligible for classification in other nonimmigrant visa categories.

*Comment:* One commenter asked whether DHS will count a 3-year visa against the cap for 3 consecutive years.

*Response:* This provision provides no change to the way that H–2B aliens are currently counted against the H–2B visa cap. An alien is counted against the cap when an initial H–2B petition for consular notification or change of status is filed on his or her behalf. H–2B aliens requesting an extension of stay, for up to their total period of stay of 3 years, are exempt from the numerical limitations.

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

*Comment:* Two out of four commenters supported the proposed rule exempt certain periods of time spent outside the United States from being counted toward the 3-year maximum period of stay in H–2B nonimmigrant status.

*Response:* The final rule adopts the proposed revision, reducing the minimum period spent outside the United States that would be considered interruptive of accrual of time toward the 3-year limit, where the accumulated stay is 18 months or less, to 45 days. If the accumulated stay is longer than 18 months, the required interruptive period will be 2 months. *See* new 8 CFR 214.2(h)(13)(v).

*Comment:* Two commenters requested clarification of this proposal.

*Response:* An alien worker's total period of stay in H–2B nonimmigrant status may not exceed three years. 8 CFR 214.2(h)(15)(ii)(C). In order to clarify what constitutes continuous presence in H–2B status, DHS determined to apply the same standard to the H–2B status as is used for H–2A ''temporary agricultural worker'' nonimmigrant classification. In the H–2A nonimmigrant visa classification, certain periods of time spent outside the United States are deemed to ''stop the clock'' toward the accrual of the 3-year limit on the total period of stay in that status. 8 CFR 214.2(h)(5)(viii)(C). In other words, if an alien who has been in the United States in H–2A status for a certain period of time that counts towards his or her 3-year maximum period of stay, then leaves the United States for one of the ''interruptive'' periods proposed in this rule, that time spent outside of the United States will not count towards the exhaustion of that alien's 3-year maximum period of stay in the United States. DHS recently revised these periods for the H–2A classification to streamline the program. Similarly, for H–2B nonimmigrants, the minimum period spent outside the United States that would be considered interruptive of accrual of time toward the 3-year limit, where the accumulated period of time the worker has physically been present in the United States H–2B status is 18 months or less, is 45 days. If the accumulated period of time the worker has been physically present in the United States in H–2B status is longer than 18 months, the required interruptive period is two months.

12. Substitution of Beneficiaries

*Comment:* Seven out of 11 commenters supported the provisions allowing the substitution of beneficiaries who were previously approved with aliens either inside or outside of the United States. Some commenters indicated that they felt as though the provision would be very helpful and would provide employers greater flexibility to meet their staffing needs.

*Response:* DHS appreciates these comments and agrees that this would make the H–2B program more user-friendly. Accordingly, the final rule adopts this provision. To ensure the integrity of the congressionally-mandated H–2B semi-annual numerical limitations, the final rule contains the caveat that the amended petition filed on the substituted beneficiaries' behalf must retain a period of employment within the same half of the same fiscal year as the original petition. Otherwise, a new petition, together with a new temporary labor certification, must be filed in order to effect the substitution.

*Comment:* One commenter indicated that the fees should not be required for second or amended petitions.

*Response:* DHS understands the concern but does not adopt the commenters' suggestion, because there will be additional labor and material costs incurred by USCIS in processing and adjudicating petitions for substituted beneficiaries. Section 286(m) of the INA, 8 U.S.C. 1356(m), allows USCIS to recover the costs incurred in providing these services.

*Comment:* One commenter indicated that when seeking to substitute beneficiaries, the petitioner should be able to file on behalf of beneficiaries outside the United States and inside the United States on the same petition.

*Response:* It is not operationally feasible for DHS to adopt this suggestion, as petition approvals on behalf of aliens who will be seeking consular processing abroad and petition approvals on behalf of aliens who will be applying within the United States for a change of status or extension of stay are generated and documented differently, as separate and distinct actions. This suggestion would require USCIS to take two separate actions (consular notification for aliens abroad and adjudication of the alien's application for change of status/extension of stay for aliens in the United States) on one petition. DHS will not adopt the suggestion.

*Comment:* With respect to the issue of substitution, one commenter inquired whether once the first half cap is

reached, substituted workers would be counted against the cap, and whether an amended petition could be filed to allow substituted workers to be used during the second half of the fiscal year.

*Response:* The proposed rule specified that the amended petition to substitute workers must retain a period of employment within the same half of the fiscal year as the original petition. The purpose of this restriction is to ensure that employers who are substituting workers do not gain an unfair advantage with respect to obtaining cap numbers over others seeking H–2B numbers by gaining access to new workers during the second cap period, which is from April 1 through September 30 of each fiscal year. For example, if the employer, whose original petition was approved for an employment that starts on October 1, could not find all of the workers abroad, he or she is allowed to file an amended petition to substitute vacant positions with aliens who are already in the United States as long as the employment of the substituted worker starts prior to April 1 of the following year.

*Comment:* One commenter opposed the proposed rule, stating that its adoption would severely harm prospective H–2B workers who frequently spend tremendous resources and leave employment in their home countries in order to enter the H–2B program.

*Response:* DHS disagrees that adoption of the proposed rule will harm prospective H–2B workers abroad. The annual cap of 66,000 H–2B visas is reached earlier every year. The changes in this final rule will allow employers to maximize the number of approved H–2B workers available for employment regardless of their location. It will also allow H–2B workers to maximize their 3 years of H–2B visa eligibility, since employers can more easily apply for them. Further, DOL has provided protections, including the payment of return transportation, for aliens who are terminated.

13. Employer Sanctions

*Comment:* Ten out of 20 commenters expressed support concerning the employer sanctions provisions. Some commenters found this provision to be misguided because it would specifically target employers who hire workers legally through the H–2B program instead of employers who hire falsely documented workers and/or undocumented workers. One commenter suggested that, along with this provision, an appeals process should be established for employers found to be in violation. Of those opposed to this provision, most found that these regulations do not go far enough to protect H–2B workers against exploitation and abuse or to prevent employers and recruiters from violating immigration and labor laws. One commenter stated, in particular, that the rule does not provide protection for workers from retaliation by employers and recruiters who violate the law.

*Response:* After carefully considering the comments received on this provision, the final rule adopts the employer sanctions provisions. New 8 CFR 204.5(o) and 214.1(k). As such, DHS has delegated to the Department of Labor the authority to impose the administrative penalties described in section 214(c)(14)(A) of the INA, 8 U.S.C. 1184(c)(14)(A).

14. Miscellaneous Changes

DHS proposed 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. DHS also proposed to amend 8 CFR 214.2(h)(8)(ii)(A) to codify the current numerical counting procedures for the H–2B classification. No comments were received on these proposals, and they will be adopted as final without change.

## 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 *http://www.regulations.gov* in rulemaking Docket No. USCIS–2007–0058.

1. Comments From the U.S. Small Business Administration (SBA), Office of Advocacy

In addition to the public comments received on the proposed rule, DHS received a comment from SBA, Office of Advocacy (Advocacy). The comment letter from Advocacy summarized the concerns that they heard from small business owners and representatives of the small business community. Advocacy's comments on the substance of the rule are addressed in the rule's preamble along with other comments received on the proposed rule, and their comments on the rule's estimated costs and benefits are summarized and addressed as follows:

*(i). DHS must disclose how it estimated the cost of $500 per employee for job placement fees, because the State Department has reported that applicants have paid foreign recruiters from $2000 to $20,000.*

The regulatory impact analysis for the final rule indicates that recruiting practices vary widely among employers and industries, and provides an explanation for how the estimate of $500 was determined. Also, as stated in the cost benefit analysis for the proposed rule, a detailed breakdown of what services were being provided in return for the $500 payment was not obtained, and none was provided in a comment on the rule. DHS included the entire $500 in its calculation of the costs of this change on employers so that the estimated costs would be at the highest point in the range of costs that would actually be imposed. Even using those liberal cost estimates, as shown below, the costs imposed by this rule do not result in a significant economic impact on the affected entities.

*(ii). DHS should quantify the costs to employers for the payment of the worker's indirect fees, such as attorney's fees, travel agent fees, and fees for assistance to prepare visa application forms. Advocacy indicated that the proposed rule stated that the prospective employer would be responsible for the payment of indirect fees, attorneys fees, travel agent fees, and fees for assistance to prepare visa application forms.*

The $500 estimated cost per employee that will result from this ban on fees is

intended to include incidental attorney's fees, travel agent fees, and fees for assistance to prepare visa application forms. Therefore they have been quantified. This provision will require an employer to ask the employee about any fees the employee may have paid. The fee allowable is dependent on: (a) What is paid after the employee establishes meaningful contact with the agent or recruiter and (b) whether the alien has an independent choice with respect to such payment. For example, if a Mexican national hears that a recruiter will be in Pueblo on Tuesday looking for landscapers he or she may, for example, pay bus fare to Pueblo, and the associated lodging and meals. However, once the Mexican national establishes meaningful contact with the recruiter, any fee that the recruiter makes the person pay (except for the limited exceptions specified) must be borne by the employer, otherwise that person is not eligible for H–2B status. Some of those fees, may, in fact be indirect fees that the recruiter is requiring as a condition for the recruitment. If the worker decides on his or her own to hire an attorney, for personal legal assistance unrelated to obtaining their H–2B job, or a travel agent for arrangement of personal travel, and the amounts paid are reasonable and not an obvious effort to get around this prohibition, or are not otherwise incurred at the behest or urging of the recruiter (such as an implied promise or other commitment to engage the alien if the alien presents himself or herself at a specific location or perform certain preliminary actions), then the employer need not reimburse the alien for such fees. Likewise, amounts for purely personal items or actions paid by the alien at the suggestion of the recruiter, such as, grooming or wearing freshly washed clothing, that might increase the worker's chances of getting the job, would not be required to be reimbursed. Ultimately, the determination of what may or may not be reimbursed to the employer is necessarily dependent on the specific facts surrounding the alien's engagement in or recruitment for the H–2B position.

*(iii). DHS should quantify the costs to employers to pay for transportation expenses for workers to return to their last place of foreign residence.*

DOL regulations make employers liable for return transportation if the employee is dismissed early by the employer. As stated above, this rule simply reinforces the DOL requirement. Even so, very few employers are expected to take the actions necessary to be subject to this sanction.

*(iv). DHS should attribute recordkeeping costs for employers that have to complete reasonable inquiries pursuant to the prohibition on fees.*

The final rule removes the separate attestation requirement that was proposed regarding use of employment services to locate H–2B workers, and knowledge of the beneficiary's payment of prohibited recruitment fees. DHS has determined that the attestation increased a petitioner's burdens, and duplicated information that petitioners must provide on the H–2B petition to establish benefit eligibility. In conjunction with the final rule, DHS has amended the H Supplement to Form I–129 to explicitly ask the employer if they used a recruiting firm, how much they paid the recruiting firm, the name of the recruiting firm, and if the beneficiary employee has paid a fee to anyone. This replaces the need to attest to any knowledge and provides space for employers to expressly indicate such knowledge. These questions will apply to petitions for both H–2A and H–2B workers. This method for obtaining this information is superior to asking the petitioner to attest to whether it knows or does not know about a fee. By asking the question, the employer may answer yes, no, or do not know, rather than attesting to that knowledge, and USCIS will have the name of the recruiter they used for future reference. As stated in the Paperwork Reduction Act section of this rule, USCIS estimates that the public reporting burden for each Form I–129 at 2 hours and 45 minutes per response is sufficient to encompass the questions added to the forms to address this requirement. Thus, the current OMB approved inventory of the costs imposed by this information collection includes sufficient leeway to account for these additional questions.

As for the burden for a firm to complete reasonable inquiries pursuant to the prohibition on fees, there are no additional costs. DHS agrees that this rule may require reasonable inquiries as part of the ''due diligence'' requirement imposed on prospective recruiters. However, after this rule takes effect, employers should notify recruiters upfront that no fees may be collected from a prospective recruit. Interviews and inquiries will provide opportunities for the employer to quite easily and quickly ask the employee, ''Did you pay anyone a fee to get this job (or interview).'' If the answer is yes, they may ask, ''Who and how much did you pay, what services were provided for the fee, and were you provided with an itemized bill?'' The answers may have significant ramifications for the employee by rendering him ineligible unless any fee he or she identifies is only for allowable transportation costs and/or government fees. The employer that is informed by its potential employee that a particular recruiter has charged fees should keep a record of such firms or agents and either continue to deal with those firms in the future or not. However, asking the straightforward question does not impose a substantial record keeping or information collection burden.

If an employer determines that its workers have been charged or will be charged a fee, they may incur costs in reimbursing such persons. If a fee payment is discovered prior to the commencement of the work, the employer may replace that worker with a worker who did not pay fees or reimburse those it intends to hire. In any event, it cannot be predicted in advance the amount a prospective employer might have to pay to go forward with planned work, as this will depend on how much the alien has paid or if the employer would seek other workers in lieu of those it originally intended to hire. In the end, though, it is the employer's responsibility to set the terms and conditions of any recruitment contract, and the employer will be in a position to require, as a condition of any such contract, that the domestic recruiter and agent working in the worker's home country do not charge any fee of prospective alien workers.

*(v). DHS should quantify the costs to employers for the opportunity costs of losing potential employees and scheduled contracts.*

This comment relates to workers lost by the employer as a result of the prohibition on employee-paid placement fees. The comment does not explain how such employees would be lost, could not be readily replaced, or how a contract may be lost by application of the no-fee requirement of this rule. As a result of this rule, an employer must consider the availability of an alternative employee and the costs of any delays if the employer determines the employee paid a fee that is larger than the employer wants to reimburse. The discovery that an employee paid a fee may be large enough to result in the employer choosing not to hire that employee and finding a replacement employee who paid no fee that must be reimbursed, if there is an adequate supply of replacement workers readily available. That is a business decision that is up to the employer. As stated above, the cost that an employer would expend per employee as a result of this ban on fees has been quantified as about $500.

Delays caused by an employer's discovery of such a fee payment by a prospective employee may result from the employer's decision to not incur that expense, but they do not result directly from this rule.

*(vi). DHS should quantify the costs and fees to notify DHS within 48 hours if: (1) An H–2B worker fails to report for work within 5 days after the employment start date, (2) the services for which H–2B workers were hired is completed more than 30 days early, (3) an H–2B worker leaves the worksite (for a period of 5 consecutive work days without the consent of the employer), or (4) an H–2B worker is terminated prior to the completion of the services for which he or she was hired.*

These costs have been quantified in the regulatory impact analysis of the final rule in the discussion of the paperwork reduction act impacts of this rule. DHS has estimated the costs of this new report to amount to $8,123 per year. This cost will be incurred only by a few employers that have employees abscond, so the cost per petition and per H–2B worker are not appropriate for comparison, because affected firms will not bear these costs equally.

*(vii). There are opportunity costs to employers that are debarred from the H–2B program for a notification failure.*

This rule does not provide that an employer that fails to report abscondment will be debarred. The costs of the absconder reporting requirement have been discussed above. The costs imposed as a result of violations of H–2B regulations petitions and to impose administrative penalties, fines, and debarment are enforcement provisions and not regulatory compliance costs. Should DOL determine that a petitioner substantially failed to meet any of the conditions of the H–2B petition or willfully misrepresented a material fact in such petition, then DHS may debar the petitioner. However, DHS and DOL have authority notwithstanding this rule to investigate violations of H–2B petitions and to impose administrative penalties including debarment An employer will want to consider that possibility before it decides to not report an abscondment or to not meet any other requirement of the H–2B program. An employer who was unable to hire an H–2B employee as a result of being debarred from participation in the program may be harmed, but only because of their failure to report the abscondment of an employee as required by this rule, not as a direct result of this rule. If the employer chooses to comply with the rule they would not incur any additional cost.

*(viii). DHS should quantify the additional costs to small business to pay a premium processing fee of $1000 for their application to be considered in time.*

USCIS' Premium Processing Program is a program by which certain petitioners and applicants may request USCIS to expedite handling of those petitions and applications and approve or deny them within 15 days. The comment assumes that, in order to be assured that they will receive one of the 66,000 limited slots for an H–2B employee, the petitioner must request premium processing for their petition because normal processing times are too lengthy to ensure they will obtain approval for the number of employees needed. This assumption is incorrect. It is true that most petitioners request premium processing for their petitions because they think that normal processing times are too long to ensure they will obtain approval for the number of employees needed. In fiscal year 2007, 10,481 of the 13,561 H–2B petitions filed, or 77 percent, were accompanied by Form I–907, Request for Premium Processing Service, and the required $1,000 fee. While processing times may improve as a result of this rule, the proportion of petitioners requesting premium processing is not expected to increase or decrease. USCIS average processing time for an H–2B petition is less than 60 days and most petitions are filed with USCIS more than 60 days, and often up to 120 days, before start of the employment. Premium processing is not required except for the time pressure that employers feel to have their petitions approved before other employers and before the number of annual H–2B workers approved reaches the 66,000 limitation imposed by law. That limitation is not imposed or addressed by this rule; thus, this rule does not require petitioners to request premium processing.

2. Comments From the Public on the Regulatory Cost Benefit Analysis

*(i) The add-on of incidental recruiting costs to employers is counterproductive and the estimates used to justify this move are not accurately documented.*

As commenters on the rule acknowledged, the documented abuses of H–2B workers are serious and must be addressed. In fact, DHS has now learned that some aliens have paid as much as $80,000 to recruiters and others in order to obtain H–2B employment in this country. Further, the practice of passing fees to the alien has resulted in a number of serious abuses, including, but not limited to, visa sales, petition padding, and extortionate practices directed at aliens and their family members. While it is true that DHS lacks jurisdiction to regulate the activities of recruiters and other facilitators abroad, DHS has, under section 214(a)(1) of the INA, 8 U.S.C. 1184(a)(1), the authority to determine, by regulation, the terms and conditions of H–2B nonimmigrant status and petition approval within the United States. It is inequitable to extract fees from economically disadvantaged foreign workers by passing on costs to an alien by reducing the alien's net wages. Recruiting costs may be factored into the initial wage offer and reflected in the temporary labor certification. Thus, these new requirements are not ''counterproductive.'' The estimates used in calculating the costs were the best available in light of the lack of detailed records on the practice.

*(ii) This rule imposes significant, unspecified and uncapped financial liability on employers making them liable for related indirect and other fees associated with H–2B employees' travel.*

DHS is unclear as to what uncertain and unspecified costs the comment is referring. This rule provides that an alien will not bear the cost to use a job placement service or prepare the H–2B petition. Any costs incurred by the employee because the recruiter requires it as a condition of employment will have to be borne by the employer. However, this rule will not require an employer to bear the cost if the alien chooses to hire a lawyer on his or her own volition. The employer will not have to pay what the employee paid for transportation or government fees, unless required to do so by statute.

*(iii) DHS does not calculate the cost of an employer having to do research on foreign labor recruiters so that employers are able to feel they met the standard of ''having reasonably known'' that their employees did not pay a recruiter.*

The prospective employer has a number of means of ascertaining whether the alien has paid or may be under an obligation to pay fees. It is the employer who chooses to contract with a recruiter or job placement service. That provides them with the ability to negotiate the terms and conditions of the contract, including a prohibition on workers paying fees. This may require switching from one foreign labor recruiter to another until one is found that does not charge alien's fees. There is no way to calculate the cost, if any, of that potentiality.

*(iv) The DHS analysis does not take into account the increased costs from having to file multiple temporary labor*

*certifications if an employer needs to change their employee's start date.*

This rule requires that the employment start date on the H–2B petition be the same as the dates on the temporary labor certification. An exception is made for the time needed to replace an unavailable worker. Some businesses stated that they list the actual date of need in their temporary labor certifications to DOL, but need to write a different start date in their DHS H–2B petitions when, for example, the H–2B cap is filled for the winter season and they need to re-apply for the summer season, or when employees arrive late due to delays at a foreign consulate or an illness. The commenters suggest that, by not allowing those employers to use a different start date, this rule adds the cost of obtaining a new DOL temporary labor certification when re-applying for a petition.

DHS recognizes that requiring the petition start date to be the same as that on the temporary labor certification may disadvantage filers whose employment start date begins more than four months after the beginning of the first or second half of the fiscal year. The fact that an employer may have to obtain a new temporary labor certification may be an indirect effect of this change, but it is not directly related. That result is, unfortunately, another by-product of the over subscription of the H–2B program. Nevertheless, this change ensures compliance with the law which requires the unavailability of U.S. workers. Requiring that an employer adhere to the start date stated in the temporary labor certification will ensure that U.S. workers were able to make an informed decision as to their availability to fill the position in question.

2. Summary of Final Rule Impacts

The impacts of the changes in this rule are summarized as follows:

The number of petitions filed by H–2B employers is expected to increase, but the annual volume of petitions processed will not change. More petitions will be returned without depositing their fee payment and reviewing the petition.

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.

By eliminating the ''extraordinary circumstances'' restriction on periods longer than a year and providing that such a period could last up to 3 years, this proposed rule would benefit employers who need workers for a specific project that will take longer than one year to complete.

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 in a more timely manner, but businesses will still be constrained by a limited labor supply.

The administrative improvements proposed in this rule are intended to make employers more likely to participate in the program. This is expected to cause some employers who currently hire seasonal workers who are not properly authorized to replace those workers with lawful workers.

By requiring an employer to notify USCIS quickly after the employer terminates an alien's employment, immigration authorities will be made more aware of the fact that an alien without legal immigration status may be in the United States, and determine his or her whereabouts for appropriate enforcement measures.

The fee impacts of this rule are neutral. Only those petitions received before the maximum annual number 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 under this final rule 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.

Most H–2B petitions filed, or about 77 percent, are accompanied by Form I–907, Request for Premium Processing Service, and the required $1,000 fee. While processing times may improve as a result of this rule, the proportion of petitioners requesting premium processing is not expected to increase or decrease.

*Paperwork Burden.* 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.

*Effect of repatriation provision.* This rule will prohibit approval of an H–2B petition for a worker from a country that has not been designated, with the concurrence of the Secretary of State, as eligible for its nationals to participate in the H–2B program, unless DHS determines that participation of that worker in the H–2B program is in the U.S. interest. The actual 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 small impacts as may occur would represent transfers from one country's workers to another.

*Costs of exit registration requirement.* U.S. Customs and Border Protection (CBP) will establish a new land-border exit system for H–2 temporary workers in San Luis, Arizona, or Douglas, Arizona. Aliens who entered through these ports must depart from either one of those ports and provide biometric information at one of the kiosks established for this purpose. CBP will collect biometrics under this pilot from all returning workers. This rule change will require an H–2B worker to incur opportunity costs of between thirty minutes and one hour as a result of having to go through the registration process. In its regulatory impact analysis prepared for this rule, DHS estimated that the total annual costs for the time required for aliens to comply what this exit registration process is around $2,424.

*Effects of proposed requirement for petitioners to reimburse workers for any fee or risk denial of their petition.* By requiring a petitioner to demonstrate that the alien has paid no fees or show they have reimbursed the alien for such fees, this rule would effectively ban the payment of such fees by the alien beneficiary with limited exceptions for certain transportation costs and government-imposed fees, if the passing of such transportation costs and government-imposed fees to the alien is not precluded by statute. 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. DHS prepared an analysis of the costs of this rule in order to comply with the Regulatory Flexibility Act (RFA) and Executive Order 12866. In that analysis DHS estimated that the cost of this requirement could be as high as about $4,500 per employer, based on

the average number of employees sponsored by each employer, if all of their H–2B workers were found to have paid a fee, or $33 million total, in the unlikely event that all 66,000 H–2B employees per year, every year, pay such a fee.

*Absconder reporting.* This rule requires an employer to notify DHS within two work days if: (1) An H–2B worker fails to report for work within 5 days after the employment start date, (2) the services for which H–2B workers were hired is completed more than 30 days early, (3) an H–2B worker leaves the worksite (for a period of 5 consecutive work days without the consent of the employer), or (4) an H–2B worker is terminated prior to the completion of the services for which he or she was hired. Following publication of this rule, USCIS will publish a **Federal Register** Notice outlining the employer's requirements under this provision. DHS has estimated the total costs per year that will be imposed on the public for the absconder notification requirement are about $8,123.

This rule is expected to reduce costs for the government by terminating mandatory H–2B review. Employees handling these appeals will then be able to focus on eliminating application and petition backlogs for other benefits.

The exit pilot program being implemented in San Luis, Arizona, and Douglas, Arizona is expected to cost the Federal Government at least $27,201 for the DHS employees' time to carry out the registration process. These costs do not include the costs of setting up the biometrics collection kiosks and otherwise equipping these offices with the required staffing and technology, which may be additional.

*D. Regulatory Flexibility Act*

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

1. Number of Regulated Entities

In FY06, an estimated 15,000 Form I–129 petitions were received by USCIS for H–2B workers; approximately 14,000 of those petitions were approved. In fiscal year 2007, USCIS received 13,561 petitions and approved 14,355. For fiscal year 2008, USCIS received 7,739 H–2B petitions and approved 7,755. In fiscal year 2008, the mean and median number of H–2B worker beneficiaries requested per petition were 19 and 9 workers, respectively.

Since the current volume of petitions already meets the statutory annual maximum of 66,000, the number of petitions processed will not change and USCIS will have to reject a higher number of petitions without depositing their fee payment or reviewing the petition. USCIS expects processing volume to continue along these lines in the near future, barring a major change to underlying legislation. Thus, an estimated 7,700 H–2B petitions are expected to be accepted per year.[1]

2. Size Categories of Affected Entities

Typical petitioner. The actual average or median revenue of the typical H–2B employer is unknown. However, DHS considered what was considered small for the typical firm in the industries that use most H–2B workers according to the U.S. Small Business Administration (SBA) Small Business Size Regulations at 13 CFR part 121. The SBA regulations provide that the annual gross revenue threshold for firms in the Landscape Architectural Services (NAICS code 541320[2]) or a hotel industry (NAICS 721110) is $7.0 million. For Nursery and Tree Production (NAICS 111421) it is $750,000. For Construction, it is $33.5 million. Based on these 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.[3] Assuming that the proportion of small employers participating in the H–2B program is similar to the overall market, more than 90 percent of H–2B petitions are filed by firms which are classified as small businesses. Thus, this rule will have an impact on about 7,000 small entities.

3. Other Firms That May Be Affected by This Change

a. Employee Recruiters.

DHS has no reliable data on the number of firms that recruit H–2B employees, but DHS research in this area indicates that the majority of new, and many returning, H–2B employees have utilized such a service in their home countries. This rule does not prohibit firms from charging nonimmigrant workers for some services, such as: preparation of the worker's income tax return; certain transportation costs (except where the passing of such costs to the worker is prohibited by statute); lodging; food; clothing; translation services; or other services for which the value is generally known based on an existing market or can be readily quantified, and which are not charged as a condition of the employee being referred to a petitioner.[4]

b. Employer Agents.

The agent hired by the seasonal employer assists in completing applications and locating and processing worker applicants abroad. Agents usually charge a flat fee per employee to process the employer's DOL, the Department of State, and DHS certification, application, and petition. Some agents collect an initial retainer and then charge additional fees based on the number of workers, the application fees, the advertising costs required, and other expenses. The total charges an employer pays the agent per H–2B employee ranges from approximately $500 to $4,000, including travel expenses and all application and petition fees. The actual cost depends on the home country, the skills needed for the position, and the general complexity of the worker and employer's respective situations. DHS does not have any estimate of the number of employer agents who are active in the recruiting of H–2B employees. However, the relationship between employers and agents is not affected by this rule, except to the extent the agent may also be collecting a fee from the foreign worker.

4. Significance of Impact

DHS has determined that this rule will require affected employers to pay between $150 and $500 per employee because recruiter fees that are now being paid by employees will be shifted by recruiters from employees to employers.

[1] For this analysis it is assumed that a firm will request all of the foreign workers they need in a given year on one petition. As a result of this assumption, the number of firms affected in this case is assumed to equal the number of petitions filed in a year, although some firms may file multiple petitions.

[2] The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. See, *http://www.census.gov/eos/www/naics/*.

[3] U.S. Department of Commerce, Economics and Statistics Administration, U.S. CENSUS BUREAU, at *http://www.census.gov/prod/ec02/ec0223sg1t.pdf*. Page 9.

[4] Notwithstanding that DOL may or may not prohibit such fees in some instances.

Also, the absconder notification requirements of this rule are estimated to cost $8,123 per year, for an average of $.12 per employee.

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

In fiscal year 2008, the mean and median authorized duration of H–2B employment were 219 and 231 days, respectively. Thus, a new H–2B employee in 2008 worked an average of 31.3 weeks. Assuming that the typical employee worked an 8 hour work day and took two days per week off from work, the employee would have worked 156 days and accrued 1,251 hours. Using the U.S. Department of Labor hourly wage rate for an H–2B worker of $9.32 per hour,[5] plus a multiplier of 1.4 to account for fringe benefits and incidental expenses, the average hourly wage compensation costs equal $13.05. Multiplying the hourly compensation costs by the hours worked provides an average compensation cost for an H–2B employee for the period he or she is in the United States of about $16,326. If the employer is required to pay a recruiter or reimburse the employee $500 for fees paid, and if that employee absconds, requiring the employer to file a report, the added cost of $501 is only 3.1 percent of the $16,326 annual salary for only one H–2B worker. Since the cost increase per H–2B employee is less than 5 percent of the costs associated with hiring only one H–2B worker, the average cost increase imposed by this rule will not exceed 5 percent of the average labor costs of the entire sector.

Also, as stated above, guidelines provided by the SBA Office of Advocacy suggest that an added cost of more than one percent of the gross revenues of the affected entities in a particular sector may be a significant impact. USCIS believes that it is unlikely that an employer will incur costs of $4,501 due to this rulemaking, as it is the high end of the range of possible costs. Again, if each firm affected by this rule hires the average of 9 workers and all 9 are recruited by a firm that charges or causes the employer to reimburse all 9 employees $500, the additional cost of this rule could reach as high as $4,501 per employer. While the actual revenue of the typical H–2B employer is unknown, DHS believes that the companies that use the H–2B program are likely to be on the upper bounds of the small business size standards for annual gross cash receipts. If an employer hires 9 employees and incurs recruiting costs of $500 for every one of them, the $4,500 added cost represents only 0.6 percent of $750,000 (the standard for Nursery and Tree Production). To further illustrate, for $4,500 to exceed one percent of annual revenues, sales would have to be $450,000 per year or less. While most H–2B petitioners are small entities, DHS believes that a firm with annual sales below $450,000 would be very unlikely to hire 9 temporary seasonal employees and incur the $4,500 in added costs. Therefore, DHS believes that the costs of this rulemaking to small entities will not exceed one percent of annual revenues.

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

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

As outlined above, this rule affects recruiting firms' activities tangentially. Nonetheless, the effect of the fee prohibition on recruiting companies, staffing firms, or employment agents is not a new compliance requirement on regulated entities. Establishment of a non-immigrant temporary worker program was intended to alleviate seasonal labor shortages. Demand from employers for foreign workers makes the 66,000 H–2B slots significantly insufficient to meet the demand. This has created a market where the ''price'' for the scarce good, the nonimmigrant temporary worker visa, has increased. That employer demand and the demand from foreign workers to come to the U.S. have combined to result in a portion of the ''price'' being passed on to the workers. DHS views that trend and practice as undesirable and is attempting to take action in this rule to limit those costs. The formation of firms that recruit workers in foreign countries is an unintended consequence of nonimmigrant temporary worker programs since those firms are not the intended recipients of the benefits that are supposed to inure to participants in those programs. In any event, DHS does not believe the prohibition on charging aliens will cause a significant economic impact on the affected placement, recruiting, or staffing firms because they may, and are expected to, transfer those costs to the employers, as analyzed above.

6. Certification

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

*E. 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.

*F. Executive Order 12988*

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

*G. Paperwork Reduction Act*

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 (PRA). The OMB control number for this collection is 1615–0009. This rule requires under 8 CFR 214.2(h)(6)(i)(F) that the petitioner notify DHS if:

- An H–2B worker fails to report for work;
- The services for which an H–2B worker is hired is completed 30 days early;
- An H–2B worker absconds from the worksite; or
- An H–2B worker is terminated prior to completion of services for which he or she is hired.

This notification requirement is considered an information collection covered under the PRA. Accordingly, this information collection has been submitted and approved by OMB under the PRA.

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). DHS has submitted a request for a non-

[5] Average of the DOL required Level 1 salaries for a Landscaper in Memphis, a Food Server in DC, a Bellhop in Miami, a Tree Trimmer in Denver, and a Pesticide Applicator in Seattle. Available at: *http://www.dol.gov/compliance/topics/wages-foreign-workers.htm.*

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 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 debarment by the Department of Labor pursuant to 20 CFR 655.31, USCIS may deny any employment-based immigrant petition filed by that petitioner for a period of at least 1 year but not more than 5 years. The time 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, Public Law 108–287; sec. 643, Public Law 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.

■ 4. 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 debarment by the Department of Labor pursuant to 20 CFR 655.31, USCIS may deny any petition filed by that petitioner for nonimmigrant status under section 101(a)(15)(H) (except for status under sections 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 length of the period 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.

■ 5. Section 214.2 is amended by:
■ a. Revising paragraph (h)(1)(ii)(D);
■ b. Adding a new sentence to the end of paragraph (h)(2)(ii);
■ c. Revising paragraph (h)(2)(iii);
■ d. Redesignating paragraph (h)(2)(iv) as paragraph (h)(6)(viii), and by reserving paragraph (h)(2)(iv);
■ e. Revising paragraph (h)(6)(i);
■ f. Revising paragraph (h)(6)(ii)(B) introductory text;
■ g. Revising the word ''amendable'' to read ''amenable'' in the second sentence in paragraph (h)(6)(iii)(B);
■ h. Adding the word ''favorable'' immediately after the phrase ''has obtained a'' in paragraph (h)(6)(iii)(C);
■ i. Adding the word ''favorable'' immediately after the phrase ''After obtaining a'' in paragraph (h)(6)(iii)(E);
■ j. Revising paragraph (h)(6)(iv)(A);
■ k. Revising paragraph (h)(6)(iv)(D);
■ l. Removing paragraph (h)(6)(iv)(E);
■ m. Revising paragraph (h)(6)(v)(A);
■ n. Removing and reserving paragraphs (h)(6)(v)(C) and (D);
■ o. Adding the word ''States'' immediately before ''and'' in the first sentence in paragraph (h)(6)(v)(E)(*2*)(*iii*);
■ p. Revising paragraph (h)(6)(vi)(A);
■ q. Removing and reserving paragraph (h)(6)(vi)(B);
■ r. Revising paragraph (h)(6)(vi)(C);
■ s. Removing the period at the end of paragraph (h)(6)(vi)(D), and adding a ''; or'' in its place;
■ t. Revising the word ''or'' to read ''to'' in the first sentence in paragraph (h)(6)(vii);
■ u. Revising newly designated paragraph (h)(6)(viii);
■ v. Adding new paragraph (h)(6)(ix);
■ w. Revising paragraph (h)(8)(ii)(A);
■ x. Revising paragraph (h)(9)(i)(B);
■ y. Revising paragraph (h)(9)(iii)(B)(*1*);
■ z. Revising paragraph (h)(10)(ii);
■ aa. Adding a new sentence to the end of paragraph (h)(11)(i)(A);
■ bb. Revising paragraph (h)(11)(iii)(A)(*2*);
■ cc. Revising paragraph (h)(13)(i)(B);
■ dd. Revising paragraph (h)(13)(iv); and by
■ ee. 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 nonagricultural 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 described on the approved temporary labor certification are subject to review 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) * * *

(ii) * * * H–2A and H–2B petitions for workers from countries not designated in accordance with paragraph (h)(6)(i)(E) of this section should be filed separately.

(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. USCIS may require the petitioner to name H–2B beneficiaries where the name is needed to establish eligibility for H–2B nonimmigrant status. 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. All H–2A and H–2B petitions on behalf of workers who are not from a country that has been designated as a participating country in accordance with paragraphs (h)(5)(i)(F)(*1*) or (h)(6)(i)(E)(*1*) of this section must name all the workers in the petition who fall within these categories. All H–2A and H–2B petitions must state the nationality of all beneficiaries, whether or not named, even if there are beneficiaries from more than one country.

(iv) [Reserved]

* * * * *

(6) * * *

(i) *Petition.* (A) *H–2B nonagricultural temporary worker.* An H–2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor without 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) *Denial or revocation of petition upon a determination that fees were collected from alien beneficiaries.* As a condition of approval of an H–2B petition, no job placement fee or other compensation (either direct or indirect) may be collected at any time, including before or after the filing or approval of the petition, from a beneficiary of an H–2B petition by a petitioner, agent, facilitator, recruiter, or similar employment service as a condition of an offer or condition of H–2B employment (other than the lower of the actual cost or fair market value of transportation to such employment and any government-mandated passport, visa, or inspection fees, to the extent that the passing of such costs to the beneficiary is not prohibited by statute, unless the employer, agent, facilitator, recruiter, or similar employment service has agreed with the beneficiary that it will pay such costs and fees).

(*1*) If USCIS determines that the petitioner has collected or entered into an agreement to collect such fee or compensation, the H–2B petition will be denied or revoked on notice, unless the petitioner demonstrates that, prior to the filing of the petition, either the petitioner reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

(*2*) If USCIS determines that the petitioner knew or should have known at the time of filing the petition that the beneficiary has paid or agreed to pay any agent, facilitator, recruiter, or similar employment service as a condition of an offer of the H–2B employment, the H–2B petition will be denied or revoked on notice unless the petitioner demonstrates that, prior to filing the petition, either the petitioner or the agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full for such fees or compensation or the agreement to collect such fee or compensation was terminated before the fee or compensation was paid by the beneficiary.

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

(*4*) If USCIS determines that the beneficiary paid or agreed to pay the agent, facilitator, recruiter, or similar employment service such fees or compensation after the filing of the H–2B petition and that the petitioner knew or had reason to know of the payment or agreement to pay, the petition will be denied or revoked unless the petitioner demonstrates that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed the beneficiary in full, that the parties terminated any agreement to pay before the beneficiary paid the fees or compensation, or that the petitioner has notified DHS within 2 work days of obtaining knowledge, in a manner specified in a notice published in the **Federal Register**.

(C) *Effect of petition revocation* Upon revocation of an employer's H–2B petition based upon paragraph (h)(6)(i)(B) of this section, the alien beneficiary's stay will be authorized and the beneficiary will not accrue any period of unlawful presence under section 212(a)(9) of the Act (8 U.S.C. 1182(a)(9)) for a 30-day period following the date of the revocation for the purpose of departure or extension of stay based upon a subsequent offer of employment. The employer shall be liable for the alien beneficiary's reasonable costs of return transportation 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.

(D) *Reimbursement as condition to approval of future H–2B petitions. (1) Filing subsequent H–2B petitions within 1 year of denial or revocation of previous H–2B petition.* A petitioner filing an H–2B petition within 1 year after a decision denying or revoking on notice an H–2B petition filed by the same petitioner on the basis of paragraph (h)(6)(i)(B) of this section must demonstrate to the satisfaction of USCIS, as a condition of the approval of the later petition, that the petitioner or agent, facilitator, recruiter, or similar employment service reimbursed in full each beneficiary of the denied or revoked petition from whom a prohibited fee was collected or that the petitioner has failed to locate each such beneficiary despite the petitioner's reasonable efforts to locate them. If the petitioner demonstrates to the satisfaction of USCIS that each such beneficiary was reimbursed in full, such condition of approval shall be satisfied with respect to any subsequently filed H–2B petitions, except as provided in paragraph (h)(6)(i)(D)(*2*) of this section. If the petitioner demonstrates to the satisfaction of USCIS that it has made reasonable efforts to locate but has failed to locate each such beneficiary within 1 year after the decision denying or revoking the previous H–2B petition on the basis of paragraph (h)(6)(i)(B) of this section, such condition of approval shall be deemed satisfied with respect to any H–2B petition filed 1 year or more after the denial or revocation. Such reasonable efforts shall include contacting all of each such beneficiary's known addresses.

(2) *Effect of subsequent denied or revoked petitions.* An H–2B petition filed by the same petitioner subsequent to a denial under paragraph (h)(6)(i)(B) of this section shall be subject to the condition of approval described in paragraph (h)(6)(i)(D)(*1*) of this section, regardless of prior satisfaction of such condition of approval with respect to a previously denied or revoked petition.

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

(*i*) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals and residents of that country who are subject to a final order of removal;

(*ii*) The number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country;

(*iii*) The number of orders of removal executed against citizens, subjects,

nationals and residents of that country; and

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

(*2*) A national from a country not on the list described in paragraph (h)(6)(i)(E)(*1*) of this section may be a beneficiary of an approved H–2B petition upon the request of a petitioner or potential H–2B petitioner, if the Secretary of Homeland Security, in his sole and unreviewable discretion, determines that it is in the U.S. interest for that alien to be a beneficiary of such petition. Determination of such a U.S. interest will take into account factors, including but not limited to:

(*i*) Evidence from the petitioner demonstrating that a worker with the required skills is not available from among foreign workers from a country currently on the list described in paragraph (h)(6)(i)(E)(*1*) of this section;

(*ii*) Evidence that the beneficiary has been admitted to the United States previously in H–2B status;

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

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

(*3*) Once published, any designation of participating countries pursuant to paragraph (h)(6)(i)(E)(*1*) of this section shall be effective for one year after the date of publication in the **Federal Register** and shall be without effect at the end of that one-year period.

(F) *Petitioner agreements and notification requirements.* (*1*) *Agreements.* The petitioner agrees to notify DHS, within 2 work days, 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 work days after the employment start date stated on the petition; the nonagricultural labor or services for which H–2B workers were hired were completed more than 30 days early; or an H–2B worker absconds from the worksite or is terminated prior to the completion of the nonagricultural 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. 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 event could last up to 3 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 temporary 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.* Beginning with petitions filed for workers for fiscal year 2010, an H–2B petition must state an employment start date that is the same as the date of need stated on the approved temporary labor certification. A petitioner filing an amended H–2B petition due to the unavailability of originally requested workers may state an employment start date later than the date of need stated on the previously approved temporary labor certification 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 temporary labor certification issued by 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.* An approved 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 temporary 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 such temporary labor certification. This requirement also applies to the named beneficiary who is abroad on the basis of special provisions stated in paragraph (h)(2)(iii) of this section;

* * * * *

(viii) *Substitution of beneficiaries.* Beneficiaries of 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 temporary labor certification. Beneficiaries who were admitted to the United States may not be substituted without a new petition accompanied by a newly approved temporary 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 the 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 USCIS 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 temporary 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 same fiscal year as the original petition. Otherwise, a new

temporary labor certification issued by DOL or the Governor of Guam and subsequent H–2B petition are required.

(ix) *Enforcement.* The Secretary of Labor may investigate employers to enforce compliance with the conditions of a petition and Department of Labor-approved temporary labor certification 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 sections 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. Requests for petition extension or extension of an alien's stay shall not be counted for the purpose of the 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..

* * * * *

(9) * * *

(i) * * *

(B) The petition may not be filed or approved earlier than 6 months before the date of actual need for the beneficiary's services or training, except that an H–2B petition for a temporary nonagricultural worker may not be filed or approved more than 120 days before the date of the actual need for the beneficiary's temporary nonagricultural services that is identified on the temporary labor certification.

(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 temporary labor certification.

* * * * *

(10) * * *

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

(11) * * *

(i) * * *

(A) * * * However, H–2A and H–2B petitioners must send notification to DHS pursuant to paragraphs (h)(5)(vi) and (h)(6)(i)(F) of this section respectively.

* * * * *

(iii) * * *

(A) * * *

(*2*) The statement of facts contained in the petition or on the application for a temporary 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 3-year limit set forth in 8 CFR 214.2(h)(13)(iv). 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 reside 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 sections 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 immediately preceding 3 months. An H–3 alien participant in a special education program who has spent 18 months in the United States under sections 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 sections 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under sections 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 paragraphs (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 6 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 3-year limit. If the accumulated stay is 18 months or less, an absence is interruptive if it lasts for at least 45 days. If the accumulated stay is greater than 18 months, an absence is interruptive if it lasts for at least 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

■ 6. 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.

■ 7. Section 215.9 is revised 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 his or her authorized period of stay through a port of entry participating in the program and must 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.

**Paul A. Schneider,**

*Deputy Secretary.*

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