

## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 214 and 274a

[CIS No. 2689–21]

RIN 1615–AC72

## DEPARTMENT OF LABOR

### Employment and Training Administration

### 20 CFR Part 655

[DOL Docket No. ETA–2021–0005]

RIN 1205–AC07

### Exercise of Time-Limited Authority To Increase the Fiscal Year 2021 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program and Portability Flexibility for H–2B Workers Seeking To Change Employers

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

**ACTION:** Temporary rule.

**SUMMARY:** The Secretary of Homeland Security, in consultation with the Secretary of Labor, is exercising his time-limited Fiscal Year (FY) 2021 authority and increasing the numerical limitation on H–2B nonimmigrant visas to authorize the issuance of no more than 22,000 additional visas through the end of the second half of FY 2021 to those businesses likely to suffer irreparable harm, as attested by the employer on a new attestation form. In addition to making additional visas available under the FY 2021 time-limited authority, DHS is exercising its general H–2B regulatory authority to temporarily provide portability flexibility by allowing H–2B workers who are already in the United States to begin work immediately after an H–2B petition (supported by a valid temporary labor certification) is received by USCIS, and before it is approved.

**DATES:** The amendments to title 8 of the Code of Federal Regulations in this rule are effective from May 25, 2021 through May 28, 2024, although DHS will not approve any H–2B petition under the provisions related to the supplemental numerical allocation after September 30, 2021, and the provisions related to portability are only available to petitioners and H–2B nonimmigrant workers initiating employment through

the end of November 22, 2021. The amendments to title 20 of the Code of Federal Regulations in this rule are effective from May 25, 2021 through September 30, 2021, except for 20 CFR 655.68 which is effective from May 25, 2021 through September 30, 2024.

The Office of Foreign Labor Certification within the U.S. Department of Labor will be accepting comments in connection with the new information collection Form ETA–9142B–CAA–4 associated with this rule until July 26, 2021.

**ADDRESSES:** You may submit written comments on the new information collection Form ETA–9142B–CAA–4, identified by Regulatory Information Number (RIN) 1205–AC07 electronically by the following method:

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

*Instructions:* Include the agency's name and the RIN 1205–AC07 in your submission. All comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>. Please do not include any personally identifiable information or confidential business information you do not want publicly disclosed.

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

Regarding 20 CFR part 655 and Form ETA–9142B–CAA–4: Brian D. Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Ave NW, Room N–5311, Washington, DC 20210, telephone (202) 693–8200 (this is not a toll-free number).

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

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#### I. Executive Summary

##### FY 2021 H–2B Supplemental Cap

With this temporary final rule (TFR), the Secretary of Homeland Security, following consultation with the Secretary of Labor, is authorizing the immediate release of an additional 22,000 H–2B visas through the end of FY 2021, subject to certain conditions. The 22,000 visas are divided into two allocations, as follows:

- 16,000 visas limited to returning workers, regardless of country of nationality, in other words, those workers who were issued H–2B visas or held H–2B status in fiscal years 2018, 2019, or 2020; and
- 6,000 visas initially reserved for nationals of the Northern Triangle countries as attested by the petitioner (regardless of whether such nationals are returning workers). However, if all 6,000 visas reserved for nationals of the Northern Triangle countries are not allocated by July 8, 2021, USCIS will announce by July 23, 2021, on its website, that such unused Northern Triangle country visas will be made available to employers regardless of the beneficiary's country of nationality, subject to the returning worker limitation.

To qualify for the FY 2021 supplemental cap, eligible petitioners must:

- Meet all existing H–2B eligibility requirements, including obtaining an approved temporary labor certification

(TLC) from DOL before filing the Form I-129, Petition for Nonimmigrant Worker, with USCIS;

- Submit an attestation affirming, under penalty of perjury, that the employer will likely suffer irreparable harm if it cannot employ the requested H-2B workers, and that it is seeking to employ returning workers only, unless the H-2B worker is a Northern Triangle national and counted towards the 6,000 cap (during such time as when the Northern Triangle cap reservation allocation is applicable); and

- Agree to comply with all applicable labor and employment laws, including health and safety laws pertaining to COVID-19, as well as any rights to time off or paid time off to obtain COVID-19 vaccinations, and notify the workers in a language understood by the worker, as necessary or reasonable, of equal access of nonimmigrants to COVID-19 vaccines and vaccination distribution sites.

Employers filing an H-2B petition 45 or more days after the certified start date on the TLC, must attest to engaging in the following additional steps to recruit U.S. workers:

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

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

- Contact the employer's former U.S. workers, including those the employer furloughed or laid off beginning on January 1, 2019, and until the date the H-2B petition is filed, disclose the terms of the job order and solicit their return to the job;

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

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

Petitioners filing H-2B petitions under the FY 2021 supplemental cap must retain documentation of compliance with the attestation requirements for 3 years from the date the TLC was approved, and must provide the documents and records

upon the request of DHS or DOL, as well as fully cooperate with any compliance reviews such as audits. Both DHS and DOL intend to conduct a significant number of post-adjudication audits to ascertain compliance with the attestation requirements of this TFR.

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

The authority to approve H-2B petitions under the FY 2021 supplemental cap expires on September 30, 2021.

### *H-2B Portability*

In addition to exercising time limited authority to make additional H-2B visas available in FY 2021, DHS is providing additional flexibilities to H-2B petitioners under its general programmatic authority by allowing nonimmigrant workers in the United States in valid H-2B status to begin work with a new employer after an H-2B petition (supported by a valid TLC) is filed and before the petition is approved generally for a period of up to 60 days. However, such employment authorization would end 15 days after USCIS denies the H-2B petition or such petition is withdrawn. This H-2B portability ends 180 days after the effective date of this rule, in other words, after the date this rule is published in the **Federal Register**.

## **II. Background**

### *A. Legal Framework*

The Immigration and Nationality Act (INA), as amended, establishes the H-2B nonimmigrant classification for a nonagricultural temporary worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country." INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b). Employers must petition the Department of Homeland Security (DHS) for classification of prospective temporary workers as H-2B nonimmigrants. INA section 214(c)(1), 8 U.S.C. 1184(c)(1). Generally, DHS must approve this petition before the beneficiary can be considered eligible for an H-2B visa. In addition, the INA

requires that "[t]he question of importing any alien as [an H-2B] nonimmigrant . . . in any specific case or specific cases shall be determined by [DHS],<sup>1</sup> after consultation with appropriate agencies of the Government." INA section 214(c)(1), 8 U.S.C. 1184(c)(1). The INA generally charges the Secretary of Homeland Security with the administration and enforcement of the immigration laws, and provides that the Secretary "shall establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority" under the INA. *See* INA section 103(a)(1), (3), 8 U.S.C. 1103(a)(1), (3); *see also* 6 U.S.C. 202(4) (charging the Secretary with "[e]stablishing and administering rules . . . governing the granting of visas or other forms of permission . . . to enter the United States to individuals who are not a citizen or an alien lawfully admitted for permanent residence in the United States"). With respect to nonimmigrants in particular, the INA provides that "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the [Secretary] may by regulations prescribe." INA section 214(a)(1), 8 U.S.C. 1184(a)(1); *see also* INA section 274A(h)(1) and (3), 8 U.S.C. 1324a(h)(1) and (3) (prohibiting employment of noncitizen<sup>2</sup> not authorized for employment). The Secretary may designate officers or employees to take and consider evidence concerning any matter which is material or relevant to the enforcement of the INA. INA sections 287(a)(1), (b), 8 U.S.C. 1357(a)(1), (b) and INA section 235(d)(3), 8 U.S.C. 1225(d)(3).

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

DHS regulations provide that an H-2B petition for temporary employment in the United States must be accompanied by an approved TLC from the U.S.

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

<sup>2</sup> For purposes of this discussion, the Departments use the term "noncitizen" colloquially to be synonymous with the term "alien" as it is used in the Immigration and Nationality Act.

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

In order to determine whether to issue a TLC, the Departments have established regulatory procedures under which DOL certifies whether a qualified U.S. worker is available to fill the job opportunity described in the employer's petition for a temporary nonagricultural worker, and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. *See* 20 CFR part 655, subpart A. The regulations establish the process by which employers obtain a TLC and the rights and obligations of workers and employers.

Once the petition is approved, under the INA and current DHS regulations, H-2B workers do not have employment authorization outside of the validity period listed on the approved petition unless otherwise authorized, and the workers are limited to employment with the H-2B petitioner. *See* 8 U.S.C. 1184(c)(1), 8 CFR 274a.12(b)(9). An employer or U.S. agent generally may submit a new H-2B petition, with a new, approved TLC, to USCIS to request an extension of H-2B nonimmigrant status for the validity of the TLC or for a period of up to 1 year. 8 CFR 214.2(h)(15)(ii)(C). Except as provided for in this rule, and except for certain professional athletes being traded among organizations,<sup>3</sup> H-2B workers seeking to extend their status with a new employer may not begin employment with the new employer until the new H-2B petition is approved.

The INA also authorizes DHS to impose appropriate remedies against an employer for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a

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

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

The INA sets the annual number of noncitizens who may be issued H-2B visas or otherwise provided H-2B nonimmigrant status to perform temporary nonagricultural work at 66,000, to be distributed semi-annually beginning in October and April. *See* INA sections 214(g)(1)(B) and (g)(10), 8 U.S.C. 1184(g)(1)(B) and (g)(10). With certain exceptions, described below, up to 33,000 noncitizens may be issued H-2B visas or provided H-2B nonimmigrant status in the first half of a fiscal year, and the remaining annual allocation, including any unused nonimmigrant H-2B visas from the first half of a fiscal year, will be available for employers seeking to hire H-2B workers during the second half of the fiscal year.<sup>4</sup> If insufficient petitions are approved to use all H-2B numbers in a given fiscal year, the unused numbers cannot be carried over for petition approvals for employment start dates beginning on or after the start of the next fiscal year.

In FYs 2005, 2006, 2007, and 2016, Congress exempted H-2B workers identified as returning workers from the annual H-2B cap of 66,000.<sup>5</sup> A returning worker is defined by statute as

an H-2B worker who was previously counted against the annual H-2B cap during a designated period of time. For example, Congress designated that returning workers for FY 2016 needed to have been counted against the cap during FY 2013, 2014, or 2015.<sup>6</sup> DHS and the Department of State (DOS) worked together to confirm that all workers requested under the returning worker provision in fact were eligible for exemption from the annual cap (in other words, were issued an H-2B visa or provided H-2B status during one of the prior 3 fiscal years) and were otherwise eligible for H-2B classification.

Because of the strong demand for H-2B visas in recent years, the statutorily-limited semi-annual visa allocation, the DOL regulatory requirement that employers apply for a TLC 75 to 90 days before the start date of work,<sup>7</sup> and the DHS regulatory requirement that all H-2B petitions be accompanied by an approved TLC,<sup>8</sup> employers that wish to obtain visas for their workers under the semi-annual allotment must act early to receive a TLC and file a petition with U.S. Citizenship and Immigration Services (USCIS). As a result, DOL typically sees a significant spike in TLC applications from employers seeking to hire H-2B temporary or seasonal workers prior to the United States' warm weather months. For example, in FY 2021, based on TLC applications filed during the 3-day filing window of January 1 through 3, 2021, DOL's Office of Foreign Labor Certification (OFLC) received requests to certify 96,641 worker positions for start dates of work on April 1, 2021.<sup>9</sup> USCIS, in turn, received sufficient H-2B petitions to reach the second half of the fiscal year

<sup>6</sup> *See* Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec 565.

<sup>7</sup> 20 CFR 655.15(b).

<sup>8</sup> *See* 8 CFR 214.2(h)(5)(i)(A).

<sup>9</sup> DOL announcement on January 7, 2021. *See* <https://www.foreignlaborcert.doleta.gov/> (last accessed on April 9, 2021). For historical context, with the FY 2020 statutory cap, DOL announced on January 6, 2020 that it received requests to certify 99,362 worker positions for start dates of work on April 1, 2020. On February 26, 2020, USCIS announced that it had received a sufficient number of petitions to reach the congressionally mandated H-2B cap for FY 2020. On February 18, 2020, the number of beneficiaries listed on petitions received by USCIS surpassed the total number of remaining H-2B visas available against the H-2B cap for the second half of FY 2020. In accordance with regulations, USCIS determined it was necessary to use a computer generated process, commonly known as a lottery, to ensure the fair and orderly allocation of H-2B visa numbers to meet, but not exceed, the remainder of the FY 2020 cap. 8 CFR 214.2(h)(8)(vii). On February 20, 2020, USCIS conducted a lottery to randomly select petitions from those received on February 18, 2020. As a result, USCIS assigned all petitions selected in the lottery the receipt date of February 20, 2020.

<sup>3</sup> *See* 8 CFR 214.2(h)(6)(vii) and 8 CFR 274a.12(b)(9).

<sup>4</sup> The Federal Government's fiscal year runs from October 1 of the prior year through September 30 of the year being described. For example, fiscal year 2021 is from October 1, 2020, through September 30, 2021.

<sup>5</sup> INA section 214(g)(9)(A), 8 U.S.C. 1184(g)(9)(A), *see also* Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law 109-13, div. B, tit. IV, sec. 402.

statutory cap by February 12, 2021.<sup>10</sup> This early date continues to reflect an ongoing trend of higher H–2B demand in the second half of the fiscal year compared to the statutorily authorized level. Congress, in recognition of this increased demand: (1) Allowed for additional H–2B workers through the FY 2016 reauthorization of the returning worker cap exemption;<sup>11</sup> and (2) for the last 5 fiscal years authorized supplemental caps under section 543 of Division F of the Consolidated Appropriations Act, 2017, Public Law 115–31 (FY 2017 Omnibus); section 205 of Division M of the Consolidated Appropriations Act, 2018, Public Law 115–141 (FY 2018 Omnibus); section 105 of Division H of the Consolidated Appropriations Act, 2019, Public Law 116–6 (FY 2019 Omnibus); section 105 of Division I of the Further Consolidated Appropriations Act, 2020, Public Law 116–94 (FY 2020 Omnibus);<sup>12</sup> and section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus), which is discussed below.

### C. FY 2021 Omnibus

On December 27, 2020, then-President Donald Trump signed the FY 2021 Omnibus which contains a provision, section 105 of Division O (section 105), permitting the Secretary of Homeland Security, under certain circumstances and after consultation with the Secretary of Labor, to increase the number of H–2B visas available to U.S. employers, notwithstanding the otherwise-established statutory numerical limitation set forth in the INA. Specifically, section 105 provides

<sup>10</sup> On February 24, 2021, USCIS announced that it had received a sufficient number of petitions to reach the congressionally mandated H–2B cap for the second half of FY 2021. See <https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy-2021> (Feb. 24, 2021). On February 12, 2021, the number of beneficiaries listed on petitions received by USCIS surpassed the total number of remaining H–2B visas available against the H–2B statutory cap for the second half of FY 2021. In accordance with regulations, USCIS determined it was necessary to use a computer-generated process, commonly known as a lottery, to ensure the fair and orderly allocation of H–2B visa numbers to meet, but not exceed, the remainder of the FY 2021 cap. 8 CFR 214.2(h)(8)(vii). On February 17, 2021, USCIS conducted a lottery to randomly select petitions from those received on February 12, 2021. As a result, USCIS assigned all petitions selected in the lottery the receipt date of February 17, 2021.

<sup>11</sup> INA section 214(g)(9)(a), 8 U.S.C. 1184(g)(9)(a), as revised by the Consolidated Appropriations Act of 2016 (Pub. L. 114–113). This program expired on September 30, 2016.

<sup>12</sup> DHS, after consulting with DOL, did not publish a temporary final rule supplementing the H–2B cap for FY 2020 pursuant to the Further Consolidated Appropriations Act, 2020, Public Law 116–94.

that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in [FY] 2021 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H–2B visa in FY 2021 by not more than the highest number of H–2B nonimmigrants who participated in the H–2B returning worker program in any fiscal year in which returning workers were exempt from the H–2B numerical limitation.<sup>13</sup> The Secretary of Homeland Security has consulted with the Secretary of Labor, and this rule implements the authority contained in section 105.

As noted above, since FY 2017, Congress has enacted a series of public laws providing the Secretary of Homeland Security with the discretionary authority to increase the H–2B cap beyond that set forth in section 214 of the INA. The previous four statutory provisions were materially identical to section 105 of the FY 2021 Omnibus. During each fiscal year from FY 2017 through FY 2019, the Secretary of Homeland Security, after consulting with the Secretary of Labor, determined that the needs of some American businesses could not be satisfied in such year with U.S. workers who were willing, qualified, and able to perform temporary nonagricultural labor. On the basis of these determinations, on July 19, 2017, and May 31, 2018, DHS and DOL jointly published temporary final rules for FY 2017 and FY 2018, respectively, each of which allowed an increase of up to 15,000 additional H–2B visas for those businesses that attested that if they did not receive all of the workers requested on the Petition for a Nonimmigrant Worker (Form I–129), they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.<sup>14</sup> A total of 12,294 H–2B workers were approved for H–2B classification under petitions filed

<sup>13</sup> The highest number of returning workers in any such fiscal year was 64,716, which represents the number of beneficiaries covered by H–2B returning worker petitions that were approved for FY 2007. DHS also considered using an alternative approach, under which DHS measured the number of H–2B returning workers admitted at the ports of entry (66,792 for FY 2007).

<sup>14</sup> Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2017 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 82 FR 32987, 32998 (July 19, 2017); Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2018 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 83 FR 24905, 24917 (May 31, 2018).

pursuant to the FY 2017 supplemental cap increase.<sup>15</sup> In FY 2018, USCIS received petitions for more than 15,000 beneficiaries during the first 5 business days of filing for the supplemental cap, and held a lottery on June 7, 2018. The total number of H–2B workers approved toward the FY 2018 supplemental cap increase was 15,788.<sup>16</sup> The vast majority of the H–2B petitions received under the FY 2017 and FY 2018 supplemental caps requested premium processing<sup>17</sup> and were adjudicated within 15 calendar days.

On May 8, 2019, DHS and DOL jointly published a temporary final rule authorizing an increase of up to 30,000 additional H–2B visas for the remainder of FY 2019. The additional visas were limited to returning workers who had been counted against the H–2B cap or were otherwise granted H–2B status in the previous 3 fiscal years, and for those businesses that attested to a level of need such that, if they did not receive all of the workers requested on the Form I–129, they were likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss.<sup>18</sup> The Secretary determined that limiting returning workers to those who were issued an H–2B visa or granted H–2B status in the past 3 fiscal years was appropriate, as it mirrored the standard that Congress designated in previous returning worker provisions. On June 5, 2019, approximately 30 days after the supplemental visas became available, USCIS announced that it received sufficient petitions filed pursuant to the FY 2019 supplemental cap increase. USCIS did not conduct a lottery for the FY 2019 supplemental cap increase. The total number of H–2B workers approved towards the FY 2019 supplemental cap increase was 32,666.<sup>19</sup> The vast majority

<sup>15</sup> USCIS data pulled from the Computer Linked Application Information Management System (CLAIMS3) database, available at <https://www.dhs.gov/publication/dhsuscispia-016-computer-linked-application-information-management-system-claims-3-and>, on Mar. 15, 2021.

<sup>16</sup> The number of approved workers exceeded the number of additional visas authorized for FY 2018 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. USCIS data pulled from CLAIMS3 on Mar. 15, 2021.

<sup>17</sup> Premium processing allows for expedited processing for an additional fee. See INA 286(u), 8 U.S.C. 1356(u).

<sup>18</sup> Temporary Rule, *Exercise of Time-Limited Authority To Increase the Fiscal Year 2019 Numerical Limitation for the H–2B Temporary Nonagricultural Worker Program*, 84 FR 20005, 20021 (May 8, 2019).

<sup>19</sup> The number of approved workers exceeded the number of additional visas authorized for FY 2019 to allow for the possibility that some approved

Continued

of these petitions requested premium processing and were adjudicated within 15 calendar days.

Although Congress provided the Secretary of Homeland Security with the discretionary authority to increase the H-2B cap in FY 2020, the Secretary did not exercise that authority. DHS initially intended to exercise its authority and, on March 4, 2020, announced that it would make available 35,000 supplemental H-2B visas for the second half of fiscal year.<sup>20</sup> On March 13, 2020, then-President Trump declared a National Emergency concerning COVID-19, a communicable disease caused by the coronavirus SARS-CoV-2.<sup>21</sup> On April 2, 2020, DHS announced that the rule to increase the H-2B cap was on hold due to economic circumstances, and no additional H-2B visas would be released until further notice.<sup>22</sup> DHS also noted that the Department of State had suspended routine visa services.<sup>23</sup> As explained in further detail below, although the COVID-19 public health emergency is still in effect, DHS believes that it is appropriate to increase the H-2B cap coupled with additional protections (for example, post-adjudication audits, investigations, and compliance checks), for FY 2021 based on the demand for H-2B workers in the second half of FY 2021, recent and continuing economic growth, the improving job market and increased visa processing by the Department of State.

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

As they did in FY 2017, FY 2018, and FY 2019, the Departments have determined that it is appropriate to jointly issue this temporary rule.<sup>24</sup> The determination to issue the temporary rule jointly follows conflicting court decisions concerning DOL's authority to independently issue legislative rules to carry out its consultative and delegated functions pertaining to the H-2B program under the INA.<sup>25</sup> Although

workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States. USCIS data pulled from CLAIMS3 on Mar. 15, 2021.

<sup>20</sup> DHS to Improve Integrity of Visa Program for Foreign Workers, March 5, 2020, <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

<sup>21</sup> Proclamation 9994 of Mar. 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).

<sup>22</sup> <https://twitter.com/DHSGov/status/1245745115458568192?s=20>.

<sup>23</sup> *Id.*

<sup>24</sup> 82 FR 32987 (Jul. 19, 2017); 83 FR 24905 (May 31, 2018); 84 FR 20005 (May 8, 2019).

<sup>25</sup> See *Outdoor Amusement Bus. Ass'n v. Dep't of Homeland Sec.*, 983 F.3d 671 (4th Cir. 2020); see also *Temporary Non-Agricultural Employment of*

DHS and DOL each have authority to independently issue rules implementing their respective duties under the H-2B program,<sup>26</sup> the Departments are implementing section 105 in this manner to ensure there can be no question about the authority underlying the administration and enforcement of the temporary cap increase. This approach is consistent with rules implementing DOL's general consultative role under INA section 214(c)(1), 8 U.S.C. 1184(c)(1), and delegated functions under INA sections 103(a)(6) and 214(c)(14)(B), 8 U.S.C. 1103(a)(6), 1184(c)(14)(B).<sup>27</sup>

### III. Discussion

#### A. Statutory Determination

Following consultation with the Secretary of Labor, the Secretary of Homeland Security has determined that the needs of some U.S. employers cannot be satisfied in FY 2021 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor. In accordance with section 105 of the FY 2021 Omnibus, the Secretary of Homeland Security has determined that it is appropriate, for the reasons stated below, to raise the numerical limitation on H-2B nonimmigrant visas up to 22,000 additional visas for those American businesses that attest to a level of need such that, if they do not receive the workers under the cap increase, they are likely to suffer irreparable harm, in other words, suffer a permanent and severe financial loss. These businesses must retain documentation, as described below, supporting this attestation.

DHS and DOL intend to conduct a significant number of random audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. If an employer's documentation does not establish the likelihood of irreparable harm, or if the employer fails to provide evidence demonstrating irreparable harm or comply with the audit process, this may be considered a substantial violation resulting in an adverse agency action on the employer, including revocation of the petition and/or TLC or program debarment.

*H-2B Aliens in the United States*, 80 FR 24042, 24045 (Apr. 29, 2015).

<sup>26</sup> See *Outdoor Amusement Bus. Ass'n*, 983 F.3d at 684-89.

<sup>27</sup> See 8 CFR 214.2(h)(6)(iii)(A) and (C), (h)(6)(iv)(A).

The Secretary of Homeland Security has also determined that for certain employers, additional recruitment steps are necessary to confirm that there are no qualified U.S. workers available for the positions. In addition, the Secretary of Homeland Security has determined that the supplemental visas will be limited to returning workers, with the exception that up to 6,000 of the 22,000 visas will be exempt from the returning worker requirement and will be reserved for H-2B workers who are nationals of Guatemala, Honduras, or El Salvador (the Northern Triangle countries).<sup>28</sup> The 6,000 H-2B visas are reserved for nationals of the Northern Triangle countries to further the objectives of E.O. 14010, which among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for individuals from the Northern Triangle.<sup>29</sup> This decision supports the President's vision of expanding lawful pathways for protection and opportunity for individuals from the Northern Triangle.<sup>30</sup>

Similar to the temporary final rule for the FY 2019 supplemental cap, the Secretary of Homeland Security has also determined to limit the supplemental visas to H-2B returning workers, in other words, workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2018, 2019, or 2020,<sup>31</sup> unless the employer indicates on the new attestation form that it is requesting workers who are nationals of the Northern Triangle countries and who are therefore counted towards the 6,000 allotment regardless of whether they are new or returning workers. If the 6,000 returning worker exemption cap for Northern Triangle nationals has been

<sup>28</sup> These conditions and limitations are not inconsistent with sections 214(g)(3) ("first in, first out" H-2B processing) and (g)(10) (fiscal year H-2B allocations) because noncitizens covered by the special allocation under section 105 of the FY 2021 Omnibus are not "subject to the numerical limitations of [section 214(g)(1)]." See, e.g., INA section 214(g)(3); INA section 214(g)(10); FY 2021 Omnibus div. O. sec. 105 ("Notwithstanding the numerical limitation set forth in section 214(g)(1)(B) of the [INA]. . . .").

<sup>29</sup> See Section 3(c) of E.O. 14010, *Creating a Comprehensive Regional Framework to Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, signed February 2, 2021. <https://www.govinfo.gov/content/pkg/FR-2021-02-05/pdf/2021-02561.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> For purposes of this rule, these returning workers could have been H-2B cap exempt or extended H-2B status in FY 2018, 2019, or 2020. Additionally they may have been previously counted against the annual H-2B cap of 66,000 visas during FY 2018, 2019, or 2020, or the supplemental caps in FY 2018 or FY 2019.

reached and visas remain available under the returning worker cap, the petition would be rejected and any fees submitted returned to the petitioner. In such a case, a petitioner may continue to request workers who are nationals of one of the Northern Triangle countries, but the petitioner must file a new Form I-129 petition, with fee, and attest that these noncitizens will be returning workers, in other words, workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2018, 2019, or 2020. If the 6,000 returning worker exemption cap for nationals of the Northern Triangle countries remains unfilled by July 8, 2021, USCIS will announce on its website that the remaining visas will be made available to the general public, but the petitioner must file a new Form I-129 petition and attest that these noncitizens will be returning workers.

The Secretary of Homeland Security's determination to increase the numerical limitation is based, in part, on the conclusion that some businesses are likely to suffer irreparable harm in the absence of a cap increase. Congress has expressed concern with the unavailability of H-2B visas for employers that need workers to start late in the fiscal year.<sup>32</sup> In addition, members of Congress have sent numerous letters to the Secretaries of Homeland Security and Labor about the needs of some U.S. businesses for H-2B workers (after the statutory cap for the second half of the fiscal year has been reached) and about the potentially negative impact on state and local economies if the cap is not increased.<sup>33</sup> U.S. businesses, chambers of commerce, employer organizations, and state and local elected officials have also written to the DHS and Labor Secretaries to express their concerns with the unavailability of H-2B visas after the statutory cap has been reached.<sup>34</sup> DHS held a stakeholder listening session on April 8, 2021, during and after which numerous small and seasonal business owners described the challenges they face absent the ability to secure H-2B

workers because the statutory cap has been reached.<sup>35</sup>

The Secretary of Homeland Security and the Secretary of Labor heard from many trade unions and worker advocates who opposed raising the cap. They argued that the unemployment rate remains high. In particular, they provided evidence that the unemployment rate for summer-related occupations, such as landscaping workers, restaurant workers, construction workers and others, for which businesses were pressing for an increase in visas, exceeds the national average in unemployment.<sup>36</sup> They also pointed to what they consider weaknesses in the labor market test, and stated that some H-2B employers have violated labor laws, including requirements in the H-2B program.

After considering the full range of evidence and diverse points of view, the Secretary of Homeland Security has deemed it appropriate to take action to avoid irreparable harm to businesses that were unable to obtain H-2B workers under the statutory cap, including potential wage and job losses by their U.S. workers, as well as other adverse downstream economic effects.<sup>37</sup> At the same time, the Secretary of Homeland Security believes it is appropriate to condition receipt of supplemental visas on adherence to additional worker protections, particularly because of current national unemployment rates, as discussed below.

The decision to afford the benefits of this temporary cap increase to U.S. businesses that need workers to avoid irreparable harm and that will comply with additional worker protections, rather than applying the cap increase to any and all businesses seeking temporary workers, is consistent with section 105 of the FY 2021 Omnibus, as explained below. The Secretary of Homeland Security, in implementing section 105 and determining the scope

of any such increase, has broad discretion, following consultation with the Secretary of Labor, to identify the business needs that are most relevant, while bearing in mind the need to protect U.S. workers. Within that context, for the below reasons, the Secretary of Homeland Security has determined to allow an overall increase of 22,000 additional visas solely for the businesses facing permanent, severe potential losses.

First, DHS interprets section 105's reference to "the needs of American businesses" as describing a need different from the need ordinarily required of employers in petitioning for an H-2B worker. Under the generally applicable H-2B program, each individual H-2B employer must demonstrate that it has a temporary need for the services or labor for which it seeks to hire H-2B workers. *See* 8 CFR 214.2(h)(6)(ii), 20 CFR 655.6. The use of the phrase "needs of American businesses," which is not found in INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), or the regulations governing the standard H-2B cap, authorizes the Secretary of Homeland Security in allocating additional H-2B visas under section 105 to require that employers establish a need above and beyond the normal standard under the H-2B program, that is, an inability to find sufficient qualified U.S. workers willing and available to perform services or labor and that the employment of the H-2B worker will not adversely affect the wages and working conditions of U.S. workers, *see* 8 CFR 214.2(h)(6)(i)(A). DOL concurs with this interpretation.

Second, the approach set forth in this rule limits the increase in a way that is similar to the implementation of the supplemental caps in fiscal years 2017, 2018, and 2019, and provides protections against adverse effects on U.S. workers that may result from a cap increase. Although there is not enough time to conduct a more full and formal quantitative analysis of such adverse effects, the Secretary has determined that in the particular circumstances presented here, it is appropriate, within the limits discussed below, to tailor the availability of this temporary cap increase to those businesses likely to suffer irreparable harm, in other words, those facing permanent and severe financial loss.

As noted above, to address the increased, and, in some cases, imminent need for H-2B workers, for FY 2021, the Secretary of Homeland Security has determined that employers may petition for supplemental visas on behalf of up to 16,000 workers who were issued an

<sup>32</sup> In the Joint Explanatory Statement for the FY 2018 DHS Consolidated Appropriations Act (Public Law 115-141), for example, Congress directed DHS, in consultation with DOL, to report on options to improve the accessibility of H-2B visas for employers that need workers to start late in the season. DHS submitted the report to Congress on June 7, 2019. Congress made a similar request in the Joint Explanatory Statement for the FY 2020 DHS Further Consolidated Appropriations Act (Public Law 116-94).

<sup>33</sup> See the docket for this rulemaking for access to these letters.

<sup>34</sup> *Id.*

<sup>35</sup> USCIS expects to post a recording of the stakeholder listening engagement on its Electronic Reading Room, at <https://www.uscis.gov/records/electronic-reading-room>.

<sup>36</sup> See: Department of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Table A-30, available at <https://www.bls.gov/web/empsit/cpseea30.htm>. According to the March 2021 Current Population Survey, the unemployment rate for construction and landscaping workers was 9.5 percent and 9.9 percent, respectively, whereas the national unemployment rate was 6.2 percent.

<sup>37</sup> See, e.g., Impacts of the H-2B Visa Program for Seasonal Workers on Maryland's Seafood Industry and Economy, Maryland Department of Agriculture Seafood Marketing Program and Chesapeake Bay Seafood Industry Association (March 2, 2020), available at <https://mda.maryland.gov/documents/2020-H2B-Impact-Study.pdf> (last visited May 7, 2021).



H-2B visa or were otherwise granted H-2B status in FY 2018, 2019, or 2020.<sup>38</sup> The last 3 fiscal years' temporal limitation in the returning worker definition in this temporary rule mirrors the temporal limitation Congress imposed in previous returning worker statutes.<sup>39</sup> Such workers (in other words, those who recently participated in the H-2B program) have previously obtained H-2B visas and therefore have been vetted by DOS, would have departed the United States after their authorized period of stay as generally required by the terms of their nonimmigrant admission, and therefore may obtain their new visas through DOS and begin work more expeditiously.<sup>40</sup> DOS has informed DHS that, in general, H-2B visa applicants who are able to demonstrate clearly that they have previously abided by the terms of their status granted by DHS have a higher success rate when applying to renew their H-2B visas, as compared with the overall visa applicant pool from a given country. For that reason, some consular sections waive the in-person interview requirement for H-2B applicants whose visa expired within a specific timeframe and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h). We note that DOS has, in response to the COVID-19 pandemic, expanded interview waivers to some first-time H-2 applicants<sup>41</sup> potentially allowing some such applicants to be processed with increased efficiency. However, there is no indication that this temporary, short-term measure will necessarily affect the overall success rates of applicants, which DOS has indicated is higher for returning workers who can demonstrate prior compliance with the program.

Limiting the supplemental cap to returning workers is beneficial because

<sup>38</sup> DHS believes that this temporal limitation is appropriate even though H-2B visa issuances and admissions were lower in FY 2020 than in previous years, likely due to the impacts of COVID-19 as DHS believes that there will still be a sufficient number of returning workers available to U.S. employers to use the 16,000 additional visas authorized by this rule.

<sup>39</sup> Consolidated Appropriations Act, 2016, Public Law 114-113, div. F, tit. V, sec. 565; John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, div. A, tit. X, sec. 1074, (2006); Save Our Small and Seasonal Businesses Act of 2005, Public Law. 109-13, div. B, tit. IV, sec. 402.

<sup>40</sup> Non-returning workers cannot meet the statutory criteria under INA section 222(h)(1)(B) for an interview waiver. The previous review of an applicant's qualifications and current evidence of lawful travel to the United States will generally lead to a shorter processing time of a renewal application.

<sup>41</sup> DOS, *Important Announcement on H2 Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html> (last updated Mar. 26, 2020).

these workers have generally followed immigration law in good faith and demonstrated their willingness to return home after they have completed their temporary labor or services or their period of authorized stay, which is a condition of H-2B status. The returning worker condition therefore provides a basis to believe that H-2B workers under this cap increase will again abide by the terms and conditions of their visa. The returning worker condition also benefits employers that seek to re-hire known and trusted workers who have a proven positive employment track record while previously employed as workers in this country. While the Departments recognize that the returning worker requirement may limit to an extent the flexibility of employers that might wish to hire non-returning workers, the requirement provides an important safeguard against H-2B abuse, which DHS considers to be a significant consideration.

In allocating up to 6,000 H-2B visas to nationals of the Northern Triangle countries while making the remaining up to 16,000 H-2B initially available visas available to qualified returning workers, irrespective of their country of nationality, this rule strikes a balance between furthering the U.S. foreign policy interests of creating a comprehensive framework—of which this allocation is one piece—to address and manage migration from the Northern Triangle and addressing the needs of certain H-2B employers at risk of suffering from irreparable harm. The United States has strong foreign policy interests in initially allocating up to 6,000 supplemental visas only to nationals of the Northern Triangle countries and exempting such persons from the returning worker requirement. The Secretary of Homeland Security has determined that both the 6,000 limitation and the exemption from the returning worker requirement for nationals of the Northern Triangle countries is beneficial in light of President Biden's February 2, 2021 E.O. 14010, which instructed the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access for individuals of the Northern Triangle countries to visa programs, as appropriate and consistent with applicable law. In response to this executive order, DHS seeks to promote and improve safety, security, and economic stability throughout the region, and work with these countries to stem the flow of irregular migration in the region and enhance access to visa programs.

The exemption from the returning worker requirement recognizes the

relatively small numbers of individuals from the three Northern Triangle countries who were previously granted H-2B visas in recent years.<sup>42</sup> Absent this exemption, there may be insufficient workers from these countries, which means that the rule might thereby fail to achieve its intended policy objective, in other words, to provide additional temporary foreign workers for U.S. employers that may suffer irreparable harm absent these workers, while also enhancing access to the H-2B visa classification for individuals from the Northern Triangle countries.

Finally, this rule provides that employers seeking H-2B visas for nationals of the Northern Triangle countries exempt from the returning worker requirement must file their petitions with USCIS no later than July 8, 2021. If fewer petitions are received than needed to reach the 6,000 allocation by July 8, 2021, the remaining visas will be made available to returning workers, irrespective of their country of origin. USCIS will announce the availability and filing period for such remaining visas on its website, [uscis.gov](https://uscis.gov), no later than July 23, 2021. DHS believes that making any remaining visas available to returning workers after July 8, 2021 will provide sufficient opportunity for their use by nationals of Northern Triangle countries and also help ensure that supplemental H-2B visas do not go unused if there is insufficient demand from employers seeking or able to employ nationals of Northern Triangle countries.

For all petitions filed under this rule and the H-2B program, generally, employers must establish, among other requirements, that insufficient qualified U.S. workers are available to fill the petitioning H-2B employer's job opportunity and that the foreign worker's employment in the job opportunity will not adversely affect the wages or working conditions of similarly-employed U.S. workers. INA section 214(c)(1), 8 U.S.C. 1184(c)(1); 8 CFR 214.2(h)(6)(iii)(A) and (D); 20 CFR 655.1. To meet this standard of protection for U.S. workers and, in order to be eligible for additional visas under this rule, employers must have applied for and received a valid TLC in accordance with 8 CFR 214.2(h)(6)(iv)(A) and (D) and 20 CFR

<sup>42</sup> DOS issued a combined total of approximately 26,600 H-2B visas to nationals of the Northern Triangle countries from FY 2015 through FY 2020, combined, approximately 4,400 per year. DOS Monthly NIV Issuances by Nationality and Visa Class; <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited April 11, 2021).

part 655, subpart A. Under DOL's H-2B regulations, TLCs are valid only for the period of employment certified by DOL and expire on the last day of authorized employment. 20 CFR 655.55(a).

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

In sum, this rule increases the FY 2021 numerical limitation by up to 22,000 visas, but also restricts the availability of those additional visas by prioritizing only the most significant business needs, and limiting eligibility to H-2B returning workers, unless the worker is a national of one of the Northern Triangle countries counted towards the 6,000 allocation that are exempt from the returning worker limitation. These provisions are each described in turn below.

#### *B. Numerical Increase and Allocation of up to 22,000 Visas*

The increase of up to 22,000 visas will help address the urgent needs of eligible employers for additional H-2B workers for the remainder of FY 2021.<sup>43</sup> The determination to allow up to 22,000 additional H-2B visas reflects a balancing of a number of factors including the demand for H-2B visas for the second half of FY 2021; current

<sup>43</sup> In contrast with section 214(g)(1) of the INA, 8 U.S.C. 1184(g)(1), which establishes a cap on the number of individuals who may be issued visas or otherwise provided H-2B status, and section 214(g)(10) of the INA, 8 U.S.C. 1184(g)(10) (emphasis added), which imposes a first half of the fiscal year cap on H-2B issuance with respect to the number of individuals who may be issued visas or are accorded [H-2B] status" (emphasis added), section 105 only authorizes DHS to increase the number of available H-2B visas. Accordingly, DHS will not permit individuals authorized for H-2B status pursuant to an H-2B petition approved under section 105 to change to H-2B status from another nonimmigrant status. See INA section 248, 8 U.S.C. 1258; see also 8 CFR part 248. If a petitioner files a petition seeking H-2B workers in accordance with this rule and requests a change of status on behalf of someone in the United States, the change of status request will be denied, but the petition will be adjudicated in accordance with applicable DHS regulations. Any noncitizen authorized for H-2B status under the approved petition would need to obtain the necessary H-2B visa at a consular post abroad and then seek admission to the United States in H-2B status at a port of entry.

economic conditions; the increased demand for supplemental visas from FY 2017 to FY 2019; H-2B returning worker data; the amount of time remaining for employers to hire and obtain H-2B workers in the fiscal year; congressional concerns such as the one demonstrated by the FY 2018 and FY 2020 Joint Explanatory Statements where Congress directed DHS, in consultation with DOL, to consider options that would help address the unavailability of H-2B visas for late-season employers; and the objectives of E.O. 14010. DHS believes the numerical increase both addresses the needs of U.S. businesses and, as explained in more detail below, furthers the foreign policy interests of the United States. Additional provisions address the need to protect workers, such as informing them of access to COVID-19 vaccines and requiring additional recruitment efforts.

Section 105 of the FY 2021 Omnibus sets the highest number of H-2B returning workers who were exempt from the cap in certain previous years as the maximum limit for any increase in the H-2B numerical limitation for FY 2021.<sup>44</sup> Consistent with the statute's reference to H-2B returning workers, in determining the appropriate number by which to increase the H-2B numerical limitation, the Secretary of Homeland Security focused on the number of visas allocated to such workers in years in which Congress enacted returning worker exemptions from the H-2B numerical limitation. During each of the years the returning worker provision was in force, U.S. employers' standard business needs for H-2B workers exceeded the statutory 66,000 cap. The highest number of H-2B returning workers approved was 64,716 in FY 2007. In setting the number of additional H-2B visas to be made available during FY 2021, DHS considered this number, overall indications of increased need, the availability of U.S. workers during this period of high unemployment, as discussed below, Congress's prior direction that DHS review options for addressing the problem of unavailability of H-2B visas for businesses that need workers to start work late in a semiannual period of availability, and

<sup>44</sup> During fiscal years 2005 to 2007, and 2016, Congress enacted "returning worker" exemptions to the H-2B visa cap, allowing workers who were counted against the H-2B cap in one of the three preceding fiscal years not to be counted against the upcoming fiscal year cap. Save Our Small and Seasonal Businesses Act of 2005, Public Law 109-13, Sec. 402 (May 11, 2005); John Warner National Defense Authorization Act, Public Law 109-364, Sec. 1074 (Oct. 17, 2006); Consolidated Appropriations Act of 2016, Public Law 114-113, Sec. 565 (Dec. 18, 2015).

the time remaining in FY 2021. On the basis of these considerations, DHS determined that it would be appropriate to make additional visas available and to limit the supplemental cap to up to 22,000. The Secretary further considered the objectives of E.O. 14010, which among other initiatives, instructs the Secretary of Homeland Security and the Secretary of State to implement measures to enhance access to visa programs for individuals from the Northern Triangle, and determined that reserving up to 6,000 of the up to 22,000 additional visas and exempting this number from the returning worker requirement would be appropriate.

In past years, the number of beneficiaries covered by H-2B petitions filed exceeded the number of additional visas allocated under the two most recent supplemental caps. In FY 2018, USCIS received petitions for approximately 29,000 beneficiaries during the first 5 business days of filing for the 15,000 supplemental cap. USCIS therefore conducted a lottery on June 7, 2018, to randomly select petitions that would be accepted under the supplemental cap. Of the petitions that were selected, USCIS issued approvals for 15,672 beneficiaries.<sup>45</sup> In FY 2019, USCIS received sufficient petitions for the 30,000 supplemental cap on June 5, 2019, but did not conduct a lottery to randomly select petitions that would be accepted under the supplemental cap. Of the petitions received, USCIS issued approvals for 32,717 beneficiaries.<sup>46</sup>

Available data clearly indicate a need for supplemental H-2B visas in FY 2021. As noted above, in FY 2021, based on TLC applications filed during the 3-day filing window of January 1 through 3, 2021, DOL's Office of Foreign Labor Certification (OFLC) received requests to certify 96,641 worker positions, from 5,377 H-2B applications, for start dates

<sup>45</sup> USCIS recognizes it may have received petitions for more than 29,000 supplemental H-2B workers if the cap had not been exceeded within the first 5 days of opening. However, DHS estimates that not all of the 29,000 workers requested under the FY 2018 supplemental cap would have been approved and/or issued visas. For instance, although DHS approved petitions for 15,672 beneficiaries under the FY 2018 cap increase, the Department of State data shows that as of January 15, 2019, it issued only 12,243 visas under that cap increase. Similarly, DHS approved petitions for 12,294 beneficiaries under the FY 2017 cap increase, but the Department of State data shows that it issued only 9,160 visas.

<sup>46</sup> The number of approved workers exceeded the number of additional visas authorized for FY 2018 and FY 2019 to allow for the possibility that some approved workers would either not seek a visa or admission, would not be issued a visa, or would not be admitted to the United States.



of work on April 1, 2021.<sup>47</sup> USCIS, in turn, received sufficient H–2B petitions to reach the second half of the fiscal year statutory cap by February 12, 2021.<sup>48</sup> This is similar to the level of demand in FY 2020, when OFLC received requests to certify 99,362 worker positions for start dates of work on April 1, 2020,<sup>49</sup> and USCIS received sufficient H–2B petitions to reach the second half of the fiscal year statutory cap by February 18, 2020.<sup>50</sup> On March 4, 2020, DHS announced that it would make available 35,000 supplemental H–2B visas for the second half of fiscal year.<sup>51</sup> However, on March 13, 2020, then-President Trump declared a National Emergency concerning the COVID–19 outbreak to control the spread of the virus in the United States.<sup>52</sup> On April 2, 2020, DHS announced that the rule to increase the H–2B cap was on hold due to economic circumstances, and no additional H–2B visas would be released until further notice.<sup>53</sup> DHS also noted that DOS had suspended routine visa services.<sup>54</sup>

Although the public health emergency due to COVID–19 still exists,<sup>55</sup> DHS

believes that it is appropriate to issue additional H–2B visas for the remainder of FY 2021. While the economic impacts of COVID–19 continue to be felt, real gross domestic product (GDP) grew significantly in the third and fourth quarters of 2020.<sup>56</sup> Economists project that this economic growth will continue throughout FY 2021 and beyond.<sup>57</sup> Similarly, the unemployment rate, while still not at pre-pandemic levels, improved from 14.7 percent in April 2020<sup>58</sup> to 6.0 percent in March 2021. (Note, however, that higher unemployment in the top H–2B occupations remains.<sup>59</sup>)

In March 2020, the U.S. labor market was severely affected by the onset of the COVID–19 pandemic, pushing the national unemployment rate to near record levels and resulting in millions of U.S. workers being displaced from work. At the beginning of March 2020, the national unemployment rate was 3.5 percent with an estimated 5.8 million people categorized as unemployed.<sup>60</sup> This continued a 6-month trend of the unemployment rate sitting at or below 3.5 percent. However, by the end of April 2020, the unemployment rate increased from 4.4 percent to a peak of 14.7 percent. The 10.3 percent increase in the unemployment rate is the largest recorded month-to-month increase in the rate and coincided with total employment declining 20.5 million in April 2020.<sup>61</sup> As of April 2021, the U.S. unemployment rate sat at 6.0 percent. While this is a considerable decline from the prior year's rate, it remains 2.5 percent above the pre-pandemic unemployment rate, and the number of unemployed persons is currently 9.7 million people which is 4 million people higher than it was at the beginning of March 2020. A February 2021 Congressional Budget Office outlook of the labor market projects that a full recovery to pre-pandemic levels of employment could take in excess of 3 years.<sup>62</sup>

Typically H–2B occupations are cyclical jobs, and U.S. workers in these

occupations are more susceptible to job instability and labor market variability. Amongst the occupations most commonly associated with the H–2B program, the unemployment rate has displayed a wide degree of variance. Whereas the pre-pandemic unemployment rate for the U.S. was 3.5 percent, the unemployment rate across the top 25 occupations most commonly associated with the H–2B program sat at 6.82 percent.<sup>63</sup> Currently the average unemployment rate across these occupations is 8.93 percent. The current unemployment rate for Landscaping and Groundskeeping Workers (the single largest occupation that uses the H–2B program) is 7.8 percent, followed by Amusement and Recreation Attendants at 9.3 percent, and 7.1 percent for Meat, Poultry, and Fish Cutters.<sup>64</sup>

From March 2020 through March 2021, approximately 1 million U.S. workers have been displaced across occupations that are predominantly used in the H–2B program.<sup>65</sup> Because of the higher unemployment rate of these occupations for U.S. workers, there is an increased likelihood that more U.S. workers could be available to work in H–2B jobs. The Departments acknowledge that it is challenging to extrapolate, from national unemployment rates in occupations, precise estimates regarding the availability of U.S. workers for any particular job opportunity and in any particular geographic area. The additional procedures contained in this rule, including the attestation requirements and DOL procedures, provide appropriate protections for U.S. workers within the context of that uncertainty.

Finally, while DOS temporarily suspended routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates on March 20, 2020, it subsequently announced a phased resumption of visa services<sup>66</sup> and indicated it would continue

<sup>47</sup> DOL announcement on January 7, 2021. See <https://www.foreignlaborcert.doleta.gov/> (last accessed on February 24, 2021).

<sup>48</sup> On February 24, 2021, USCIS announced that it had received a sufficient number of petitions to reach the congressionally mandated H–2B cap for the second half of FY 2021. See <https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy-2021> (Feb. 24, 2021). On February 12, 2021, the number of beneficiaries listed on petitions received by USCIS surpassed the total number of remaining H–2B visas available against the H–2B statutory cap for the second half of FY 2021. In accordance with regulations, USCIS determined it was necessary to use a computer-generated process, commonly known as a lottery, to ensure the fair and orderly allocation of H–2B visa numbers to meet, but not exceed, the remainder of the FY 2021 cap. 8 CFR 214.2(h)(8)(vii). On February 17, 2021, USCIS conducted a lottery to randomly select petitions from those received on February 12, 2021. As a result, USCIS assigned all petitions selected in the lottery the receipt date of February 17, 2021.

<sup>49</sup> DOL announcement on January 6, 2020. *OFLC Conducts Randomization Process on H–2B Applications Requesting an April 1, 2020, Work Start Date*, <https://flag.dol.gov/announcements/01-06-2020>.

<sup>50</sup> *H–2B Cap Reached for Second Half of FY2020*, Feb. 26, 2020, <https://www.uscis.gov/news/alerts/h-2b-cap-reached-for-second-half-of-fy2020>.

<sup>51</sup> DHS to Improve Integrity of Visa Program for Foreign Workers, March 5, 2020, <https://www.dhs.gov/news/2020/03/05/dhs-improve-integrity-visa-program-foreign-workers>.

<sup>52</sup> Proclamation 9994 of Mar. 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID–19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).

<sup>53</sup> <https://twitter.com/DHSGov/status/1245745115458568192?s=20>.

<sup>54</sup> *Id.*

<sup>55</sup> See HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15April2021.aspx> (Apr. 15, 2021).

<sup>56</sup> <https://www.bea.gov/news/glance>.

<sup>57</sup> <https://www.bloomberg.com/news/articles/2021-02-12/charting-the-global-economy-u-s-growth-forecasts-upgraded>.

<sup>58</sup> <https://www.bls.gov/opub/ed/2020/unemployment-rate-rises-to-record-high-14-point-7-percent-in-april-2020.htm>

<sup>59</sup> Department of Labor, Bureau of Labor Statistics, *The Employment Situation*, March 2021. Available at [https://www.bls.gov/news.release/archives/empsit\\_04022021.htm](https://www.bls.gov/news.release/archives/empsit_04022021.htm).

<sup>60</sup> [https://www.bls.gov/news.release/archives/empsit\\_03062020.pdf](https://www.bls.gov/news.release/archives/empsit_03062020.pdf).

<sup>61</sup> [https://www.bls.gov/news.release/archives/empsit\\_05082020.pdf](https://www.bls.gov/news.release/archives/empsit_05082020.pdf).

<sup>62</sup> <https://www.cbo.gov/system/files/2021-02/56965-Economic-Outlook.pdf>.

<sup>63</sup> See <https://www.bls.gov/web/empsit/cpseea30.htm>. The unemployment rates for the top 25 H–2B occupations were obtained by identifying the top occupations based on OFLC performance data.

<sup>64</sup> See 2021 Q2 OFLC Performance data: [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_Disclosure\\_Data\\_FY2021\\_Q2.xlsx](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Disclosure_Data_FY2021_Q2.xlsx) and OFLC 2021 Q2 Selected statistics [https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B\\_Selected\\_Statistics\\_FY2021\\_Q2.pdf](https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/H-2B_Selected_Statistics_FY2021_Q2.pdf)

<sup>65</sup> See <https://www.bls.gov/web/empsit/cpseea30.htm>. The number of displaced workers within the most commonly held H–2B occupations were obtained by identifying the top occupations based on OFLC performance data and comparing those occupations to unemployment data from BLS.

<sup>66</sup> DOS, *Suspension of Routine Visa Services*, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html> (last updated July 22, 2020).

processing H-2 cases as much as possible, as permitted by post resources and local government restrictions, and expanded the categories of H-2 visa applicants whose applications can be adjudicated without an in-person interview.<sup>67</sup> In addition, Presidential Proclamation 10052, which temporarily suspended the entry of certain nonimmigrants, including certain H-2B nonimmigrants, expired on March 31, 2021.<sup>68</sup> Given the level of demand for H-2B workers, the continued and projected economic recovery, the continued and projected job growth, and the resumption of visa processing services and the expiration of the suspension of entry of H-2B nonimmigrants, DHS believes it is appropriate to release additional visas at this time. Further, DHS believes that 22,000 is an appropriate number of visas for the reasons discussed above.

Finally, recognizing the high demand for H-2B visas, it is plausible that the additional H-2B allocations provided in this rule will be reached prior to the end of the fiscal year. Specifically, the following scenarios may still occur:

- The 16,000 supplemental cap visas limited to returning workers that will be immediately available for employers will be reached before September 15, 2021.
- The 6,000 supplemental cap visas limited to nationals of the Northern Triangle countries will be reached before July 8, 2021.
- The cap for any remaining visas from the Northern Triangle allotment made available to returning workers after July 8, 2021, regardless of the country of nationality, will be reached before September 15, 2021.

DHS regulation, 8 CFR 214.2(h)(6)(x)(E), reaffirms the use of the processes that are in place when H-2B numerical limitations under INA section 214(g)(1)(B) or (g)(10), 8 U.S.C. 1184(g)(1)(B) or (g)(10), are reached, as applicable to each of the scenarios described above that involve numerical limitations of the supplemental cap. Specifically, for each of the scenarios mentioned above, DHS will monitor petitions received, and make projections of the number of petitions necessary to achieve the projected numerical limit of approvals. USCIS will also notify the

public of the dates that USCIS has received the necessary number of petitions (the “final receipt dates”) for each of these scenarios. The day the public is notified will not control the final receipt dates. Moreover, USCIS may randomly select, via computer-generated selection, from among the petitions received on the final receipt date the remaining number of petitions deemed necessary to generate the numerical limit of approvals for each of the scenarios involving numerical limitations to the supplemental cap. USCIS may, but will not necessarily, conduct a lottery if: The 16,000 supplemental cap visas for returning workers is reached before September 15, 2021; the 6,000 visas limited to nationals of the Northern Triangle countries is reached before July 8, 2021; or the cap for any remaining visas from the Northern Triangle allotment made available to returning workers regardless of the country of nationality, is reached before September 15, 2021. Finally, similar to the processes applicable to the H-2B statutory cap, if the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limit may be received (in other words, if the numerical limit is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

### C. Returning Workers

Similar to the temporary increase in FY 2019, the Secretary of Homeland Security has determined that the supplemental visas should be granted to returning workers from the past 3 fiscal years, in order to meet the immediate need for H-2B workers, unless the H-2B worker is a national of one of the Northern Triangle countries and is counted towards the separate 6,000 cap for such workers. The Secretary has determined that, for purposes of this program, H-2B returning workers include those individuals who were issued an H-2B visa or were otherwise granted H-2B status in FY 2018, 2019, or 2020. As discussed above, the Secretary determined that limiting returning workers to those who were issued an H-2B visa or granted H-2B status in the past three fiscal years is appropriate as it mirrors the standard that Congress designated in previous returning worker provisions. DHS acknowledges that H-2B visa issuances and admissions were lower in the second half of FY 2021 than in recent fiscal years, likely as a result of COVID-19. However, DHS believes that there

will be sufficient numbers of returning workers to meet the needs of employers and fully utilize the additional 16,000 visas, and thus the temporal limitation remains appropriate. Returning workers have previously obtained H-2B visas and therefore been vetted by DOS, would have departed the United States after their authorized period of stay as generally required by the terms of their nonimmigrant admission, and therefore may have a higher likelihood of success in obtaining their new visas through DOS, possibly without a required interview, and begin work more expeditiously.

To ensure compliance with the requirement that additional visas only be made available to returning workers, petitioners seeking H-2B workers under the supplemental cap will be required to attest that each employee requested or instructed to apply for a visa under the FY 2021 supplemental cap was issued an H-2B visa or otherwise granted H-2B status in FY 2018, 2019, or 2020, unless the H-2B worker is a national of one of the Northern Triangle countries and is counted towards the 6,000 cap. This attestation will serve as prima facie initial evidence to DHS that each worker, unless a national of one of the Northern Triangle countries who is counted against the 6,000 cap, meets the returning worker requirement. DHS and DOS retain the right to review and verify that each beneficiary is in fact a returning worker any time before and after approval of the petition or visa. DHS has authority to review and verify this attestation during the course of an audit or investigation.

### D. Returning Worker Exemption for up to 6,000 Visas for Nationals of Guatemala, El Salvador, and Honduras (Northern Triangle Countries)

As described above, the Secretary of Homeland Security has determined that up to 6,000 additional H-2B visas will be limited to workers who are nationals of one of the Northern Triangle countries. These 6,000 visas will be exempt from the returning worker requirement. If the 6,000 visa limit has been reached and the 16,000 cap has not, petitioners may continue to request workers who are nationals of one of the Northern Triangle countries, but these noncitizens must be specifically requested as returning workers who were issued H-2B visas or were otherwise granted H-2B status in FY 2018, 2019, or 2020. Alternatively, if the returning worker exemption cap initially reserved for nationals from the Northern Triangle remains unfilled on July 8, 2021, the remaining H-2B visas will be made available to workers

<sup>67</sup> DOS, *Expansion of Interview Waiver Eligibility*, <https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html> (last updated Mar. 11, 2021); DOS, *Important Announcement on H2 Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html> (last updated Mar. 26, 2020).

<sup>68</sup> <https://travel.state.gov/content/travel/en/News/visas-news/update-on-presidential-proclamation-10052.html>

irrespective of their home country, but these noncitizens must be returning workers. USCIS will announce the availability of the remainder of the allocation on the USCIS website at [uscis.gov](https://uscis.gov) no later than July 23, 2021.

DHS has determined that reserving 6,000 supplemental H-2B visas for nationals of the Northern Triangle countries—a number significantly higher than the average annual number of visas issued to such persons in the past 6 fiscal years—will encourage U.S. employers who face a likelihood of irreparable harm to seek out workers from such countries, while, at the same time, increase interest among nationals of the Northern Triangle countries seeking temporary employment in the United States. DOS issued a combined total of approximately 26,600 H-2B visas to nationals of the Northern Triangle countries from FY 2015 through FY 2020, an average of approximately 4,400 per year.<sup>69</sup> As previously stated, DHS has determined that the additional increase will not only provide U.S. businesses who have been unable to find qualified and available U.S. workers with potential workers, but also promote lawful immigration and lawful employment authorization for Northern Triangle nationals.

While DHS reiterates the importance of limiting the general supplemental cap exclusively to returning workers, for the reasons stated previously, the Secretary has determined that the exemption from the returning worker requirement for nationals of the Northern Triangle countries is beneficial for the following reasons. It strikes a balance between furthering the U.S. foreign policy interests of expanding access to lawful pathways in the United States for Northern Triangle nationals and addressing the needs of certain H-2B employers at risk of suffering from irreparable harm. This policy initiative would also support the strategies for the region described in E.O. 14010, which directs DHS to implement efforts to expand access to lawful immigration to the United States, including visa programs, as appropriate and consistent with the law through both protection-related and non-protection related programs. The availability of workers from the Northern Triangle countries may help provide U.S. employers with additional labor from neighboring countries who are committed to working with the United States and also promote

safe and lawful immigration to the United States.

Similar to the discussion above regarding returning workers, DOS will work with the relevant countries to facilitate consular interviews, as required,<sup>70</sup> and channels for reporting incidents of fraud and abuse within the H-2 programs. Further, each country's own consular networks will maintain contact with the workers while in the United States and ensure the workers know their rights and responsibilities under the U.S. immigration laws, which are all valuable protections to the immigration system, U.S. employers, U.S. workers, and workers entering the country on H-2 visas.

Nothing in this rule will limit the authority of DHS or DOS to deny, revoke, or take any other lawful action with respect to an H-2B petition or visa application at any time before or after approval of the H-2B petition or visa application.

#### *E. Business Need Standard—Irreparable Harm and FY 2021 Attestation*

To file any H-2B petition under this rule during the remainder of FY 2021, petitioners must meet all existing H-2B eligibility requirements, including having an approved, valid, and unexpired TLC. *See* 8 CFR 214.2(h)(6) and 20 CFR part 655, subpart A. In addition, the petitioner must submit an attestation to USCIS in which the petitioner affirms, under penalty of perjury, that it meets the business need standard. Under that standard, the petitioner must be able to establish that, if it does not receive all of the workers requested under the cap increase,<sup>71</sup> it is likely to suffer irreparable harm, that is, permanent and severe financial loss. The TLC process focuses on establishing whether a petitioner has a temporary need for workers and whether there are U.S. workers who are able, willing, qualified, and available to perform the

temporary service or labor, and does not address the harm a petitioner may face in the absence of such workers; the attestation addresses this question. The attestation must be submitted directly to USCIS, together with Form I-129, the approved and valid TLC, and any other necessary documentation. As in the rules implementing the FY 2017, FY 2018, and FY 2019 temporary cap increases, employers will be required to complete the new attestation form which can be found at: <https://www.foreignlaborcert.doleta.gov/form.cfm>.<sup>72</sup>

The attestation form will serve as prima facie initial evidence to DHS that the petitioner's business is likely to suffer irreparable harm. Any petition requesting H-2B workers under the FY 2021 supplemental cap that is received lacking the requisite attestation form may be, as applicable, rejected in accordance with 8 CFR 103.2(a)(7)(ii) or denied in accordance with 8 CFR 103.2(b)(8)(ii). Although this regulation does not require submission of evidence at the time of filing of the petition, other than an attestation, the employer must have such evidence on hand and ready to present to DHS or DOL at any time starting with the date of filing the I-129 petition, through the prescribed document retention period discussed below. In fact, the Departments intend to select a significant number of petitions approved for audit examination to verify compliance with program requirements, including the irreparable harm standard and recruitment provisions implemented through this rule. Failure to provide evidence demonstrating irreparable harm or to comply with the audit process may be considered a substantial violation resulting in an adverse agency action on the employer, including revocation of the petition and/or TLC or program debarment. Similarly, failure to cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS or DOL as required by 8 CFR 214.2(h)(6)(x)(B)(2)(vi) and (vii), respectively, may constitute a violation of the terms and conditions of an approved petition and lead to petition revocation under 8 CFR 214.2(h)(11)(iii)(A)(3).

In addition to the statement regarding the irreparable harm standard, the

<sup>69</sup> DOS Monthly NIV Issuances by Nationality and Visa Class; <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/nonimmigrant-visa-statistics.html> (last visited April 11, 2021).

<sup>70</sup> As noted previously, some consular sections waive the in-person interview requirement for H-2B applicants whose prior visa expired within a specific timeframe and who otherwise meet the strict limitations set out under INA section 222(h), 8 U.S.C. 1202(h) and, as an effort to reduce the risk of COVID-19 transmission, DOS recently expanded the ability of consular officers to waive the in-person interview requirement for individuals applying for a nonimmigrant visa in the same classification. DOS, *Expansion of Interview Waiver Eligibility*, <https://travel.state.gov/content/travel/en/News/visas-news/expansion-of-interview-waiver-eligibility.html> (last updated Mar. 11, 2021).

<sup>71</sup> An employer may request fewer workers on the H-2B petition than the number of workers listed on the TLC. *See* Instructions for Petition for Nonimmigrant Worker, providing that "the total number of workers you request on the petition must not exceed the number of workers approved by the Department of Labor or Guam Department of Labor, if required, on the temporary labor certification."

<sup>72</sup> This portion of the temporary rule does not apply to workers who have already been counted under the fiscal year 2021 H-2B statutory cap (66,000). Further, this portion of the rule does not apply to noncitizens who are exempt from the fiscal year 2021 H-2B statutory cap, including those who are extending their stay in H-2B status. Accordingly, petitioners who are filing on behalf of such workers are not subject to the attestation requirement.

attestation submitted to USCIS will also state that the employer meets all other eligibility criteria for the available visas, including the returning worker requirement, unless exempt because the H-2B worker is a national of one of the Northern Triangle countries who is counted against the 6,000 visas reserved for such workers; will comply with all assurances, obligations, and conditions of employment set forth in the *Application for Temporary Employment Certification* (Form ETA 9142B and appendices) certified by DOL for the job opportunity (which serves as the TLC); will conduct additional recruitment of U.S. workers in accordance with the requirements of this rule and discussed further below; and will document and retain evidence of such compliance. Because the attestation will be submitted to USCIS as initial evidence with Form I-129, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, a petition may be denied or revoked, as applicable, based on or related to statements made in the attestation, including but not limited to the following grounds: (1) Because the employer failed to demonstrate employment of all of the requested workers as required under the irreparable harm standard; and (2) the employer failed to demonstrate that it requested and/or instructed that each worker petitioned for was a returning worker, or a national of one of the Northern Triangle countries, as required by this rule. Any denial or revocation on such basis, however, would be appealable under 8 CFR part 103, consistent with DHS regulations and existing USCIS procedures.

It is the view of the Secretaries of Homeland Security and Labor that requiring a post-TLC attestation to USCIS is the most practical approach, given the time remaining in FY 2021 and the need to assemble the necessary documentation. In addition, the employer is required to retain documentation, which must be provided upon request by DHS or DOL, supporting the new attestations regarding (1) the irreparable harm standard, (2) the returning worker requirement, or, alternatively, documentation supporting that the H-2B worker(s) requested is a national of one of the Northern Triangle countries who is counted against the 6,000 cap (which may be satisfied by the separate Form I-129 that employers are required to file for such workers in accordance with this rule) and (3) a recruitment report for any additional

recruitment required under this rule for a period of 3 years. *See* new 20 CFR 655.68. Although the employer must have such documentation on hand at the time it files the petition, the Departments have determined that, if employers were required to submit the attestation form to DOL before filing a petition with DHS, the attendant delays would render any visas unlikely to satisfy the needs of American businesses given processing timeframes and the time remaining in this fiscal year. However, as noted above, the Departments will be conducting audits, investigations and/or post-adjudication compliance reviews on a significant number of H-2B petitions. As part of that process, USCIS may issue a request for additional evidence, a notice of intent to revoke, or a revocation notice, based on the review of such documentation, and DOL's OFLC and WHD will be able to review this documentation and enforce the attestations during the course of an audit examination or investigation. *See* 8 CFR 103.2(b) or 8 CFR 214.2(h)(11).

In accordance with the attestation requirements, under which petitioners attest that they meet the irreparable harm standard, that they are seeking to employ only returning workers (unless exempt as described above), and they meet the document retention requirements at new 20 CFR 655.68, the petitioner must retain documents and records fulfilling their responsibility to demonstrate compliance with this rule for 3 years from the date of the attestation, and must provide the documents and records upon the request of DHS or DOL. Supporting evidence may include, but is not limited to, the following types of documentation:

(1) Evidence that the business has suffered or will suffer permanent and severe financial loss due to the inability to meet financial or existing contractual obligations without all of the H-2B workers, including evidence of contracts, reservations, orders, or other business arrangements that have been or would be cancelled absent the requested H-2B workers, and evidence demonstrating an inability to pay debts/bills;

(2) Evidence that the business has suffered or will suffer permanent and severe financial loss during the period of need, as compared to the period of need in prior years, such as financial statements (including profit/loss statements) comparing the present period of need to prior years; bank statements, tax returns, or other documents showing evidence of current and past financial condition; and

relevant tax records, employment records, or other similar documents showing hours worked and payroll comparisons from prior years to current year;

(3) Evidence showing the number of workers needed in the previous three seasons (FY 2018, 2019 and 2020) to meet the employer's need as compared to those currently employed. Such evidence must indicate the dates of their employment, and their hours worked (for example, payroll records) and evidence showing the number of H-2B workers requested under this rule, the number of workers it claims are needed, the workers' actual dates of employment and hours worked;

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

(5) With respect to satisfying the returning worker requirement, evidence that the employer requested and/or instructed that each of the workers petitioned by the employer in connection with this temporary rule were issued H-2B visas or otherwise granted H-2B status in FY 2018, 2019, or 2020, unless the H-2B worker is a national of one of the Northern Triangle countries counted towards the 6,000 cap. Such evidence would include, but is not limited to, a date-stamped written communication from the employer to its agent(s) and/or recruiter(s) that instructs the agent(s) and/or recruiter(s) to only recruit and provide instruction regarding an application for an H-2B visa to those foreign workers who were previously issued an H-2B visa or granted H-2B status in FY 2018, 2019, or 2020.

These examples are not exhaustive, nor will they necessarily establish that the business meets the irreparable harm or returning worker standards; petitioners may retain other types of evidence they believe will satisfy these standards. When an approved petition is selected for audit examination or investigation, DHS or DOL will review all evidence available to it to confirm that the petitioner properly attested to DHS that their business would likely suffer irreparable harm and that they petitioned for and employed only returning workers, unless the H-2B worker is a national of one of the Northern Triangle countries counted

towards the 6,000 cap. If DHS subsequently finds that the evidence does not support the employer's attestations, DHS may deny or, if the petition has already been approved, revoke the petition at any time consistent with existing regulatory authorities. DHS may also, or alternatively, notify DOL. In addition, DOL may independently take enforcement action, including by, among other things, debarring the petitioner from the H-2B program for not less than 1 year or more than 5 years from the date of the final agency decision, which also disqualifies the debarred party from filing any labor certification applications or labor condition applications with DOL for the same period set forth in the final debarment decision. *See, e.g.*, 20 CFR 655.73; 29 CFR 503.20, 503.24.<sup>73</sup>

To the extent that evidence reflects a preference for hiring H-2B workers over U.S. workers, an investigation by other agencies enforcing employment and labor laws, such as the Immigrant and Employee Rights Section (IER) of the Department of Justice's Civil Rights Division, may be warranted. *See* INA section 274B, 8 U.S.C. 1324b (prohibiting certain types of employment discrimination based on citizenship status or national origin). Moreover, DHS and DOL may refer potential discrimination to IER pursuant to applicable interagency agreements. *See* IER, Partnerships, <https://www.justice.gov/crt/partnerships> (last visited Apr. 9, 2021). In addition, if members of the public have information that a participating employer may be abusing this program, DHS invites them to notify USCIS by completing the online fraud tip form, <https://www.uscis.gov/report-fraud/uscis-tip-form> (last visited Apr. 9, 2021).<sup>74</sup>

DHS, in exercising its statutory authority under INA section 101(a)(15)(H)(ii)(b), 8 U.S.C. 1101(a)(15)(H)(ii)(b), and section 105 of the FY 2021 Omnibus, is responsible for adjudicating eligibility for H-2B

<sup>73</sup> Pursuant to the statutory provisions governing enforcement of the H-2B program, INA section 214(c)(14), 8 U.S.C. 1184(c)(14), a violation exists under the H-2B program where there has been a willful misrepresentation of a material fact in the petition or a substantial failure to meet any of the terms and conditions of the petition. A substantial failure is a willful failure to comply that constitutes a significant deviation from the terms and conditions. *See, e.g.*, 29 CFR 503.19.

<sup>74</sup> DHS may publicly disclose information regarding the H-2B program consistent with applicable law and regulations. For information about DHS disclosure of information contained in a system of records, *see* <https://www.dhs.gov/system-records-notice-sorns>. Additional general information about DHS privacy policy generally can be accessed at <https://www.dhs.gov/policy>.

classification. As in all cases, the burden rests with the petitioner to establish eligibility by a preponderance of the evidence. INA section 291, 8 U.S.C. 1361. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Accordingly, as noted above, where the petition lacks initial evidence, such as a properly completed attestation, DHS may, as applicable, reject the petition in accordance with 8 CFR 103.2(a)(7)(ii) or deny the petition in accordance with 8 CFR 103.2(b)(8)(ii). Further, where the initial evidence submitted with the petition contains inconsistencies or is inconsistent with other evidence in the petition and the underlying TLC, DHS may issue a Request for Evidence, Notice of Intent to Deny, or Denial in accordance with 8 CFR 103.2(b)(8). In addition, where it is determined that an H-2B petition filed pursuant to the FY 2021 Omnibus was granted erroneously, the H-2B petition approval may be revoked. *See* 8 CFR 214.2(h)(11).

Because of the particular circumstances of this regulation, and because the attestation and other requirements of this rule play a vital role in achieving the purposes of this rule, DHS and DOL intend that the attestation requirement, DOL procedures, and other aspects of this rule be non-severable from the remainder of the rule, including the increase in the numerical allocations.<sup>75</sup> Thus, in the event the attestation requirement or any other part of this rule is enjoined or held invalid, the remainder of the rule, with the exception of the retention requirements being codified in 20 CFR 655.68, is also intended to cease operation in the relevant jurisdiction, without prejudice to workers already present in the United States under this regulation, as consistent with law.

### G. Portability

As an additional option for employers that cannot find U.S. workers this rule allows petitioners to hire immediately certain H-2B workers that are already present in the United States in H-2B status without waiting for approval of a new H-2B petition. Specifically, the rule allows H-2B nonimmigrant workers to begin new employment with a new H-2B employer or agent upon USCIS' receipt of a timely, non-frivolous H-2B petition. The H-2B nonimmigrant worker must have been lawfully admitted to the United States, must not have worked without authorization

<sup>75</sup> The Departments' intentions with respect to non-severability extend to all features of this rule other than the portability provision, which is described in the section below.

subsequent to such lawful admission, and must currently hold valid H-2B status. Since every H-2B petition must be accompanied by an approved TLC, all H-2B petitioners must have completed a test of the U.S. labor market, as a result of which DOL determined that there were no qualified U.S. workers available to fill these temporary positions.

This provision mirrors temporary flexibilities that DHS has used previously to improve employer access to noncitizen workers during the COVID-19 pandemic.<sup>76</sup> In the context of this rule, DHS believes this flexibility will help some U.S. employers address the challenges related to the limitations imposed by the cap, as well as due to the ongoing disruptions caused by the COVID-19 pandemic. The pandemic has resulted in a variety of travel restrictions and visa processing limitations to mitigate the spread of COVID-19.

In addition to resulting in a devastating loss of life, the worldwide pandemic of COVID-19 has impacted the United States in myriad ways, disrupting daily life, travel, and the operation of individual businesses and the economy at large. On January 31, 2020, the Secretary of the U.S. Department of Health and Human Services (HHS) declared a public health emergency dating back to January 27, 2020, under section 319 of the Public Health Service Act (42 U.S.C. 247d).<sup>77</sup> This determination that a public health emergency exists due to COVID-19 has subsequently been renewed five times: On April 21, 2020, on July 23, 2020, on October 2, 2020, on January 7, 2021, and most recently on April 15, 2021, effective April 21, 2021.<sup>78</sup> On March 13, 2020, then-President Trump declared a National Emergency concerning the

<sup>76</sup> On May 14, 2020, DHS published a temporary final rule in the **Federal Register** to amend certain H-2B requirements to help H-2B petitioners seeking workers to perform temporary nonagricultural services or labor essential to the U.S. food supply chain. 85 FR 28843 (May 14, 2020). In addition, on April 20, 2020, DHS issued a temporary final rule which, among other flexibilities, allowed H-2A workers to change employers and begin work before USCIS approved the new H-2A petition for the new employer. 85 FR 21739. DHS has subsequently extended that portability provision for H-2A workers through two additional temporary final rules, on August 20, 2020, and December 18, 2020, which have been effective for H-2A petitions that were received on or after August 19, 2020 through December 17, 2020, and on or after December 18, 2020 through June 16, 2021, respectively. 85 FR 51304 and 85 FR 82291.

<sup>77</sup> HHS, *Determination of Public Health Emergency*, 85 FR 7316 (Feb. 7, 2020).

<sup>78</sup> *See* HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15April2021.aspx> (Apr. 15, 2021).

COVID-19 outbreak to control the spread of the virus in the United States.<sup>79</sup> The proclamation declared that the emergency began on March 1, 2020. DOS temporarily suspended routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates on March 20, 2020, and subsequently announced a phased resumption of visa services in which it would continue to provide emergency and mission critical visa services and resume routine visa services as local conditions and resources allowed.<sup>80</sup> Based on the importance of the H-2A temporary agricultural worker and H-2B temporary nonagricultural worker programs, DOS indicated it would continue processing H-2A and H-2B cases to the extent possible, as permitted by post resources and local government restrictions, and expanded the categories of H-2 visa applicants whose applications can be adjudicated without an in-person interview.<sup>81</sup> As recently as April 6, 2021, however, DOS noted the COVID-19 pandemic continues to have a severe adverse impact on routine visa services for embassies and consulates around the world.<sup>82</sup>

Further, due to the possibility that some H-2B workers may be unavailable due to visa processing delays or may become unavailable due to COVID-19 related illness or a legitimate fear of contracting COVID-19 under current conditions, U.S. employers that have approved H-2B petitions or who will be filing H-2B petitions in accordance with this rule might not receive all of the workers requested to fill the temporary positions.

DHS is strongly committed not only to protecting U.S. workers and helping U.S. businesses receive the documented and work-authorized workers to perform temporary nonagricultural services or labor that they need, but also to protecting the rights and interests of H-2B workers (consistent with Executive Order 13563 and in particular its reference to “equity,” “fairness,” and “human dignity”). In the FY 2020 DHS

Further Consolidated Appropriations Act (Public Law 116-94), Congress directed DHS to provide options to improve the H-2A and H-2B visa programs, to include options that would protect worker rights.<sup>83</sup> DHS has determined that providing H-2B nonimmigrant workers with the flexibility of being able to begin work with a new H-2B petitioner immediately and avoid a potential job loss or loss of income while the new H-2B petition is pending, provides some certainty to H-2B workers who have maintained their status but may have found themselves in situations that warrant a change in employers.<sup>84</sup> Providing that flexibility is also equitable and fair.

Portability for H-2B workers provides these noncitizens with the option of not having to worry about job loss or loss of income between the time they leave a current employer and while they await approved employment with a new U.S. employer or agent. DHS believes this flexibility and job portability not only protects H-2B workers but also provides an alternative to H-2B petitioners who have not been able to find U.S. workers and who have not been able to obtain H-2B workers subject to the statutory or supplemental caps who have the skills to perform the job duties. In that sense as well, it is equitable and fair.

DHS is making this flexibility available for a 180-day period in order to provide stability for H-2B employers amidst uncertainties surrounding the COVID-19 pandemic. This period is justified especially given the possible

future impacts of COVID-19 variants, continuing limited vaccine access for certain groups (including in H-2B workers’ home countries), and uncertainty regarding the duration of vaccine-gained immunity and how effective currently approved vaccines are in responding to COVID-19 variants.<sup>85</sup> DHS will continue to monitor the evolving health crisis caused by COVID-19 and may address it in future rules.

#### H. COVID-19 Worker Protections

It is the policy of DHS and its Federal partners to support equal access to the COVID-19 vaccines and vaccine distribution sites, irrespective of an individuals’ immigration status.<sup>86</sup> This policy promotes fairness and equity (see Executive Order 13563). Accordingly, DHS and DOL encourage all individuals, regardless of their immigration status, to receive the COVID-19 vaccine. U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection do not conduct enforcement operations at or near vaccine distribution sites or clinics. Consistent with ICE’s long-standing sensitive locations policy, ICE does not and will not carry out enforcement operations at or near health care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities, except in the most extraordinary of circumstances.

This TFR reflects that policy by providing as follows:

*Supplemental H-2B Visas:* With respect to petitioners who wish to qualify to receive supplemental H-2B visas pursuant to the FY 2021 Omnibus, the Departments are using the DOL Form ETA-9142-B-CAA-4 to support equal access to vaccines in two ways. First, the Departments are requiring such petitioners to attest on the DOL Form ETA-9142-B-CAA-4 that, consistent with such petitioners’ obligations under generally applicable H-2B regulations, they will comply with all Federal, State, and local employment-related laws and

<sup>83</sup> The Joint Explanatory Statement accompanying the *Fiscal Year (FY) 2020 Department of Homeland Security (DHS) Further Consolidated Appropriations Act* (Public Law 116-94) states, “H-2A and H-2B Visa Program Processes.—Not later than 120 days after the date of enactment of this Act, DHS, the Department of Labor, the Department of State, and the United States Digital Service are directed to report on options to improve the execution of the H-2A and H-2B visa programs, including: processing efficiencies; combatting human trafficking; protecting worker rights; and reducing employer burden, to include the disadvantages imposed on such employers due to the current semiannual distribution of H-2B visas on October 1 and April 1 of each fiscal year. USCIS is encouraged to leverage prior year materials relating to the issuance of additional H-2B visas, to include previous temporary final rules, to improve processing efficiencies.”

<sup>84</sup> The National Action Plan to Combat Human Trafficking, Priority Action 1.6.3, at p. 20–21 (2020) (Stating that “[w]orkers sometimes find themselves in abusive work situations, but because their immigration status is dependent on continued employment with the employer in whose name the visa has been issued, workers may be left with few options to leave that situation.” By providing the option of changing employers without risking job loss or a loss of income through the publication of this rule, DHS believes that H-2B workers may be more likely to leave abusive work situations, and thereby are afforded greater worker protections.)

<sup>85</sup> See, About Variants of the Virus that Causes COVID-19, Centers for Disease Control and Prevention, last updated April 2, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html>, Key Things to Know About COVID-19 Vaccines, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html?cid=10499:what%20is%20the%20covid%20vaccine.sem.ga:RG:GM:gen:PTN:FY21> (Last visited April 14, 2021).

<sup>86</sup> See DHS Statement on Equal Access to COVID-19 Vaccines and Vaccine Distribution Sites, <https://www.dhs.gov/news/2021/02/01/dhs-statement-equal-access-covid-19-vaccines-and-vaccine-distribution-sites> (Feb. 1, 2021), (accessed Apr. 28, 2021).

<sup>79</sup> Proclamation 9994 of Mar. 13, 2020, *Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak*, 85 FR 15337 (Mar. 18, 2020).

<sup>80</sup> DOS, *Suspension of Routine Visa Services*, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html> (last updated July 22, 2020).

<sup>81</sup> DOS, *Important Announcement on H2 Visas*, <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h2-visas.html> (last updated Mar. 26, 2020).

<sup>82</sup> DOS, *Visa Services Operating Status Update*, <https://travel.state.gov/content/travel/en/News/visas-news/visa-services-operating-status-update.html> (last updated, Apr. 6, 2021).



regulations, including health and safety laws and laws related to COVID-19 worker protections and any right to time off or paid time off for COVID-19 vaccination. See new 8 CFR 214.2(h)(6)(x)(B)(2)(iii) and 20 CFR 655.64(a)(4). Second, the Departments are requiring such petitioners to also attest that they will notify any H-2B workers approved under the supplemental cap, in a language understood by the worker, as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites. Because the attestation will be submitted to USCIS as initial evidence with Form I-129, DHS considers the attestation to be evidence that is incorporated into and a part of the petition consistent with 8 CFR 103.2(b)(1). Accordingly, a petition may be denied or revoked, as applicable, based on or related to statements made in the attestation, including, but not limited to, because the employer violated an applicable employment-related law or regulation, or failed to notify workers regarding equal access to COVID-19 vaccines and vaccine distribution sites.

*Other H-2B Employers:* While there is no additional attestation with respect to H-2B petitioners that do not avail themselves of the supplemental H-2B visas made available under this rule, the Departments remind all H-2B employers that they must comply with all Federal, State, and local employment-related laws and regulations, including health and safety laws and laws related to COVID-19 worker protections and any right to time off or paid time off for COVID-19 vaccination. Failure to comply with such laws may be a basis for DHS to revoke the petition under 8 CFR 214.2(h)(11). This obligation is also reflected as a condition of H-2B portability under this rule. See new 8 CFR 214.2(h)(26)(iii)(C).

Ensuring that the Departments encourage employers to provide access to COVID-19 vaccines is consistent with the policies of the Biden Administration. President Biden, in his speech to Joint Session of Congress, made the following statement: “[T]oday, I’m announcing a program to address [the issue of COVID vaccinations] . . . nationwide. I’m calling on every employer, large and small, in every state, to give employees the time off they need, with pay, to get vaccinated and any time they need, with pay, to recover if they are feeling under the

weather after the shot.”<sup>87</sup> Consistent with the President’s statement, the Departments strongly urge, but do not require, that all employers seeking H-2B workers under either the Supplemental Cap or portability sections of the TFR, make every effort to ensure that all their workers, including nonimmigrant workers, be afforded an opportunity to take the time off needed to get receive their COVID-19 vaccinations, as well as time off, with pay, to recover from any temporary side effect.

As noted, Executive Order 13563 refers to fairness, equity, and human dignity, and such efforts, on the part of employers, would be consistent with those commitments.

Petitioners otherwise are strongly encouraged to facilitate and provide flexibilities, to the greatest extent possible, to all workers who wish to receive COVID-19 vaccinations.

#### *I. DHS Petition Procedures*

To petition for H-2B workers under this rule, the petitioner must file a Form I-129 in accordance with applicable regulations and form instructions, an unexpired TLC, and the attestation form described above. All H-2B petitions must state the nationality of all the requested H-2B workers, whether named or unnamed, even if there are beneficiaries from more than one country. See 8 CFR 214.2(h)(2)(iii). If filing multiple Forms I-129 based on the same TLC (for instance, one requesting returning workers and another requesting workers who are nationals of one of the Northern Triangle countries), each H-2B petition must include a copy of the TLC and reference all previously-filed or concurrently filed petitions associated with the same TLC. The total number of requested workers may not exceed the total number of workers indicated on the approved TLC. Petitioners seeking H-2B classification for Northern Triangle country nationals under the 6,000 visas that are exempt from the returning worker provision must file a separate Form I-129 for those Northern Triangle country nationals only. See new 8 CFR 214.2(h)(6)(x). Requiring the filing of separate petitions to request returning workers and to request workers who are Northern Triangle country nationals is necessary to ensure the operational capability to properly calculate and manage the respective additional cap allocations and to ensure that all corresponding visa issuances are

limited to qualifying applicants, particularly when such petitions request unnamed beneficiaries or are relied upon for subsequent requests to substitute beneficiaries in accordance with 8 CFR 214.2(h)(6)(viii). The attestations must be filed on Form ETA-9142-B-CAA-4, Attestation for Employers Seeking to Employ H-2B Nonimmigrants Workers Under Section 105 of Division O of the Further Consolidated Appropriations Act, 2021 Public Law 116-260. See 20 CFR 655.64. A petitioner is required to retain a copy of such attestations and all supporting evidence for 3 years from the date the associated TLC was approved, consistent with 20 CFR 655.56 and 29 CFR 503.17. See new 20 CFR 655.68. Petitions submitted to DHS pursuant to the FY 2021 Omnibus will be processed in the order in which they were received. Petitioners may also choose to request premium processing of their petitions under 8 CFR 103.7(e), which allows for expedited processing for an additional fee.

To encourage timely filing of any petition seeking a visa under the FY 2021 Omnibus, DHS is notifying the public that the petition may not be approved by USCIS on or after October 1, 2021. See new 8 CFR 214.2(h)(6)(x). Petitions pending with USCIS that are not approved before October 1, 2021 will be denied and any fees will not be refunded. See new 8 CFR 214.2(h)(6)(x).

USCIS’s current processing goal for H-2B petitions filed via premium processing that can be adjudicated without the need for further evidence (in other words, without a Request for Evidence or Notice of Intent to Deny) is 15 days. USCIS intends to adjudicate petitions filed for standard processing within a reasonable period of time.<sup>88</sup> Given USCIS’ processing goals for premium processing, DHS believes that 15 days from the end of the fiscal year is the minimum time needed for petitions to be adjudicated, although USCIS cannot guarantee the time period will be sufficient in all cases. Therefore, if the increase in the H-2B numerical limitation to 22,000 visas has not yet been reached, USCIS will stop accepting petitions received after September 15, 2021. See new 8 CFR 214.2(h)(6)(x)(C). Such petitions will be rejected and the filing fees will be returned.

As with other Form I-129 filings, DHS encourages petitioners to provide a duplicate copy of Form I-129 and all supporting documentation at the time of filing if the beneficiary is seeking a

<sup>87</sup> See <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/21/remarks-by-president-biden-on-the-covid-19-response-and-the-state-of-vaccinations-2/>.

<sup>88</sup> These processing goals are not binding on USCIS; depending on the evidence presented, actual processing times may vary.

nonimmigrant visa abroad. Failure to submit a duplicate copy may cause a delay in the issuance of a visa to an otherwise eligible applicant.<sup>89</sup>

#### *J. DOL Procedures*

As noted above, all employers are required to have an approved and valid TLC from DOL in order to file a Form I-129 petition with DHS. See 8 CFR 214.2(h)(6)(iv)(A) and (D). The standards and procedures governing the submission and processing of *Applications for Temporary Employment Certification* for employers seeking to hire H-2B workers are set forth in 20 CFR part 655, subpart A. Employers with an approved TLC have conducted recruitment, as set forth in 20 CFR 655.40 through 655.48, to determine whether U.S. workers are qualified and available to perform the work for which H-2B workers are sought.

In addition to the recruitment already conducted in connection with a valid TLC, in order to ensure the recruitment has not become stale, employers that wish to obtain visas for their workers under 8 CFR 214.2(h)(6)(x), and who file an I-129 petition 45 or more days after the certified start date of work on the TLC must conduct additional recruitment for U.S. workers. This is particularly important this year as U.S. workers have begun to, and will continue to, reenter the workforce as they become vaccinated and the COVID-19 emergency subsides.

As noted in the 2015 H-2B Interim Final Rule, U.S. workers seeking employment in temporary or seasonal nonagricultural jobs typically do not search for work months in advance, and cannot make commitments about their availability for employment far in advance of the work start date. See 80 FR 24041, 24061, 24071. Given that the temporary labor certification process generally begins 75 to 90 days in advance of the employer's start date of work, employer recruitment efforts typically occur between 40 and 60 days before that date with an obligation to provide employment to any qualified U.S. worker who applies until 21 days before the date of need. Therefore, employers with TLCs containing a start date of work on April 1, 2021, likely conducted their positive recruitment beginning around late-January and ending around mid-February 2021, and continued to consider U.S. worker

applicants and referrals only until March 11, 2021.

In order to provide U.S. workers a realistic opportunity to pursue jobs for which employers will be seeking foreign workers under this rule, the Departments have determined that if employers file an I-129 petition 45 or more days after their dates of need, they have not conducted recruitment recently enough for the Departments to reasonably conclude that there are currently an insufficient number of U.S. workers who are qualified, willing, and available to perform the work absent taking additional, positive recruitment steps. The 45-day threshold for additional recruitment identified in this rule reflects a timeframe between the end of the employer's recruitment and filing of the petition similar to that provided under the FY 2018 and FY 2019 H-2B supplemental cap rules.

An employer who files an I-129 petition under 8 CFR 214.2(h)(6)(x) less than 45 after the certified start date of work on the TLC must submit the TLC and a completed Form ETA-9142B-CAA-4, but is not required to conduct recruitment for U.S. workers beyond the recruitment already conducted as a condition of certification. Only those employers with still-valid TLCs with a start date of work that is 45 or more days before the date they file a petition will be required to conduct recruitment in addition to that conducted prior to being granted labor certification and attest that the recruitment will be conducted, as follows.

The employer must place a new job order for the job opportunity with the State Workforce Agency (SWA) serving the area of intended employment no later than the next business day after submitting an I-129 petition for H-2B workers to USCIS. The job order must contain the job assurances and contents set forth in 20 CFR 655.18 for recruitment of U.S. workers at the place of employment, and remain posted for at least 15 calendar days. The employer must also follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications. The Departments have concluded that keeping the job order posted for a period of 15 calendar days, during the period the employer is conducting the additional recruitment steps explained below, will effectively ensure U.S. workers are apprised of the job opportunity and are referred for employment, if they are willing, qualified, and available to perform the work. The 15 calendar day period also is consistent with the employer-

conducted recruitment activity period applicable under 20 CFR 655.40(b).

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

To increase navigability and to make the process as convenient as possible, DOL offers an online service for employers to locate the nearest local AJC at <https://www.careeronestop.org/> and by selecting the "Find Local Help" feature on the main homepage. This feature will navigate the employer to a search function called "Find an American Job Center" where the city, state or zip code covering the geographic area where work will commence can be entered. Once entered and the search function is executed, the online service will return a listing of the

<sup>89</sup> Petitioners should note that under section 105, the H-2B numerical increase relates to the total number of noncitizens who may receive a visa under INA section 101(a)(15)(H)(ii)(b) in this fiscal year.

name(s) of the AJC(s) serving that geographic area as well as contact option(s) and an indication as to whether the AJC is a “comprehensive” or “affiliate” center. Employers must contact an AJC that is labeled “comprehensive center” as those offer the full range of employment and business services. As explained on the locator website, many AJCs continue to offer virtual or remote services due to the pandemic with physical office locations temporarily closed for in-person and mail processing services. Therefore, this rule requires that employers utilize available electronic methods for the nearest AJC to meet the contact and disclosure requirements in this rule.

Second, during the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) for intrastate clearance, the employer must make reasonable efforts to contact (by mail or other effective means) its former U.S. workers that it employed in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite) during the period beginning January 1, 2019, until the date the I-129 petition required under 8 CFR 214.2(h)(6)(x) is submitted. Among the employees the employer must contact are those who have been furloughed or laid off during this period. The employer must disclose to its former employees the terms of the job order, and solicit their return to the job. The contact and disclosures required by this paragraph must be provided in a language understood by the worker, as necessary or reasonable.

Furloughed employees are employees the employer laid off (as the term is defined in 20 CFR 655.5 and 29 CFR 503.4), but the layoff is intended to last for a temporary period of time. This recruitment step will help ensure notice of the job opportunity is disseminated broadly to U.S. workers who were laid off or furloughed during the COVID-19 outbreak and who may be seeking employment as the economy begins to recover in 2021. While this requirement goes beyond the requirement at 20 CFR 655.43, the Departments believes it is appropriate given the evolving conditions of the U.S. labor market, as described above, and the increased likelihood that qualified U.S. workers will make themselves available for these job opportunities.

Third, as the employer was required to do when initially applying for its labor certification, the employer must provide a copy of the job order to the bargaining representative for employees in the occupation and area of intended employment, consistent with 20 CFR

655.45(a), or if there is no bargaining representative, post the job order in the places and manner described in 20 CFR 655.45(b).

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

The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until either (1) the date on which the last H-2B worker departs for the place of employment, or (2) 30 days after the last date on which the SWA job order is posted, whichever is later. Additionally, consistent with 20 CFR 655.40(a), applicants may be rejected only for lawful job-related reasons. Given that the employer, SWA, and AJC(s) will be actively engaged in conducting recruitment and broader dissemination of the job opportunity during the period of time the job order is active, this requirement provides an adequate period of time for U.S. workers to contact the employer or SWA for referral to the employer and completion of the additional recruitment steps described above. As explained above, the Departments have determined that if employers file a petition 45 or more days after their dates of need, they have not conducted recruitment recently enough for the Departments to reasonably conclude that there are currently an insufficient number of U.S. workers qualified, willing, and available to perform the work absent additional recruitment.

Because of the abbreviated timeline for the additional recruitment required for employers whose initial recruitment

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

Although the hiring period may require some employers to hire U.S. workers after the start of the contract period, this is not unprecedented. For example, in the H-2A program, employers have been required to hire U.S. workers through 50 percent of the contract period since at least 2010,<sup>90</sup> which “enhance[s] protections for U.S. workers, to the maximum extent possible, while balancing the potential costs to employers,” and is consistent with the Departments’ responsibility to ensure that these job opportunities are available to U.S. workers.<sup>91</sup> The Department acknowledges that hiring workers after the start of the contract period imposes an additional cost on employers, but that cost can be lessened, in part, by the ability to discharge the H-2B worker upon hiring a U.S. worker. Additionally, this rule permits employers to immediately hire H-2B workers who are already present in the United States without waiting for approval of an H-2B petition, which will reduce the potential for harm to H-2B workers as a result of displacement by U.S. workers. *See new* 8 CFR 214.2(h)(26). Most importantly, a longer hiring period will ensure that available U.S. workers have a viable opportunity to apply for H-2B job opportunities. Accordingly, the Departments have determined that in affording the benefits of this temporary cap increase to businesses that need workers to avoid irreparable harm, it is necessary to ensure U.S. workers who may be seeking employment as the economy begins to recover in 2021 have sufficient time to apply for these jobs.

Finally, as in the temporary rules implementing the supplemental cap increases in prior years, employers must retain documentation demonstrating compliance with the recruitment requirements described above, including placement of a new job order

<sup>90</sup> Final Rule, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 75 FR 6884, 6921 (Feb. 12, 2010).

<sup>91</sup> NPRM, *Temporary Agricultural Employment of H-2A Aliens in the United States*, 74 FR 45906, 45917 (Sept. 4, 2009); 75 FR at 6922.

with the SWA, contact with AJCs, contact with former U.S. workers, and compliance with § 655.45(a) or (b). Employers must prepare and retain a recruitment report that describes these efforts and meets the requirements set forth in 20 CFR 655.48, including the requirement to update the recruitment report throughout the recruitment and hiring period set forth in paragraph (a)(5)(v) of new 20 CFR 655.64. Employers must maintain copies of the recruitment report, attestation, and supporting documentation, as described above, for a period of 3 years from the date that the TLC was approved, consistent with the document retention requirements under 20 CFR 655.56. These requirements are similar to those that apply to certain seafood employers who stagger the entry of H-2B workers under 20 CFR 655.15(f).

DOL's WHD has the authority to investigate the employer's attestations, as the attestations are a required part of the H-2B petition process under this rule and the attestations rely on the employer's existing, approved TLC. Where a WHD investigation determines that there has been a willful misrepresentation of a material fact or a substantial failure to meet the required terms and conditions of the attestations, WHD may institute administrative proceedings to impose sanctions and remedies, including (but not limited to) assessment of civil money penalties; recovery of wages due; make-whole relief for any U.S. worker who has been improperly rejected for employment, laid off, or displaced; and/or debarment for 1 to 5 years. See 29 CFR 503.19, 503.20. This regulatory authority is consistent with WHD's existing enforcement authority and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.68, the petitioner must retain documents and records evidencing compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

DHS has the authority to verify any information submitted to establish H-2B eligibility at any time before or after the petition has been adjudicated by USCIS. See, e.g., INA sections 103 and 214 (8 U.S.C. 1103, 1184); see also 8 CFR part 103 and 8 CFR 214.2(h). DHS' verification methods may include, but are not limited to, review of public records and information, contact via written correspondence or telephone, unannounced physical site inspections, and interviews. USCIS will use information obtained through verification to determine H-2B eligibility and assess compliance with

the requirements of the H-2B program. Subject to the exceptions described in 8 CFR 103.2(b)(16), USCIS will provide petitioners with an opportunity to address any adverse information that may result from a USCIS compliance review, verification, or site visit after a formal decision is made on a petition or after the agency has initiated an adverse action that may result in revocation or termination of an approval.

As previously noted, the Departments have agreed to select a significant number of approved petitions for audit examination to verify compliance with the irreparable harm standard and additional employer conducted recruitment implemented through this rule. DOL's OFLC already has the authority under 20 CFR 655.70 to conduct audit examinations on adjudicated *Applications for Temporary Employment Certification*, including all appropriate appendices, and verify any information supporting the employer's attestations. OFLC uses audits of adjudicated *Applications for Temporary Employment Certification*, as authorized by 20 CFR 655.70, to ensure employer compliance with attestations made in its *Application for Temporary Employment Certification* and to ensure the employer has met all statutory and regulatory criteria and satisfied all program requirements. The OFLC certifying officer (CO) has sole discretion to choose which *Applications for Temporary Employment Certification* will be audited. See 20 CFR 655.70(a). Post adjudication audits can be used to establish a record of employer compliance or non-compliance with program requirements and the information gathered during the audit assists DOL in determining whether it needs to further investigate or debar an employer or its agent or attorney from future labor certifications.

Under this rule, an employer may submit a petition to USCIS, including a valid TLC and Form ETA-9142B-CAA-4, in which the employer attests to compliance with requirements for access to the supplemental H-2B visas allocated through 8 CFR 214.2(h)(6)(x), including that its business is likely to suffer irreparable harm and that it will conduct additional recruitment, if necessary to refresh the TLC's labor market test. DHS and DOL consider Form ETA-9142B-CAA-4 to be an appendix to the *Application for Temporary Employment Certification* and the attestations contained on the Form ETA-9142B-CAA-4 and documentation supporting the attestations to be evidence that is incorporated into and a part of the approved TLC. Therefore, DOL's audit

authority includes the authority to audit the veracity of any attestations made on Form ETA-9142B-CAA-4 and documentation supporting the attestations. However, DOL's audit authority is independently authorized, and is not limited by the expiration date of this rule. In order to make certain that the supplemental visa allocation is not subject to fraud or abuse, DHS will share information regarding Forms ETA-9142B-CAA-4 with DOL, consistent with existing authorities. This information sharing will support DOL's identification of TLCs used to access the supplemental visa allocation for closer examination of TLCs through the audit process.

In accordance with the documentation retention requirements in this rule, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL. Under this rule, DOL will audit a significant number of TLCs used to access the supplemental visa allocation to ensure employer compliance with attestations, including those regarding the irreparable harm standard and additional employer conducted recruitment, required under this rule. In the event of an audit, the OFLC CO will send a letter to the employer and, if appropriate, a copy of the letter to the employer's attorney or agent, listing the documentation the employer must submit and the date by which the documentation must be sent to the CO. During audits under this rule, the CO will request documentation necessary to demonstrate the employer conducted all e recruitment steps required under this rule and truthfully attested to the irreparable harm the employer would suffer if it does not receive all requested workers under the cap increase, including documentation the employer is required to retain under this rule. If necessary to complete the audit, the CO may request supplemental information and/or documentation from the employer during the course of the audit process. 20 CFR 655.70(c).

Failure to comply in the audit process may result in the revocation of the employer's certification or in debarment, under 20 CFR 655.72 and 655.73, respectively, or require the employer to undergo assisted recruitment in future filings of an *Application for Temporary Employment Certification*, under 20 CFR 655.71. Where an audit examination or review of information from DHS or other appropriate agencies determines that there has been fraud or willful misrepresentation of a material fact or a

substantial failure to meet the required terms and conditions of the attestations or failure to comply with the audit examination process, OFLC may institute appropriate administrative proceedings to impose sanctions on the employer. Those sanctions may result in revocation of an approved TLC, the requirement that the employer undergo assisted recruitment in future filings of an *Application for Temporary Employment Certification* for a period of up to 2 years, and/or debarment from the H-2B program and any other foreign labor certification program administered by DOL for 1 to 5 years. See 29 CFR 655.71, 655.72, 655.73. Additionally, OFLC has the authority to provide any finding made or documents received during the course of conducting an audit examination to DHS, WHD, IER, or other enforcement agencies. OFLC's existing audit authority is independently authorized, and is not limited by the expiration date of this rule. Therefore, in accordance with the documentation retention requirements at new 20 CFR 655.68, the petitioner must retain documents and records proving compliance with this rule, and must provide the documents and records upon request by DHS or DOL.

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

#### IV. Statutory and Regulatory Requirements

##### A. Administrative Procedure Act

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

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

The APA, 5 U.S.C. 553(b)(B), authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Among other things, the good cause exception for forgoing notice and comment rulemaking "excuses notice and comment in emergency situations, or where delay could result in serious harm." *Jifry v. FAA*, 370 F.3d 1174,

1179 (D.C. Cir. 2004). Although the good-cause exception is "narrowly construed and only reluctantly countenanced," *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992), the Departments have appropriately invoked the exception in this case, for the reasons set forth below.

With respect to the supplemental allocations provisions in 8 CFR 214.2 and 20 CFR part 655, subpart A, the Departments are bypassing advance notice and comment because of the exigency created by section 105 of Div. O of the FY 2021 Omnibus, which went into effect on December 27, 2020, and expires on September 30, 2021, as well as rapidly evolving economic conditions and labor demand, as described above. USCIS received more than enough petitions to meet the H-2B visa statutory cap for the second half of FY 2021 on February 12, 2021, which is 6 days earlier than when the statutory cap for the second half of FY 2020 was reached. USCIS conducted a lottery on February 17, 2021, to randomly select a sufficient number of petitions to meet the remainder of the statutory cap. USCIS rejected and returned the petitions and associated filing fees to petitioners that were not selected, as well as all cap-subject petitions received after February 12, 2021. Given high demand by American businesses for H-2B workers, rapidly evolving economic conditions and labor demand, and the short time remaining in the fiscal year for U.S. employers to avoid the economic harm described above, a decision to undertake notice and comment rulemaking would likely delay final action on this matter by weeks or months, and would, therefore, greatly complicate and indeed likely preclude the Departments from successfully exercising the authority created by section 105.

The temporary portability and change of employer provisions in 8 CFR 214.2 and 274a.12 are further supported by conditions created by the COVID-19 pandemic. On January 31, 2020, the Secretary of Health and Human Services declared a public health emergency under section 319 of the Public Health Service Act in response to COVID-19 retroactive to January 27, 2020.<sup>92</sup> This determination that a public health emergency exists due to COVID-19 has subsequently been renewed five times: On April 21, 2020, on July 23, 2020, on October 2, 2020, January 7, 2021, and

<sup>92</sup> HHS, Determination that a Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx> (last visited Apr. 20, 2021). See also HHS, Determination of Public Health Emergency, 85 FR 7316 (Feb. 7, 2020).

most recently on April 15, 2021 effective on April 21, 2021.<sup>93</sup> On March 13, 2020, then-President Trump declared a National Emergency concerning the COVID-19 outbreak, retroactive to March 1, 2020, to control the spread of the virus in the United States.<sup>94</sup> In response to the Mexican government's call to increase social distancing in that country, DOS announced the temporary suspension of routine immigrant and nonimmigrant visa services processed at the U.S. Embassy in Mexico City and all U.S. consulates in Mexico beginning on March 18, 2020.<sup>95</sup> DOS expanded the temporary suspension of routine immigrant and nonimmigrant visa services at all U.S. Embassies and Consulates on March 20, 2020.<sup>96</sup> On July 22, 2020, DOS indicated that embassies and consulates should continue to provide emergency and mission critical visa services to the extent possible and could begin a phased resumption of routine visa services as local conditions and resources allow.<sup>97</sup> On March 26, 2020 DOS designated the H-2 programs as essential to the economy and food security of the United States and a national security priority; DOS indicated that U.S. Embassies and Consulates will continue to process H-2 cases to the extent possible and implemented a change in its procedures, to include interview waivers.<sup>98</sup> On January 25, 2021, President Biden issued a *Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease*.<sup>99</sup> The proclamation restricted entry into the United States from European Schengen treaty countries, the United Kingdom (including territories outside of Europe), Ireland, Brazil, and South

<sup>93</sup> See HHS Renewal of Determination That A Public Health Emergency Exists, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVID-15April2021.aspx>. (Apr. 15, 2021).

<sup>94</sup> President of the United States, Proclamation 9994 of March 13, 2020, Declaring a National Emergency Concerning the Coronavirus Disease (COVID-19) Outbreak, 85 FR 15337 (Mar. 18, 2020).

<sup>95</sup> DOS, Suspension of Routine Visa Services, <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html> (last updated Mar. 20, 2020).

<sup>96</sup> <https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html>

<sup>97</sup> <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h-2-visas.html> (Last visited on Apr. 21, 2021).

<sup>98</sup> <https://travel.state.gov/content/travel/en/News/visas-news/important-announcement-on-h-2-visas.html> (Last visited on Apr. 21, 2021).

<sup>99</sup> Proclamation 10143 of January 25, 2021, 86 FR 7467 (Jan. 28, 2021). <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/proclamation-on-the-suspension-of-entry-as-immigrants-and-non-immigrants-of-certain-additional-persons-who-pose-a-risk-of-transmitting-coronavirus-disease/>.

Africa—countries where COVID–19 variants originated or were identified as present.<sup>100</sup> On January 28, 2021, DOS reaffirmed the importance of the H–2 programs by making a national interest designation for certain H–2 travelers from South Africa.<sup>101</sup> On April 19, 2021, Customs and Border Protection announced an extension of certain land border restrictions between U.S. and Canada, and U.S. and Mexico to May 21, 2021.<sup>102</sup>

In addition to travel restrictions and impacts of the pandemic on visa services, as discussed elsewhere in this rule, current efforts to curb the pandemic in the United States and worldwide have been partially successful, however, with the emergence of COVID–19 variants; different rates of vaccination in some countries and regions; and other uncertainties associated with the evolving pandemic situation, DHS anticipates that H–2B employers may need additional flexibilities, beyond supplemental visa numbers, to meet all of their labor needs, particularly if some U.S. and H–2B workers become unavailable due to illness or other restrictions related to the spread of COVID–19. Therefore, DHS is acting expeditiously to put in place rules that will facilitate the continued employment of H–2B workers already present in the United States. This action will help employers fill these critically necessary nonagricultural job openings and protect U.S. businesses' economic investments in their operations.

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

Consistent with the above authorities, the Departments are bypassing notice

and comment to prevent “serious economic harm to the H–2B community,” including U.S. employers, associated U.S. workers, and related professional associations, that could result from ongoing uncertainty over the status of the numerical limitation, in other words, the effective termination of the program through the remainder of FY 2021. See *Bayou Lawn & Landscape Servs. v. Johnson*, 173 F. Supp. 3d 1271, 1285 & n.12 (N.D. Fla. 2016). The Departments note that this action is temporary in nature, see *id.*,<sup>103</sup> and includes appropriate conditions to ensure that it affects only those businesses most in need, and also protects H–2B and U.S. workers.

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

The APA also authorizes agencies to make a rule effective immediately, upon a showing of good cause, instead of imposing a 30-day delay. 5 U.S.C. 553(d)(3). The good cause exception to the 30-day effective date requirement is easier to meet than the good cause exception for foregoing notice and comment rulemaking. *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992); *Am. Fed'n of Gov't Emps., AFL–CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981); *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979). An agency can show good cause for eliminating the 30-day delayed effective date when it demonstrates urgent conditions the rule seeks to correct or unavoidable time limitations. *U.S. Steel Corp.*, 605 F.2d at 290; *United States v. Gavrilovic*, 511 F.2d 1099, 1104 (8th Cir. 1977). For the same reasons set forth above expressing the need for immediate action, we also conclude that the Departments have good cause to dispense with the 30-day effective date requirement.

### B. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to proceed (to the extent permitted by law) only if the benefits justify the costs and to select (again to the extent permitted by law) the regulatory approach that maximizes net

benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits; reducing costs; simplifying and harmonizing rules; and promoting flexibility through approaches that preserve freedom of choice (including through “provision of information in a form that is clear and intelligible”). It also allows consideration of equity, fairness, distributive impacts, and human dignity, even if some or all of these are difficult or impossible to quantify.

This rule is a “significant regulatory action,” although not an economically significant regulatory action since it does not meet the threshold of \$100 million in annual economic effects, under section 3(f)(1) of Executive Order 12866. Accordingly, the Office of Management and Budget has reviewed this regulation.

### Summary

With this temporary final rule (TFR), DHS is authorizing the immediate release of an additional 22,000 H–2B visas. By the authority given under the Further Consolidated Appropriations Act, 2021, Public Law 116–260 (FY 2021 Omnibus), DHS is raising the H–2B cap by an additional 22,000 visas for the remainder of FY 2021 to businesses that: (1) Show that there are an insufficient number of U.S. workers to meet their needs in FY 2021; (2) attest that their businesses are likely to suffer irreparable harm without the ability to employ the H–2B workers that are the subject of their petition, among other commitments; and (3) petition for returning workers who were issued an H–2B visa or were otherwise granted H–2B status in FY 2018, 2019, or 2020, unless the H–2B worker is a national of Guatemala, Honduras, and El Salvador (the Northern Triangle countries). Additionally, up to 6,000 of the 22,000 visas may be granted to workers from the Northern Triangle countries who are exempt from the returning worker requirement. This TFR aims to prevent irreparable harm to certain U.S. businesses by allowing them to hire additional H–2B workers within FY 2021.

The estimated total costs to petitioners ranges from \$10,192,963 to \$26,063,006. The estimated total cost to the Federal Government is \$467,820. DHS estimates that the total cost of this rule ranges from \$10,660,783 to \$26,530,826. The benefits of this rule are diverse, though some of them are difficult to quantify. They include:

(1) Employers benefit from this rule significantly through increased access to H–2B workers;

<sup>100</sup> *Id.*

<sup>101</sup> <https://travel.state.gov/content/travel/en/News/visas-news/national-interest-exception-for-certain-h-2-travelers-from-south-africa.html> (Jan. 28, 2021).

<sup>102</sup> See *Temporary Restriction of Travelers Crossing US–Canada and Mexico Land Borders for Non-Essential Purposes*, [https://help.cbp.gov/s/article/Article-1596?language=en\\_US#:~:text=On%20March%2021%2C%202020%2C%20the,EDT%20on%20April%2021%2C%202021](https://help.cbp.gov/s/article/Article-1596?language=en_US#:~:text=On%20March%2021%2C%202020%2C%20the,EDT%20on%20April%2021%2C%202021) (last visited on April 20, 2021).

<sup>103</sup> Because the Departments have issued this rule as a temporary final rule, this rule—with the sole exception of the document retention requirements—will be of no effect after September 30, 2021, even if Congress includes an authority similar to section 105 in a subsequent act of Congress.



(2) Customers and others benefit directly or indirectly from that increased access;

(3) H-2B workers benefit from this rule significantly through obtaining jobs and earning wages, potential ability to port and earn additional wages, and increased information on COVID-19 and vaccination distribution. DHS recognizes that some of the effects of

these provisions may occur beyond the borders of the United States;<sup>104</sup>

(4) Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available;

(5) The existence of a lawful pathway, for the 6,000 visas set aside for new workers from Guatemala, Honduras, and

El Salvador, is likely to provide multiple benefits in terms of U.S. policy with respect to the Northern Triangle; and

(6) The Federal Government benefits from increased evidence regarding attestations. Table 1 provides a summary of the provisions in this rule and some of their impacts.

TABLE 1—SUMMARY OF THE TFR’S PROVISIONS AND ECONOMIC IMPACT

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
<p>—The current statutory cap limits H-2B visa allocations to 66,000 workers a year.</p>	<p>—The amended provisions will allow for an additional 22,000 H-2B temporary workers. Up to 6,000 of the 22,000 additional visas will be reserved for workers who are nationals of Guatemala, Honduras, and El Salvador and will be exempt from the returning worker requirement.</p> <p>—Petitioners will be required to fill out the newly created Form ETA-9142-B-CAA-4, Attestation for Employers Seeking to Employ H-2B Nonimmigrant Workers Under Section 105 of Div. O of the Consolidated Appropriations Act, 2021.</p> <p>—Petitioners would be required to conduct an additional round of recruitment.</p>	<p>—The total estimated cost to file Form I-129 by human resource specialists is approximately \$1,344,810. The total estimated cost to file Form I-129 and Form G-28 will range from approximately \$1,545,882 if filed by in-house lawyers to approximately \$2,148,647 if filed by outsourced lawyers. The total estimated cost associated with filing additional petitions ranges from \$2,890,692 to \$3,493,457 depending on the filer.</p> <p>—The total estimated costs associated with filing Form I-907 if it is filed with Form I-129 is \$2,863,603 if filed by human resource specialists. The total estimated costs associated with filing Form I-907 would range from approximately \$2,259,184 if filed by an in-house lawyer to approximately \$2,322,317 if filed by an outsourced lawyer. The total estimated costs associated with requesting premium processing ranges from approximately \$5,122,787 to approximately \$5,185,920.</p> <p>—DHS may incur additional adjudication costs as more applicants file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.</p> <p>—The total estimated cost to petitioners to complete and file Form ETA-9142-B-CAA-4 is approximately \$1,370,719.</p> <p>—The total estimated cost to petitioners to conduct an additional round of recruitment is approximately \$516,622.</p>	<p>—Form I-129 petitioners would be able to hire temporary workers needed to prevent their businesses from suffering irreparable harm.</p> <p>—Businesses that are dependent on the success of other businesses that are dependent on H-2B workers would be protected from the repercussions of local business failures.</p> <p>—Some American workers may benefit to the extent that they do not lose jobs through the reduced or closed business activity that might occur if fewer H-2B workers were available.</p> <p>—Form ETA-9142-B-CAA-4 will serve as initial evidence to DHS that the petitioner meets the irreparable harm standard and returning worker requirements.</p> <p>—The additional round of recruitment will ensure that a U.S. worker that is willing and able to fill the position is not replaced by a non-immigrant worker.</p>

<sup>104</sup> See, e.g., Arnold Brodbeck et al., Seasonal Migrant Labor in the Forest Industry of the

Southeastern United States: The Impact of H-2B

Employment on Guatemalan Livelihoods, 31 Society and Natural Resources 1012 (2018).

TABLE 1—SUMMARY OF THE TFR’S PROVISIONS AND ECONOMIC IMPACT—Continued

Current provision	Changes resulting from the provisions of the TFR	Expected costs of the provisions of the TFR	Expected benefits of the provisions of the TFR
	<p>—Employers of H-2B workers would be required to provide information about equal access to COVID-19 vaccines and vaccination distribution sites.</p> <p>—An H-2B nonimmigrant with a valid visa who is physically present in the United States may port to another employer.</p> <p>—DHS and DOL intend to conduct a significant number of random audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule.</p>	<p>—The total estimated cost to petitioners to provide COVID-19 vaccines and vaccination distribution site information is approximately \$1,743.</p> <p>—The total estimated cost to file Form I-129 if filed by human resource specialists will range from \$0 to approximately \$2,081,206. The total estimated costs to file Form I-129 and Form G-28 ranges from \$0 to approximately \$2,393,077 if filed by in-house lawyers and from \$0 to approximately \$5,095,792 if filed by outsourced lawyers.</p> <p>—The total estimated cost associated with filing Form I-907 if filed by human resource specialists ranges from \$0 to approximately \$4,431,409. The total estimated cost to file Form I-907 ranges from \$0 to approximately \$3,497,990 if filed by in-house lawyers and from \$0 to approximately \$3,595,738 if filed by outsourced lawyers. The total estimated costs associated with this provision ranges from \$0 to approximately \$15,204,145.</p> <p>—DHS may incur some additional adjudication costs as more petitioners file Form I-129. However, these additional costs to USCIS are expected to be covered by the fees paid for filing the form, which have been accounted for in costs to petitioners.</p> <p>—Employers will have to comply with audits for an estimated total opportunity cost of time of \$290,400.</p> <p>—It is expected both DHS and DOL will be able to shift resources to be able to conduct these audits without incurring additional costs. However, the Departments will incur opportunity costs of time. The audits are expected to take a total of approximately 6,000 hours and cost approximately \$467,820.</p>	<p>—Workers would be given information about equal access to vaccines and vaccination distribution.</p> <p>—H-2B workers with a valid visa present in the United States will be able to port to another employer and potentially extend their stay and, therefore, earn additional wages.</p> <p>—An H-2B worker with an employer that is not complying with H-2B program requirements would have additional flexibility in porting to another employer’s certified position.</p> <p>—This provision would ensure employers will be able to hire the H-2B workers they need.</p> <p>—DOL and DHS audits will yield evidence of the efficacy of attestations in enforcing compliance with H-2B supplemental cap requirements.</p> <p>—Conducting a significant number of audits will discourage uncorroborated attestations.</p>

Source: USCIS and DOL analysis.

Background and Purpose of the Proposed Rule

The H-2B visa classification program was designed to serve U.S. businesses that are unable to find a sufficient number of U.S. workers to perform nonagricultural work of a temporary or seasonal nature. For a nonimmigrant worker to be admitted into the United States under this visa classification, the hiring employer is required to: (1) Receive a temporary labor certification (TLC) from the Department of Labor

(DOL); and (2) file Form I-129 with DHS. The temporary nature of the services or labor described on the approved TLC is subject to DHS review during adjudication of Form I-129.<sup>105</sup> The current INA statute sets the annual number of H-2B visas for workers performing temporary nonagricultural work at 66,000 to be distributed semi-annually beginning in October (33,000

and in April (33,000).<sup>106</sup> Any unused H-2B visas from the first half of the fiscal year will be available for employers seeking to hire H-2B workers during the second half of the fiscal year. However, any unused H-2B visas from one fiscal year do not carry over into the next and will therefore not be made

<sup>105</sup> Revised effective 1/18/2009; 73 FR 78104.

<sup>106</sup> See 8 U.S.C. 1184(g)(1)(B), INA 214(g)(1)(B) and 8 U.S.C. 1184(g)(4), INA 214(g)(4).

available.<sup>107</sup> Once the statutory H–2B visa cap limit has been reached, petitioners must wait until the next half of the fiscal year, or the beginning of the next fiscal year, for additional visas to become available.

On Dec 27, 2020, the President signed the FY 2021 Omnibus that contains a provision (Sec. 105 of Div. O) permitting the Secretary of Homeland Security, under certain circumstances, to increase the number of H–2B visas available to U.S. employers, notwithstanding the established statutory numerical limitation. After consulting with the Secretary of Labor, the Secretary of the Homeland Security has determined it is appropriate to exercise his discretion and raise the H–2B cap by up to an additional 22,000 visas for the remainder of FY 2021 for those businesses who would qualify under certain circumstances.

These businesses must attest that they will likely suffer irreparable harm if the requested H–2B visas are not granted. The Secretary has determined that initially up to 16,000 of the 22,000 these supplemental visas will be limited to specified H–2B returning workers for nationals of any country. Specifically, these individuals must be workers who were issued H–2B visas or were otherwise granted H–2B status in fiscal years 2018, 2019, or 2020. The Secretary has also determined that up to 6,000 of the 22,000 additional visas will be reserved for workers who are nationals of Guatemala, Honduras, and El Salvador, and that these 6,000 workers will be exempt from the returning worker requirement. Once the 6,000-visa limit has been reached, a petitioner may continue to request H–2B visas for workers who are nationals of Guatemala, Honduras, and El Salvador, but these workers must be returning workers. If the 6,000 exemption cap for nationals of the Northern Triangle countries remains unfilled by July 8, 2021, USCIS will announce that the remaining visas will be made available to employers with TLCs that comply with the provisions of this rule but the petitioner must file a new Form I–129 petition and attest that these noncitizens will be returning workers.

#### Population

This rule would affect those employers that file Form I–129 on behalf of nonimmigrant workers they seek to hire under the H–2B visa

<sup>107</sup> A Temporary Labor Certification (TLC) approved by the Department of Labor must accompany an H–2B petition. The employment start date stated on the petition must match the start date listed on the TLC. See 8 CFR 214.2(h)(6)(iv)(A) and (D).

program. More specifically, this rule would affect those employers that can establish that their business is likely to suffer irreparable harm because they cannot employ the H–2B returning workers requested on their petition in this fiscal year, without the exercise of authority that is the subject of this rule. Due to the temporary nature of this rule and the limited time left for these additional visas to become available, DHS believes that it is reasonable to assume that eligible petitioners for these additional 22,000 visas will generally be those employers that have already completed the steps to receive an approved TLC prior to the issuance of this rule.

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

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

According to DOL OFLC's certification data for FY 2021, as of April 15, 2021, about 6,172 TLCs for 107,654 H–2B positions were received with expected work start dates between April 1 and September 30, 2021. DOL OFLC has approved 5,507 certifications for 97,627 H–2B positions and is still reviewing the remaining 155 TLC requests for 2,227 H–2B positions. DOL OFLC has denied, withdrawn, rejected, or returned 510 certifications for 7,800 H–2B positions.<sup>108</sup> However, many of these certified worker positions have already been filled under the semi-annual cap of 33,000 and, for approximately 10 percent of the worker positions certified and still under review by DOL, employers indicated on the Form ETA–9142B their intention to employ some or all of the H–2B workers under the application who will be exempt from the statutory visa cap. The number of approved and pending certifications is 5,662 for 99,854 H–2B positions.<sup>109</sup>

<sup>108</sup> As of April 15, 2021, DOL OFLC had denied 163 applications for 2,161 positions and rejected 28 applications for 360 positions. Employers had withdrawn 312 applications for 5,161 positions and returned 7 applications for 118 positions. This totals 510 applications for 7,800 positions either denied, rejected, withdrawn, or returned.

<sup>109</sup> Calculation: 5,507 approved certifications + 155 pending certifications = 5,662 approved and pending certifications.

Calculation: 97,627 positions associated with approved certification + 2,227 positions associated with pending certifications = 99,854 positions associated with approved and pending certifications.

Of the 5,507 certified Applications for Temporary Employment Certification DOL issued, USCIS data shows that 2,104 H–2B petitions for 36,792 positions with approved certifications were already filed toward the second semi-annual cap of 33,000 visas.<sup>110</sup> Therefore, we estimate that approximately 3,558 *Applications for Temporary Employment Certification* may be filed towards the FY 2021 supplemental cap. This number is based on 5,507 (total certified) – 2,104 (certified and already submitted under the second semi-annual cap) and 155 (*Applications for Temporary Employment Certification* that are still being processed by DOL), and therefore represents a reasonable estimate of the pool of potential petitions that may request additional H–2B workers under this rule, in other words, under the FY 2021 supplemental cap. USCIS recognizes that some employers would have to submit two Forms I–129 if they choose to request H–2B workers under both the returning worker and Northern Triangle Countries cap. At this time, USCIS cannot predict how many employers will choose to take advantage of this set-aside, and therefore recognize that the number of petitions may be underestimated. Additionally, due to the timing of the availability of these additional 22,000 visas, USCIS assumes there will not be additional TLCs filed with the DOL.

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

If an attorney or accredited representative submits Form I–129 on behalf of the petitioner, Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative, must accompany the Form I–129 submission.<sup>111</sup> Using data from FY 2016 to FY 2020, we estimate that approximately 43.59 percent of Form I–129 petitions will be filed by a lawyer or accredited representative (Table 2). Table 2 shows the percentage of Form I–129 H–2B petitions that were accompanied by a Form G–28. We estimate that 1,551 Form I–129 and Form G–28 will be filed by in-house or outsourced lawyers, and that 2,007 Form I–129 will be filed by human resources (HR) specialists.<sup>112</sup>

<sup>110</sup> USCIS, Office of Performance and Quality, Data pulled on April 21, 2021.

<sup>111</sup> USCIS, *Filing Your Form G–28*, <https://www.uscis.gov/forms/filing-your-form-g-28>.

<sup>112</sup> Calculation: 3,558 estimated additional petitions \* 43.59 percent of petitions filed by a lawyer = 1551 petitions (rounded) filed by a lawyer.

TABLE 2—FORM I-129 H-2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY A FORM G-28, FY 2016–2020

Fiscal year	Number of Form I-129 H-2B petitions accompanied by a Form G-28	Total Number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by a Form G-28
2016 .....	2,795	6,527	42.82
2017 .....	2,615	6,112	42.78
2018 .....	2,626	6,148	42.71
2019 .....	3,335	7,461	44.70
2020 .....	2,434	5,422	44.89
2016–2020 Total .....	13,805	31,670	43.59

Source: USCIS Claims3 database, queried using the SMART utility by the USCIS Office of Policy and Strategy on April 8, 2021.

Population That Files Form I-907, Request for Premium Processing Service

Employers may use Form I-907, Request for Premium Processing Service, to request faster processing of their Form I-129 petitions for H-2B visas. Table 3 shows the percentage of

Form I-129 H-2B petitions that were filed with a Form I-907. USCIS estimates that approximately 93.37 percent of Form I-129 H-2B petitioners will also file a Form I-907 requesting premium processing, though this could be higher because of the timing of this

rule. Based on this historical data, USCIS estimates that 3,322 Forms I-907 will be filed with the Forms I-129 as a result of this rule.<sup>113</sup> We estimate that 1,448 Forms I-907 will be filed by in-house or outsourced lawyers and 1,874 will be filed by HR specialists.<sup>114</sup>

TABLE 3—FORM I-129 H-2B PETITION RECEIPTS THAT WERE ACCOMPANIED BY A FORM I-907, FY 2016–2020

Fiscal year	Number of Form I-129 H-2B petitions accompanied by Form I-907	Total Number of Form I-129 H-2B petitions received	Percent of Form I-129 H-2B petitions accompanied by Form I-907
2016 .....	6,084	6,527	93.21
2017 .....	5,932	6,112	97.05
2018 .....	5,986	6,148	97.36
2019 .....	7,227	7,461	96.86
2020 .....	4,341	5,422	80.06
2016–2020 Total .....	29,570	31,670	93.37

Source: USCIS Claims3 database, queried using the SMART utility by the USCIS Office of Policy and Strategy on April 8, 2021.

Population That Files Form ETA-9142-B-CAA-4, Attestation for Employers Seeking To Employ H-2B Nonimmigrant Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260

Petitioners seeking to take advantage of the FY 2021 H-2B supplemental visa cap will need to file a Form ETA-9142-B-CAA-4 attesting their business will suffer irreparable harm without the ability to hire temporary nonimmigrant

workers, comply with third party notification, and maintain required records, among other requirements. DOL estimates that each of the 3,558 petitioners will need to file a Form ETA-9142-B-CAA-4 and comply with its provisions.

Population Affected by the Portability Provision

The population affected by this provision are nonimmigrants in H-2B status who are present in the United States and the employers with valid

TLCs seeking to hire H-2B workers. We use the population of 66,000 H-2B workers authorized by statute and 22,000 additional H-2B workers authorized by this supplemental cap regulation as a proxy for the H-2B population that could be currently present in the United States.<sup>115</sup> We use the number of approved TLCs (5,507) to estimate the potential number of Form I-129 H-2B petitions that incur impacts associated with this porting provision. USCIS is not able to predict an estimate of what percentage of these approved

Calculation: 3,558 estimated additional petitions – 1,551 petitions filed by a lawyer = 2,007 petitions filed by an HR specialist.

<sup>113</sup> Calculation: 3,558 estimated additional petitions \* 93.37 percent premium processing filing rate = 3,322 (rounded) additional Form I-907.

<sup>114</sup> Calculation: 3,322 additional Form I-907 \* 43.59 percent of petitioners represented by a lawyer = 1,448 (rounded) additional Form I-907 filed by a lawyer.

Calculation: 3,322 additional Form I-907 – 1448 additional Form I-907 filed by a lawyer = 1,874 additional Form I-907 filed by an HR specialist.

<sup>115</sup> H-2B workers may have varying lengths in time approved on their H-2B visas. This number may overestimate H-2B workers who have already completed employment and departed and may underestimate H-2B workers not reflected in the current cap and long-term H-2B workers. In FY2020, 346 requests for change of status to H-2B were approved by USCIS and 3,505 crossings of visa-exempt H-2B workers were processed by

Customs and Border Protection (CBP). See *Characteristics of H-2B Nonagricultural Temporary Workers FY2020 Report to Congress at https://www.uscis.gov/sites/default/files/document/reports/H-2B-FY20-Characteristics-Report.pdf*. USCIS assumes some of these workers, along with current workers with a valid H-2B visa under the cap, could be eligible to port under this new provision. USCIS does not know the exact number of H-2B workers who would be eligible to port at this time but uses the cap and supplemental cap allocations as a possible proxy for this population.

TLCs will file petitions for H-2B workers who would port under this provision. Therefore, USCIS presents a sensitivity analysis in Table 4 based on the percentage of employers with approved TLCs that could file a Form I-129 H-2B petition in order to obtain an H-2B worker under the porting provision.

TABLE 4—SENSITIVITY ANALYSIS OF FORM I-129 H-2B PETITIONS FILED ON BEHALF OF H-2B WORKERS WHO MAY BE ELIGIBLE TO PORT

Percent of Form I-129 H-2B petitions that may be filed on behalf of workers eligible to port	Estimated number of approved Form I-129 H-2B petitions that may be filed on behalf of workers eligible to port
0 .....	0
5 .....	275
25 .....	1,377
50 .....	2,754
75 .....	4,130
95 .....	5,232
100 .....	5,507

Source: USCIS Analysis.

Population Affected by the Audits

DHS and DOL each intend to conduct 250 audits of employers hiring H-2B workers under this FY2021 H-2B supplemental cap rule. The determination of which employers are audited will be mostly random, though the agencies will coordinate so that no employer is audited by both DOL and DHS. Therefore, a total of 500 audits on employers who petition for H-2B workers under this TFR will be conducted by the Federal Government.

Cost-Benefit Analysis

The provisions of this rule require the submission of a Form I-129 H-2B petition. The costs for this form include filing costs and the opportunity cost of time to complete and submit the form. The current filing fee for Form I-129 is \$460 and the estimated time to complete and file Form I-129 for H-2B classification is 4.34 hours.<sup>116</sup> The application must be filed by a U.S. employer, a U.S. agent, or a foreign employer filing through the U.S. agent. DHS estimates that 43.59 percent of Form I-129 H-2B petitions will be filed by an in-house or outsourced lawyer,

<sup>116</sup> The public reporting burden for this form is 2.34 hours for Form I-129 and an additional 2.00 hours for H Classification Supplement, totaling 4.34 hours. See Form I-129 instructions at <https://www.uscis.gov/i-129>.

and the remainder (56.41 percent) will be filed by an HR specialist or equivalent occupation. DHS presents estimated costs for HR specialists filing Form I-129 petitions and an estimated range of costs for in-house lawyers or outsourced lawyers filing Form I-129 petitions.

To estimate the total opportunity cost of time to HR specialists who complete and file Form I-129, DHS uses the mean hourly wage rate of HR specialists of \$33.38 as the base wage rate.<sup>117</sup> If petitioners hire an in-house or outsourced lawyer to file Form I-129 on their behalf, DHS uses the mean hourly wage rate of \$71.59 as the base wage rate.<sup>118</sup> Using the most recent Bureau of Labor Statistics (BLS) data, DHS calculated a benefits-to-wage multiplier of 1.45 to estimate the full wages to include benefits such as paid leave, insurance, and retirement.<sup>119</sup> DHS multiplied the average hourly U.S. wage rate for HR specialists and for in-house lawyers by the benefits-to-wage multiplier of 1.45 to estimate the full cost of employee wages. The total compensation for an HR specialist is \$48.40 per hour, and the total compensation for an in-house lawyer is \$103.81 per hour.<sup>120</sup> In addition, DHS recognizes that an entity may not have in-house lawyers and seek outside counsel to complete and file Form I-129 on behalf of the petitioner. Therefore, DHS presents a second wage rate for lawyers labeled as outsourced lawyers. DHS recognizes that the wages for outsourced attorneys may be much higher than in-house attorneys and therefore uses a higher compensation-to-wage multiplier of 2.5 for outsourced attorneys.<sup>121</sup> DHS estimates the total

<sup>117</sup> U.S. Department of Labor, Bureau of Labor Statistics, “May 2020 National Occupational Employment and Wage Statistics” Human Resources Specialist (13-1071), Mean Hourly Wage, available at [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#13-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#13-0000) (accessed April 9, 2021).

<sup>118</sup> U.S. Department of Labor, Bureau of Labor Statistics, “May 2020 National Occupational Employment and Wage Estimates” Lawyers (23-1011), Mean Hourly Wage, available at [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#23-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#23-0000) (accessed April 9, 2021).

<sup>119</sup> Calculation: \$38.60 mean Total Employee Compensation per hour for civilian workers/\$26.53 mean Wages and Salaries per hour for civilian workers = 1.45 benefits-to-wage multiplier. See Economic News Release, Bureau of Labor Statistics, U.S. Department of Labor, Table 1. Employer Costs for Employee Compensation by ownership, Civilian workers, available at <https://www.bls.gov/news.release/pdf/ecec.pdf> (accessed April 9, 2021).

<sup>120</sup> Calculation for the total wage of an HR specialist: \$33.38 × 1.45 = \$48.40 (rounded).

Calculation for the total wage of an in-house lawyer: \$71.59 × 1.45 = \$103.81 (rounded).

<sup>121</sup> The DHS ICE “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” used a multiplier of 2.5 to convert in-house attorney wages to the cost of outsourced attorney based on

compensation for an outsourced lawyer is \$178.98 per hour.<sup>122</sup> If a lawyer submits Form I-129 on behalf of the petitioner, Form G-28 must accompany the Form I-129 petition.<sup>123</sup> DHS estimates the time burden to complete and submit Form G-28 for a lawyer is 50 minutes (0.83 hour, rounded).<sup>124</sup> For this analysis, DHS adds the time to complete Form G-28 to the opportunity cost of time to lawyers for filing Form I-129 on behalf of a petitioner. This results in a time burden of 5.17 hours for in-house lawyers and outsourced lawyers to complete Form G-28 and Form I-129.<sup>125</sup> Therefore, the total opportunity cost of time per petition for an HR specialist to complete and file Form I-129 is approximately \$210.06, for an in-house lawyer to complete and file Forms I-129 and G-28 is about \$536.70, and for an outsourced lawyer to complete and file is approximately \$925.33.<sup>126</sup> The total cost, including filing fee and opportunity costs of time, per petitioner to file Form I-129 is approximately \$670.06 if HR specialists file, \$996.70 if an in-house lawyer files, and \$1,385.33 if an outsourced lawyer files the form.<sup>127</sup>

Cost to Petitioners

As mentioned in Section 3, the estimated population impacted by this rule is 3,558 eligible petitioners who are projected to apply for the additional 22,000 H-2B visas for the remainder of FY 2021, with 6,000 of the additional visas reserved for employers that will petition for workers who are nationals

information received in public comment to that rule. We believe the explanation and methodology used in the Final Small Entity Impact Analysis remains sound for using 2.5 as a multiplier for outsourced labor wages in this rule, see page G-4 [September 1, 2015] [<https://www.regulations.gov/document/ICEB-2006-0004-0921>].

<sup>122</sup> Calculation: Average hourly wage rate of lawyers × benefits-to-wage multiplier for outsourced lawyer = \$71.59 × 2.5 = \$178.98.

<sup>123</sup> USCIS, *Filing Your Form G-28*, <https://www.uscis.gov/forms/filing-your-form-g-28>.

<sup>124</sup> Id.

<sup>125</sup> Calculation: 0.83 hours to file Form G-28 + 4.34 hours to file Form I-129 = 5.17 hours to file both forms.

<sup>126</sup> Calculation if an HR specialist files Form I-129: \$48.40 × 4.34 hours = \$210.06 (rounded).

Calculation if an in-house lawyer files Forms I-129 and G-28: \$103.81 × 5.17 hours = \$536.70 (rounded).

Calculation if an outsourced lawyer files Forms I-129 and G-28: \$178.98 × 5.17 hours = \$925.33 (rounded).

<sup>127</sup> Calculation if an HR specialist files Form I-129 and filing fee: \$210.06 opportunity cost of time + \$460 filing fee = \$670.06.

Calculation if an in-house lawyer files Forms I-129, G-28, and filing fee: \$536.70 opportunity cost of time + \$460 filing fee = \$996.70.

Calculation if outsourced lawyer files Forms I-129, G-28 and filing fee: \$925.33 opportunity cost of time + \$460 filing fee = \$1,385.33.

of the Northern Triangle countries who are exempt from the returning worker requirement.

#### Costs to Petitioners To File Form I-129 and Form G-28

As discussed above, DHS estimates that an additional 2,007 petitions will be filed by HR specialists using Form I-129 and an additional 1,551 petitions will be filed by lawyers using Form I-129 and Form G-28. DHS estimates the total cost to file Form I-129 petitions if filed by HR specialists is \$1,344,810 (rounded).<sup>128</sup> DHS estimates total cost to file Form I-129 petitions and Form G-28 if filed by lawyers will range from \$1,545,882 (rounded) if only in-house lawyers file these forms to \$2,148,647 (rounded) if only outsourced lawyers file them.<sup>129</sup> Therefore, the estimated total cost to file Form I-129 and Form G-28 range from \$2,890,692 and \$3,493,457.<sup>130</sup>

#### Costs To File Form I-907

Employers may use Form I-907 to request premium processing of Form I-129 petitions for H-2B visas. The filing fee for Form I-907 for H-2B petitions is \$1,500 and the time burden for completing the form is 35 minutes (0.58 hour).<sup>131</sup> Using the wage rates established previously, the opportunity cost of time to file Form I-907 is approximately \$28.07 for an HR specialist, \$60.21 for an in-house lawyer, and \$103.81 for an outsourced lawyer.<sup>132</sup> Therefore, the total filing cost

to complete and submit Form I-907 per petitioner is approximately \$1,528.07 for HR specialists, \$1,560.21 for in-house lawyers, and \$1,603.81 for outsourced lawyers.<sup>133</sup>

As discussed above, DHS estimates that an additional 1,874 Form I-907 will be filed by HR specialists and an additional 1,448 Form I-907 will be filed lawyers. DHS estimates the total cost of Form I-907 filed by HR specialists is about \$2,863,603 (rounded).<sup>134</sup> DHS estimates total cost to file Form I-907 filed by lawyers range from about \$2,259,184 (rounded) for only in-house lawyers to \$2,322,317 (rounded) for only outsourced lawyers.<sup>135</sup> The estimated total cost to file Form I-907 range from \$5,122,787 and \$5,185,920.<sup>136</sup>

#### Cost To File Form ETA-9142-B-CAA-4

Form ETA-9142-B-CAA-4 is an attestation form that includes recruiting requirements, the irreparable harm standard, and document retention obligations. DOL estimates the time burden for completing and signing the form is 0.25 hour, 0.25 hours for retaining records, and 0.5 hours to comply with the returning workers' attestation, for a total time burden of 1 hour. Using the total wage per hour for an HR specialist (\$48.40), the opportunity cost of time for an HR specialist to complete the attestation form, and notify third parties, and retain records relating to the returning worker requirements, is approximately \$48.40.<sup>137</sup>

Additionally, the form requires that petitioners assess and document supporting evidence for meeting the irreparable harm standard, and retain those documents and records, which we assume will require the resources of a financial analyst (or another equivalent occupation). Using the same methodology previously described for wages, the total wage per hour for a financial analyst is \$67.37.<sup>138</sup> DOL estimates the time burden for these tasks is at least 4 hours, and 1 hour for gathering and retaining documents and records. Therefore, the total opportunity cost of time for a financial analyst to assess, document, and retain supporting evidence is approximately \$336.85.<sup>139</sup>

As discussed previously, DHS believes that the estimated 3,558 remaining certifications for the latter half of FY 2021 would include potential employers that might request to employ H-2B workers under this rule. This number of certifications is a reasonable proxy for the number of employers that may need to review and sign the attestation. Using this estimate for the total number of certifications, we estimate the opportunity cost of time for completing the attestation for HR specialists is approximately \$172,207 and for financial analysts is about \$1,198,512.<sup>140</sup> The total cost is estimated to be approximately \$1,370,719.<sup>141</sup>

#### Cost to Conduct Recruitment

An employer that files Form ETA-9142B-CAA-4 and the I-129 petition 45 or more days after the certified start date of work must conduct additional

<sup>128</sup> Calculation: \$670.06 opportunity costs for HR specialist plus filing fees \* 2,007 Form I-129 filed by HR specialists = \$1,344,810 (rounded) total cost of Form I-129 filed by HR specialists.

<sup>129</sup> Calculation: \$996.70 opportunity costs for in-house lawyers plus filing fees \* 1,551 Form I-129 and Form G-28 filed by in-house lawyers = \$1,545,882 (rounded) total cost of Form I-129 and Form G-28 filed by in-house lawyers.

Calculation: \$1,385.33 opportunity costs for outsourced lawyers plus filing fees \* 1,551 Form I-129 and Form G-28 filed by outsourced lawyers = \$2,148,647 (rounded) total cost of Form I-129 and Form G-28 filed by outsourced lawyers.

<sup>130</sup> Calculation: \$1,344,810 total cost of Form I-129 filed by HR specialists + \$1,545,882 total cost of Form I-129 and Form G-28 filed by in-house lawyers = \$2,890,692 estimated total costs to file Form I-129 and G-28

Calculation: \$1,344,810 total cost of Form I-129 filed by HR specialists + \$2,148,647 total cost of Form I-129 and G-28 filed by outsourced lawyers = \$3,493,457 estimated total costs to file Form I-129 and G-28

<sup>131</sup> See Form I-907 instructions at <https://www.uscis.gov/i-907>.

<sup>132</sup> Calculation for opportunity cost of time if an HR specialist files Form I-907: \$48.40 × 0.58 hours = \$28.07 (rounded).

Calculation for opportunity cost of time if an in-house lawyer files Form I-907: \$103.81 × 0.58 hours = \$60.21 (rounded).

Calculation for opportunity cost of time if an outsourced lawyer files Form I-907: \$178.98 × 0.58 hours = \$103.81 (rounded).

<sup>133</sup> Calculation if an HR specialist files: \$28.07 + \$1,500 = \$1,528.07.

Calculation if an in-house lawyer files: \$60.21 + \$1,500 = \$1,560.21.

Calculation if outsourced lawyer files: \$103.81 + \$1,500 = \$1,603.81.

<sup>134</sup> Calculation: \$1,528.07 opportunity costs for HR specialist plus filing fees \* 1,874 Form I-907 filed by HR specialists = \$2,863,603 (rounded) total cost of Form I-907 filed by HR specialists.

<sup>135</sup> Calculation: \$1,560.21 opportunity costs for in-house lawyers plus filing fees \* 1,448 Form I-907 filed by in-house lawyers = \$2,259,184 (rounded) total cost of Form I-907 filed by in-house lawyers.

Calculation: \$1,603.81 opportunity costs for outsourced lawyers plus filing fees \* 1,448 Form I-907 filed by outsourced lawyers = \$2,322,317 (rounded) total cost of Form I-907 filed by outsourced lawyers.

<sup>136</sup> Calculation: \$2,863,603 total cost of Form I-907 filed by HR specialists + \$2,259,184 total cost of Form I-907 filed by in-house lawyers = \$5,122,787 estimated total costs to file Form I-907.

Calculation: \$2,863,603 total cost of Form I-129 filed by HR specialists + \$2,322,317 total cost of Form I-907 filed by outsourced lawyers = \$5,185,920 estimated total costs to file Form I-907.

<sup>137</sup> Calculation: \$48.40 opportunity cost of time for HR specialist × 1-hour time burden for the new attestation form and notifying third parties and retaining records related to the returning worker requirements = \$48.40.

<sup>138</sup> Calculation: \$46.46 (average per hour wage for a financial analyst, based on BLS wages) × 1.45 (benefits-to-wage multiplier) = \$67.37. U.S. Department of Labor, Bureau of Labor Statistics, "May 2020 National Occupational Employment and Wage Statistics" Financial and Investment Analysts, Financial Risk Specialists, and Financial Specialists, All Other (13-2098): [https://www.bls.gov/oes/2020/may/oes\\_nat.htm#13-0000](https://www.bls.gov/oes/2020/may/oes_nat.htm#13-0000) (accessed April 9, 2021).

<sup>139</sup> Calculation: \$67.37 (fully loaded hourly wage for a financial analyst) × 5 hours (time burden for assessing, documenting and retention of supporting evidence demonstrating the employer is likely to suffer irreparable harm) = \$336.85.

<sup>140</sup> Calculations: Cost for HR Specialists: \$48.40 opportunity cost of time for an HR specialist to comply with attestation requirements \* 3,558 estimated additional petitions = \$172,207 (rounded) total cost for HR specialists to comply with attestation requirements.

Calculation: \$336.85 opportunity cost of time for a financial analyst to comply with attestation requirements \* 3,558 estimated additional petitions = \$1,198,512 (rounded) for financial analysts to comply with attestation requirements.

<sup>141</sup> Calculation: \$172,207 total cost for HR specialist to comply with attestation requirement + \$1,198,512 total cost for financial analysts to comply with attestation requirements = \$1,370,719 total cost to comply with attestation requirements.



recruitment of U.S. workers. This consists of placing a new job order with the State Workforce Agency, contacting the American Job Center, and contacting laid-off workers. Employers must place a new job order for the job opportunity with the State Workforce Agency (SWA). DOL estimates that it would take up to one hour to satisfy this requirement.

Employers are required to make reasonable efforts to contact, by mail or other effective means, their former U.S. workers, including those workers who were furloughed and laid off, beginning January 1, 2019. Employers must also disclose the terms of the job order to these workers as required by the rule. DOL estimates that it would take up to one hour to contact and provide the disclosure to displaced U.S. workers.

During the period of time the SWA is actively circulating the job order, employers must contact, by email or other available electronic means, the nearest local American Job Center (AJC) in order to request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and to provide to the AJC the unique identification number associated with the job order placed with the SWA. DOL estimates that it would take up to one hour to satisfy this requirement.

DOL estimates the total time burden for activities related to conducting recruitment is 3 hours. Assuming this work will be done by an HR specialist or an equivalent occupation, the estimated cost to each petitioner is approximately \$145.20.<sup>142</sup> Using the 3,558 as the estimated number of petitioners, the estimated total cost of this provision is approximately \$516,622.<sup>143</sup> It is possible that if U.S. employees apply for these positions, H-2B employers may incur some costs associated with reviewing applications, interviewing, vetting, and hiring applicants who are referred to H-2B employers by the recruiting activities required by this rule. However, DOL is unable to quantify the impact.

**Cost of the COVID Protection Provision**

Employers must notify employees, in a language understood by the worker, as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine

distribution sites. We assume that employers will provide a printed notification to inform their employees and that printing and posting the notification can be done during the normal course of business. Given that the regulatory text associated with this provision is less than 150 words, we expect that an employer would only need to post a one-page notification, even if the notification is in multiple languages. The printing cost associated with posting the notification (assuming that the notification is written) is \$0.49 per posting.<sup>144</sup> The estimated total cost to petitioners to print copies is approximately \$1,743 (rounded).<sup>145</sup>

**Cost of the Portability Provision**

Petitioners seeking to hire H-2B nonimmigrants who are currently present in the United States with a valid H-2B visa would need to file a Form I-129 which includes paying the associated fee as discussed above. Also previously discussed, we assume that all employers with an approved TLC—5,507—would be able to file a petition under this provision. As discussed previously, if a petitioner is represented by a lawyer, the lawyer must file Form G-28; if premium processing is desired, a petitioner must file Form I-907 and pay the associated fee. We expect these actions to be performed by an HR specialist, in-house lawyer, or an outsourced lawyer. Moreover, as previously estimated, we expect that about 43.59 percent of these Form I-129 petitions will be filed by an in-house or outsourced lawyer. We do not have an estimate of the percentage of H-2B workers that may choose to port under this provision and therefore we do not know the numbers of petitions that may be filed with USCIS. Therefore, Table 5 presents a sensitivity analysis of the number of Forms I-129 H-2B petitions that may be filed under this provision by an HR specialist and the number of Forms I-129 H-2B petitions and accompanying Forms G-28 that may be filed by an in-house or outsourced lawyer.

**TABLE 5—NUMBERS OF FORM I-129 H-2B PETITIONS THAT MAY BE FILED ON BEHALF OF H-2B WORKERS THAT CHOOSE TO PORT BY HR SPECIALISTS AND LAWYERS**

Percent of approved TLCs	Numbers of Form I-129 H-2B petitions filed by HR specialists	Numbers of Form I-129 H-2B petitions and Form G-28 filed by lawyers
0 .....	0	0
5 .....	155	120
25 .....	777	600
50 .....	1,554	1,200
75 .....	2,330	1,800
95 .....	2,951	2,281
100 .....	3,106	2,401

Source: USCIS Analysis.

Previously, we estimated that about 93.37 percent of Form I-129 H-2B petitions are filed with Form I-907 for premium processing. For this provision, we estimate that 5,142 Form I-129 H-2B petitions will be filed with premium processing Forms I-907.<sup>146</sup> Table 6 presents a sensitivity analysis of the numbers of Forms I-907 that may be filed by HR specialists and lawyers under this portability provision.

**TABLE 6—NUMBERS OF FORM I-907 FILED WITH FORM I-129 H-2B PETITIONS ON BEHALF OF H-2B WORKERS THAT CHOOSE TO PORT BY HR SPECIALISTS AND LAWYERS**

Percent of approved TLCs	Numbers of Form I-907 filed by HR specialists	Numbers of Form I-907 filed by lawyers
0 .....	0	0
5 .....	145	112
25 .....	725	560
50 .....	1,451	1,120
75 .....	2,176	1,681
95 .....	2,755	2,130
100 .....	2,900	2,242

Source: USCIS Analysis.

As previously discussed, the estimated cost for an HR specialist to file a Form I-129 is approximately \$670.06 and the estimated cost for an HR specialist to file a Form I-907 is about \$1,528.07. Table 7 presents a sensitivity analysis of costs resulting from HR specialists filing Form I-129, Form I-907, and the estimated total cost. The “Cost for HR Specialist Filing Form I-129” column multiplies the values in the “Form I-129 Petitions Filed by HR Specialists” column from

<sup>142</sup> Calculation: \$48.40 hourly opportunity cost of time for an HR specialist \* 3-hour time burden = \$145.20 per petitioner cost to conduct additional recruitment.

<sup>143</sup> Calculation: 3,558 estimated number of petitioners \* \$145.20 per petitioner cost to conduct additional recruitment = \$516,622 (rounded) total cost to conduct additional recruitment.

<sup>144</sup> Cost to make copies \$0.49. See <https://www.fedex.com/en-us/office/copy-and-print-services.html> (accessed April 21, 2021).

<sup>145</sup> Calculation: \$0.49 per posting \* 3,558 petitioners = \$1,743 cost of notifications copies.

<sup>146</sup> Calculation: 5,507 estimated number of approved petitioners \* 93.37 percent premium processing filing rate = 5,142 (rounded) additional Forms I-907.

Table 5 by \$670.06, the estimated cost for an HR specialist to file a Form I-129. The “Costs for HR Specialist Filing Form I-907” column multiplies the values in the “Form I-907 Filed by HR Specialists” from Table 6 by \$1,528.07, the estimated cost for an HR specialist to file a Form I-907.

TABLE 7—TOTAL COSTS FOR FILING FORM I-129 H-2B PETITIONS IF FILED BY HR SPECIALISTS ON BEHALF OF WORKERS THAT CHOOSE TO PORT

Percent of Approved TLCs	Total costs for HR specialists filing Form I-129	Total costs for HR specialists filing Form I-907	Total estimated costs for HR specialists
0 .....	0	0	0
5 .....	103,859	221,570	325,429
25 .....	520,637	1,107,852	1,628,489
50 .....	1,041,273	2,217,232	3,258,505
75 .....	1,561,240	3,325,085	4,886,325
95 .....	1,977,347	4,209,838	6,187,185
100 .....	2,081,206	4,431,409	6,512,615

Source: USCIS Analysis.

As previously discussed, the estimated cost for an in-house lawyer to file a Form I-129 petition and the accompanying Form G-28 is approximately 996.70 and the estimated cost for an in-house lawyer to file a Form I-907 is about 1,560.21. Table 8 presents a sensitivity analysis of costs resulting from in-house lawyers filing Form I-129, Form G-28, Form I-907, and the estimated total cost. The “Cost for In-house Lawyer Filing Form I-129 and Form G-28” column multiplies the values in the “Form I-129 Petitions and Form G-28 Filed by Lawyers” column from Table 5 by 996.70, the estimated cost for an in-house lawyer to file a Form I-129 and Form G-28. The “Costs for In-house Lawyer Filing Form I-907” column multiplies the values in the “Form I-907 by Lawyers” from Table 6 by 1,560.21, the estimated cost for an HR specialist to file a Form I-907.

TABLE 8—TOTAL COSTS FOR FILING FORM I-129 H-2B PETITIONS IF FILED BY IN-HOUSE LAWYERS ON BEHALF OF WORKERS THAT CHOOSE TO PORT

Percent of Approved TLCs	Costs for In-house lawyer filing Form I-129 and Form G-28	Costs for In-house lawyer filing Form I-907	Total estimated costs resulting from in-house lawyer
0 .....	\$0	\$0	\$0
5 .....	119,604	174,743	294,347
25 .....	598,020	873,717	1,471,737
50 .....	1,196,040	1,747,435	2,943,475
75 .....	1,794,060	2,622,713	4,416,773
95 .....	2,273,473	3,323,247	5,596,720
100 .....	2,393,077	3,497,990	5,891,067

Source: USCIS Analysis.

As previously discussed, the estimated cost for an outsourced lawyer to file a Form I-129 and the accompanying Form G-28 is approximately 1,385.33 and the estimated cost for an outsourced lawyer to file a Form I-907 is about 1,603.81. Table 9 presents a sensitivity analysis of costs resulting from outsourced lawyers filing Form I-129, Form G-28, Form I-907, and the estimated total cost. The “Costs for Outsourced Lawyer Filing Form I-129 and Form G-28” column multiplies the values in the “Form I-129 Petitions and Form G-28 Filed by Lawyers” column from Table 5 by 1,385.33, the estimated cost for an outsourced lawyer to file a Form I-129 and Form G-28. The “Costs for Outsourced Lawyer Filing Form I-907” column multiplies the values in the “Form I-907 by Lawyers” from Table 6 by 1,603.81, the estimated cost for an outsourced lawyer to file a Form I-907.

TABLE 9—TOTAL COSTS FOR FILING FORM I-129 H-2B PETITIONS IF FILED BY OUTSOURCED LAWYERS ON BEHALF OF WORKERS THAT CHOOSE TO PORT

Percent of Approved TLCs	Costs for outsourced lawyer filing Form I-129 and Form G-28	Costs for outsourced lawyer filing Form I-907	Total estimated costs resulting from outsourced lawyer
0	0	0	0
5	254,466	179,627	434,093
25	1,274,179	898,133	2,172,312
50	2,548,359	1,796,265	4,344,624
75	3,821,613	2,696,002	6,517,615
95	4,841,327	3,416,112	8,257,439
100	5,095,792	3,595,738	8,691,530

Source: USCIS Analysis.

The total quantified costs for this provision range from 0 to 15,204,145 and are presented in Table 10 below. Though we present the sensitivity analysis as if no one will choose to port to another employer, DHS expects that

at least one worker will take advantage of this porting provision and therefore, does not expect a 0 cost from this provision. DHS recognizes that if an employer that loses workers as a result of this provision chooses to replace

those lost workers, that employer may incur some additional search and replacement costs associated with this provision.

TABLE 10—SENSITIVITY ANALYSIS OF TOTAL COSTS OF FORM I-129 H-2B PETITIONS TO HIRE H-2B WORKERS WHO CHOOSE TO PORT

Percent of Approved TLCs	Range in costs from HR specialists and in-house lawyers to hire H-2B workers who choose to port (addition of totals from Table 7 and Table 8)	Range in costs from HR specialists and outsourced lawyers to hire H-2B workers who choose to port (addition of totals from Table 7 and Table 9)
0	0	0
5	619,776	759,522
25	3,100,226	3,800,801
50	6,201,980	7,603,129
75	9,303,098	11,403,940
95	11,783,905	14,444,624
100	12,403,682	15,204,145

Source: USCIS Analysis.

Cost of Audits to Petitioners

DHS and DOL will each conduct audits on 250 separate employers of H-2B workers hired under this supplemental cap, for a total of 500 employers. Employers will need to provide requested information to comply with the audit. The expected time burden to comply with audits is estimated to be 12 hours.<sup>147</sup> We expect that providing these documents will be accomplished by an HR specialist or equivalent occupation. Given an hourly opportunity cost of time of 48.40, the estimated cost of complying with audits

is 580.80 per audited employer.<sup>148</sup> Therefore, the total estimated cost to employers to comply with audits is 290,400.<sup>149</sup>

Estimated Total Costs to Petitioners

The monetized costs of this rule come from filing and complying with Form I-129, Form G-28, Form I-907, and Form ETA-9142-B-CAA-4, as well as contacting refreshing recruitment efforts, posting notifications, filings to

obtain a porting worker, and complying with audits. The estimated total cost to file Form I-129 and an accompanying Form G-28 ranges from \$2,890,692 to \$3,493,457, depending on the filer. The estimated total cost of filing Form I-907 ranges from \$5,122,787 to \$5,185,920, depending on the filer. The estimated total cost of filing and complying with Form ETA-9142-B-CAA-4 is about \$1,370,719. The estimated total cost of conducting additional recruitment is about \$516,662. The estimated total cost of the COVID-19 protection provision is approximately \$1,743. The estimated cost of the portability provision ranges

<sup>147</sup> The number in hours for audits was provided by the USCIS, Service Center Operations.

<sup>148</sup> Calculation: 48.40 hourly opportunity cost of time for an HR specialist \* 12 hours to comply with an audit = 580.80 per audited employer.

<sup>149</sup> Calculation: 500 audited employers \* 580.80 opportunity cost of time to comply with an audit = 290,400.

from \$0 to \$15,204,145.<sup>150</sup> The estimated total cost for employers to comply with audits is \$290,400. The total estimated cost to petitioners ranges from \$10,192,963 to \$26,063,006.<sup>151</sup>

#### Cost to the Federal Government

The INA provides USCIS with the authority for the collection of fees at a level that will ensure recovery of the full costs of providing adjudication and naturalization services, including administrative costs, and services provided without charge to certain applicants and petitioners.<sup>152</sup> DHS notes USCIS establishes its fees by assigning costs to an adjudication based on its relative adjudication burden and use of USCIS resources. Fees are established at an amount that is necessary to recover these assigned costs such as clerical, officers, and managerial salaries and benefits, plus an amount to recover unassigned overhead (for example, facility rent, IT equipment and systems among other expenses) and immigration benefits provided without a fee charge. Consequently, since USCIS immigration fees are based on resource expenditures related to the benefit in question, USCIS uses the fee associated with an information collection as a reasonable measure of the collection's costs to USCIS. DHS anticipates some additional costs in adjudicating the additional petitions submitted because of the increase in cap limitation for H-2B visas. However, DHS expects these costs to be fully recovered by the fees associated with the forms, which have been accounted for under costs to petitioners and serve as proxy of the costs to the agency to adjudicate these forms.

Both DOL and DHS intend to conduct a significant number of random audits during the period of temporary need to verify compliance with H-2B program requirements, including the irreparable harm standard as well as other key worker protection provisions implemented through this rule. While most USCIS activities are funded through fees and DOL is funded through

appropriations, it is expected that both agencies will be able to shift resources to be able to conduct these audits without incurring additional costs. As previously mentioned, the agencies will conduct a total of 500 audits and each audit is expected to take 12 hours. This results in a total time burden of 6,000 hours.<sup>153</sup> USCIS anticipates that a Federal employee at a GS-13 Step 5 salary will conduct these audits for each agency. The base pay for a GS-13 Step 5 in the Washington, DC locality area is \$117,516.<sup>154</sup> The hourly wage for this salary is approximately \$56.50.<sup>155</sup> To estimate the total hourly compensation for these positions, we multiply the hourly wage (\$56.50) by the Federal benefits to wage multiplier of 1.38.<sup>156</sup> This results in an hourly opportunity cost of time of \$77.97 for GS 13-5 Federal employees in the Washington, DC locality pay area.<sup>157</sup> The total opportunity costs of time for Federal workers to conduct audits is estimated to be \$467,820.<sup>158</sup>

#### Benefits to Petitioners

The inability to access H-2B workers for some entities may cause their businesses to suffer irreparable harm. Temporarily increasing the number of available H-2B visas for this fiscal year may result in a cost savings, because it will allow some businesses to hire the additional labor resources necessary to avoid such harm. Preventing such harm may ultimately preserve the jobs of other employees (including U.S. workers) at that establishment. Additionally, returning workers are likely to be very familiar with the H-2B process and requirements, and may be

positioned to begin work more expeditiously with these employers. Moreover, employers may already be familiar with returning workers as they have trained, vetted, and worked with some of these returning workers in past years. As such, limiting the supplemental visas to returning workers would assist employers that are facing irreparable harm.

#### Benefits to Workers

The existence of this rule will benefit the workers who receive H-2B visas. See Arnold Brodbeck et al., *Seasonal Migrant Labor in the Forest Industry of the United States: The Impact of H-2B Employment on Guatemalan Livelihoods*, 31 *Society & Natural Resources* 1012 (2018), and in particular this finding: "Participation in the H-2B guest worker program has become a vital part of the livelihood strategies of rural Guatemalan families and has had a positive impact on the quality of life in the communities where they live. Migrant workers who were landless, lived in isolated rural areas, had few economic opportunities, and who had limited access to education or adequate health care, now are investing in small trucks, building roads, schools, and homes, and providing employment for others in their home communities. . . . The impact has been transformative and positive."

Some provisions of this rule will benefit such workers in particular ways. The portability provision of this rule will allow nonimmigrants with valid H-2B visas who are present in the United States to transfer to a new employer more quickly and potentially extend their stay in the United States and, therefore, earn additional wages. Importantly, the rule will also increase information employees have about equal access to COVID-19 vaccinations and vaccine distribution sites. DHS recognizes that some of the effects of these provisions may occur beyond the borders of the United States.

Note as well that U.S. workers will benefit in multiple ways. For example, the additional round of recruitment and U.S. worker referrals required by the provisions of this rule will ensure that a U.S. worker who is willing and able to fill the position is not displaced by a nonimmigrant worker. As noted, the avoidance of irreparable harm that would be suffered by employers unable to secure sufficient workers, made possible by this rule, could ensure that U.S. workers do not lose their jobs, which might otherwise be vulnerable if H-2B workers were not given visas.

<sup>150</sup> The lower bound cost of \$0 is only if none of the eligible workers choose to port under this provision, while the upper bound cost of \$15,204,145 is if every eligible worker chooses to port and every petitioner uses the more expensive filing option of an outsourced lawyer. As shown in Table 10, the range in costs if 50 percent of eligible workers choose to port with their petitioners using an HR specialist or an outsourced lawyer to file would be from \$6,201,980 to \$7,603,129.

<sup>151</sup> Calculation of lower range: \$2,890,692 + \$5,122,787 + \$1,370,719 + \$516,622 + \$1,743 + \$0 + \$290,400 = \$10,192,963.

Calculation of upper range: \$3,493,457 + \$5,185,920 + \$1,370,719 + \$516,622 + \$1,743 + \$15,204,145 + \$290,400 = \$26,063,006.

<sup>152</sup> See INA section 286(m), 8 U.S.C. 1356(m).

<sup>153</sup> Calculation: 12 hours to conduct an audit \* 500 audits = 6,000 total hours to conduct audits.

<sup>154</sup> U.S. Office of Personnel Management, Pay and Leave, Salaries and Wages, For the Locality Pay area of Washington-Baltimore-Arlington, DC-MD-VA-WV-PA, 2021. <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/21Tables/html/DCB.aspx> (last accessed May 6, 2021).

<sup>155</sup> Calculation: \$117,516 GS 13-5 Washington, DC locality annual salary/2080 annual hours = \$56.50 (rounded).

<sup>156</sup> Calculation: \$1,717,321 Full-time Permanent Salaries + \$656,748 Civilian Personnel Benefits = \$2,374,069 Compensation.  
\$2,374,069 Compensation/\$1,717,321 Full-time Permanent Salaries = 1.38 (rounded) Federal employee benefits to wage ratio.

[https://www.uscis.gov/sites/default/files/document/reports/USCIS\\_FY\\_2021\\_Budget\\_Overview.pdf](https://www.uscis.gov/sites/default/files/document/reports/USCIS_FY_2021_Budget_Overview.pdf) (last accessed May 6, 2021).  
<sup>157</sup> Calculation: \$56.50 hourly wage for a GS 13-5 in the Washington, DC locality area \* 1.38 Federal employee benefits to wage ratio = \$77.97 hourly opportunity cost of time for a GS 13-5 federal employee in the Washington, DC locality area.

<sup>158</sup> Calculation: 6,000 hours to conduct audits \* \$77.97 hourly opportunity cost of time = \$467,820 total opportunity costs of time for Federal employees to conduct audits.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA. See 5 U.S.C. 603(a), 604(a). This temporary final rule is exempt from notice and comment requirements for the reasons stated above. Therefore, the requirements of the RFA applicable to final rules, 5 U.S.C. 604, do not apply to this temporary final rule. Accordingly, the Departments are not required to either certify that the temporary final rule would not have a significant economic impact on a substantial number of small entities nor conduct a regulatory flexibility analysis.

### D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule that includes any Federal mandate that may result in \$100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. This rule is exempt from the written statement requirement because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, this rule does not exceed the \$100 million expenditure in any 1 year when adjusted for inflation (\$169.8 million in 2020 dollars),<sup>159</sup> and this rulemaking does not contain such a mandate. The requirements of Title II of the Act, therefore, do not apply, and the

<sup>159</sup> See U.S. Bureau of Labor Statistics, *Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items*, available at <https://www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202103.pdf> (last visited May 5, 2021).

Calculation of inflation: (1) Calculate the average monthly CPI-U for the reference year (1995) and the most recent current year available (2020); (2) Subtract reference year CPI-U from current year CPI-U; (3) Divide the difference of the reference year CPI-U and current year CPI-U by the reference year CPI-U; (4) Multiply by 100 = [(Average monthly CPI-U for 2020 - Average monthly CPI-U for 1995) / (Average monthly CPI-U for 1995)] \* 100 = [(258.811 - 152.383) / 152.383] \* 100 = (106.428 / 152.383) \* 100 = 0.6984 \* 100 = 69.84 percent = 69.8 percent (rounded).

Calculation of inflation-adjusted value: \$100 million in 1995 dollars \* 1.698 = \$169.8 million in 2020 dollars.

Departments have not prepared a statement under the Act.

### E. Executive Order 13132 (Federalism)

This rule does not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, 64 FR 43255 (Aug. 4, 1999), this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

### F. Executive Order 12988 (Civil Justice Reform)

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

### G. National Environmental Policy Act

DHS and its components analyze proposed actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive (Dir) 023-01 Rev. 01 and Instruction Manual 023-01-001-01 Rev. 01 (Instruction Manual) establish the procedures that DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (“categorical exclusions”) which experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment (EA) or Environmental Impact Statement (EIS). 40 CFR 1507.3(b)(1)(iii), 1508.4. The Instruction Manual, Appendix A, Table 1 lists Categorical Exclusions that DHS has found to have no such effect. Under DHS NEPA implementing procedures, for an action to be categorically excluded, it must satisfy each of the following three conditions: (1) The entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that create the potential for a significant environmental effect. Instruction Manual, section V.B.2(a-c).

This rule temporarily amends the regulations implementing the H-2B

nonimmigrant visa program to increase the numerical limitation on H-2B nonimmigrant visas for the remainder of FY 2021 based on the Secretary of Homeland Security’s determination, in consultation with the Secretary of Labor, consistent with the FY 2021 Omnibus. It also allows H-2B beneficiaries who are in the United States to change employers upon the filing of a new H-2B petition and begin to work for the new employer for a period generally not to exceed 60 days before the H-2B petition is approved by USCIS.

DHS has determined that this rule clearly fits within categorical exclusion A3(d) because it interprets or amends a regulation without changing its environmental effect. The amendments to 8 CFR part 214 would authorize up to an additional 22,000 visas for aliens who may receive H-2B nonimmigrant visas, of which 16,000 are for returning workers (persons issued H-2B visas or were otherwise granted H-2B status in Fiscal Years 2018, 2019, or 2020). The proposed amendments would also facilitate H-2B nonimmigrants to move to new employment faster than they could if they had to wait for a petition to be approved. The amendment’s operative provisions approving H-2B petitions under the supplemental allocation would effectively terminate after September 30, 2021 for the cap increase, and 180 days from the rule’s effective date for the portability provision. DHS believes amending applicable regulations to authorize up to an additional 22,000 H-2B nonimmigrant visas will not result in any meaningful, calculable change in environmental effect with respect to the current H-2B limit or in the context of a current U.S. population exceeding 331,000,000 (maximum temporary increase of 0.0066%).

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

### H. Congressional Review Act

This temporary final rule is not a “major rule” as defined by the Congressional Review Act, 5 U.S.C. 804(2), and thus is not subject to a 60-day delay in the rule becoming effective. DHS will send this temporary final rule to Congress and to the Comptroller General under the Congressional Review Act, 5 U.S.C. 801 *et seq.*

### I. Paperwork Reduction Act

Attestation for Employers Seeking To Employ H-2B Nonimmigrants Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260, Form ETA-9142-B-CAA-4

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. DOL has submitted the Information Collection Request (ICR) contained in this rule to OMB and obtained approval of a new form, Form ETA-9142B-CAA-4, using emergency clearance procedures outlined at 5 CFR 1320.13. The Departments note that while DOL submitted the ICR, both DHS and DOL will use the information.

Petitioners will use the new Form ETA-9142B-CAA-4 to make attestations regarding, for example, irreparable harm and returning worker (unless exempt because the H-2B worker is a national of one of the Northern Triangle countries who is counted against the 6,000 returning worker exemption cap) described above. Petitioners will need to file the attestation with DHS until it announces that the supplemental H-2B cap has been reached. In addition, the petitioner will need to retain all documentation demonstrating compliance with this implementing rule, and must provide it to DHS or DOL in the event of an audit or investigation.

In addition to obtaining immediate emergency approval, DOL is seeking comments on this information collection pursuant to 5 CFR 1320.13. Comments on the information collection must be received by July 26, 2021. This process of engaging the public and other Federal agencies helps ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally

not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. See 44 U.S.C. 3501 *et seq.* In addition, notwithstanding any other provisions of law, no person must generally be subject to a penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

In accordance with the PRA, DOL is affording the public with notice and an opportunity to comment on the new information collection, which is necessary to implement the requirements of this rule. The information collection activities covered under a newly granted OMB Control Number 1205-NEW are required under Section 105 of Division O of the FY 2021 Omnibus, which provides that “the Secretary of Homeland Security, after consultation with the Secretary of Labor, and upon the determination that the needs of American businesses cannot be satisfied in [FY] 2021 with U.S. workers who are willing, qualified, and able to perform temporary nonagricultural labor,” may increase the total number of noncitizens who may receive an H-2B visa in FY 2021 by not more than the highest number of H-2B nonimmigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from the H-2B numerical limitation. As previously discussed in the preamble of this rule, the Secretary of Homeland Security, in consultation with the Secretary of Labor, has decided to increase the numerical limitation on H-2B nonimmigrant visas to authorize the issuance of up to, but not more than, an additional 22,000 visas through the end of FY 2021 for certain H-2B workers for U.S. businesses who attest that they will likely suffer irreparable harm. As with the previous supplemental rules, the Secretary has determined that the additional visas will only be available for returning workers, that is workers who were issued H-2B visas or otherwise granted H-2B status in FY 2018, 2019, or 2020, unless the worker is one of the 6,000 nationals of one of the Northern Triangle countries who are exempt from the returning worker requirement.

Commenters are encouraged to discuss the following:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- the accuracy of the agency’s estimate of the burden of the proposed

collection of information, including the validity of the methodology and assumptions used;

- the quality, utility, and clarity of the information to be collected; and
- the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, for example, permitting electronic submission of responses.

The aforementioned information collection requirements are summarized as follows:

*Agency:* DOL-ETA.

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

*Title of the Collection:* Attestation for Employers Seeking to Employ H-2B Nonimmigrants Workers Under Section 105 of Division O of the Consolidated Appropriations Act, 2021 Public Law 116-260.

*Agency Form Number:* Form ETA-9142-B-CAA-4.

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

*Total Estimated Number of Respondents:* 3,558.

*Average Responses per Year per Respondent:* 1.

*Total Estimated Number of Responses:* 3,558.

*Average Time per Response:* 9 hours per application.

*Total Estimated Annual Time Burden:* 32,023 hours.

*Total Estimated Other Costs Burden:* \$0.

Application for Premium Processing Service, Form I-907

The Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, provides that a Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. Form I-907, Application for Premium Processing Service, has been approved by OMB and assigned OMB control number 1615-0048. DHS is making no changes to the Form I-907 in connection with this temporary rule implementing the time-limited authority pursuant to section



105 of Division O, FY 2021 Omnibus (which expires on September 30, 2021). However, USCIS estimates that this temporary rule may result in approximately 3,332 additional filings of Form I-907 in fiscal year 2021. The current OMB-approved estimate of the number of annual respondents filing a Form I-907 is 319,301. USCIS has determined that the OMB-approved estimate is sufficient to fully encompass the additional respondents who will be filing Form I-907 in connection with this temporary rule, which represents a small fraction of the overall Form I-907 population. Therefore, DHS is not changing the collection instrument or increasing its burden estimates in connection with this temporary rule, and is not publishing a notice under the PRA or making revisions to the currently approved burden for OMB control number 1615-0048.

### List of Subjects

#### 8 CFR Part 214

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

#### 8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

#### 20 CFR Part 655

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

### Department of Homeland Security

#### 8 CFR Chapter I

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

### PART 214—NONIMMIGRANT CLASSES

■ 1. Effective May 25, 2021 through May 28, 2024, the authority citation for part 214 is revised to read as follows:

**Authority:** 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–

1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

■ 2. Effective May 25, 2021 through May 28, 2024, amend § 214.2 by:

■ a. Adding paragraph (h)(6)(x);

■ b. Adding reserved paragraph (h)(25); and

■ c. Adding paragraph (h)(26).

The additions read as follows:

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

\* \* \* \* \*

(h) \* \* \*

(6) \* \* \*

(x) *Special requirements for additional cap allocations under the Consolidated Appropriations Act, 2021, Public Law 116–260—(A) Public Law 116–260—(1) Supplemental allocation for returning workers.* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2021 only, the Secretary has authorized up to an additional 16,000 visas for aliens who may receive H–2B nonimmigrant visas pursuant to section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260. An alien may be eligible to receive an H–2B nonimmigrant visa under this paragraph (h)(6)(x)(A)(1) if she or he is a returning worker. The term “returning worker” under this paragraph (h)(6)(x)(A)(1) means a person who was issued an H–2B visa or was otherwise granted H–2B status in fiscal year 2018, 2019, or 2020. Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(x)(A)(1).

(2) *Supplemental allocation for nationals of Guatemala, El Salvador, and Honduras (Northern Triangle countries).* Notwithstanding the numerical limitations set forth in paragraph (h)(8)(i)(C) of this section, for fiscal year 2021 only, and in addition to the allocation described in paragraph (h)(6)(x)(A)(1) of this section, the Secretary has authorized up to an additional 6,000 aliens who are nationals of Guatemala, El Salvador, or Honduras (Northern Triangle countries) who may receive H–2B nonimmigrant visas pursuant to section 105 of Division O of the Consolidated Appropriations Act, 2021, Public Law 116–260. Such workers are not subject to the returning worker requirement in paragraph (h)(6)(x)(A)(1). Petitioners must request

such workers in an H–2B petition that is separate from H–2B petitions that request returning workers under paragraph (h)(6)(x)(A)(1) and must declare that they are requesting these workers in the attestation required under 20 CFR 655.68(a)(1).

Notwithstanding § 248.2 of this chapter, an alien may not change status to H–2B nonimmigrant under this paragraph (h)(6)(x)(A)(2).

(i) Petitions submitted under this paragraph (h)(6)(x)(A)(2) must be received by July 8, 2021. H–2B petitions under the supplemental allocation for nationals of Northern Triangle countries received after that date will be rejected.

(ii) If USCIS determines that it has received fewer petitions by July 8, 2021 than needed to reach the USCIS projections for the Northern Triangle countries supplemental allocation in this paragraph (h)(6)(x)(A)(2), it will make the remainder of the allocation available as a separate allocation described in paragraph (h)(6)(x)(A)(3) of this section.

(3) *Availability of remainder of supplemental allocation.* If USCIS determines that fewer petitions have been received by July 8, 2021 than needed to meet the additional allocation described in paragraph (h)(6)(x)(A)(2) of this section, USCIS will make the remainder of the allocation available as a separate allocation to returning workers as described in paragraph (h)(6)(x)(A)(1) of this section and will announce the availability of the remainder of the allocation on the USCIS website at *uscis.gov* no later than July 23, 2021. Such announcement, if made, will specify the date on which petitioners may begin to file H–2B petitions under this paragraph (h)(6)(x)(A)(3).

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

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

(2) Submit to USCIS, at the time the employer files its petition, a U.S. Department of Labor attestation, in compliance with this section and 20 CFR 655.64, evidencing that:

(i) Without the ability to employ all of the H–2B workers requested on the petition filed pursuant to this paragraph (h)(6)(x), its business is likely to suffer irreparable harm (that is, permanent and severe financial loss);

(ii) All workers requested and/or instructed to apply for a visa have been issued an H–2B visa or otherwise

granted H-2B status in fiscal year 2018, 2019, or 2020, unless the H-2B worker is a national of Guatemala, El Salvador, or Honduras and is counted towards the 6,000 cap described in paragraph (h)(6)(x)(A)(2) of this section;

(iii) The employer will comply with all Federal, State, and local employment-related laws and regulations, including health and safety laws and laws related to COVID-19 worker protections, any right to time off or paid time off for COVID-19 vaccination, and that the employer will notify any H-2B workers approved under the supplemental cap in paragraph (h)(6)(x)(A)(2) of this section, in a language understood by the worker, as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites;

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

(v) The employer will provide documentary evidence of the facts in paragraphs (h)(6)(x)(B)(2)(i) through (iv) of this section to DHS or DOL upon request; and

(vi) The employer will agree to fully cooperate with any compliance review, evaluation, verification, or inspection conducted by DHS, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with immigration laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2021 supplemental allocations outlined in paragraph (h)(6)(x)(B) of this section, as a condition for the approval of the petition.

(vii) The employer must attest on Form ETA-9142-B-CAA-4 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2021 supplemental allocations outlined in 20 CFR 655.64(a) and 655.68(a), as a condition for the approval of the H-2B petition. The employer must further attest on Form ETA-9142-B-CAA-4

that it will not impede, interfere, or refuse to cooperate with an employee of the Secretary of the U.S. Department of Labor who is exercising or attempting to exercise DOL's audit or investigative authority pursuant to 20 CFR part 655, subpart A, and 29 CFR 503.25.

(C) *Processing.* USCIS will reject petitions filed pursuant to paragraph (h)(6)(x)(A)(1) or (3) of this section that are received after the applicable numerical limitation has been reached or after September 15, 2021, whichever is sooner. USCIS will reject petitions filed pursuant to paragraph (h)(6)(x)(A)(2) of this section that are received after the applicable numerical limitation has been reached or after July 8, 2021, whichever is sooner. USCIS will not approve a petition filed pursuant to this paragraph (h)(6)(x) on or after October 1, 2021.

(D) *Numerical limitations under paragraphs (h)(6)(x)(A)(1), (2), and (3) of this section.* When calculating the numerical limitations under paragraphs (h)(6)(x)(A)(1), (2), and (3) of this section as authorized under Public Law 116-260, USCIS will make numbers for each allocation available to petitions in the order in which the petitions subject to the respective limitation are received. USCIS will make projections of the number of petitions necessary to achieve the numerical limit of approvals, taking into account historical data related to approvals, denials, revocations, and other relevant factors. USCIS will monitor the number of petitions (including the number of workers requested when necessary) received and will notify the public of the dates that USCIS has received the necessary number of petitions (the "final receipt dates") under paragraph (h)(6)(x)(A)(1) or paragraphs (h)(6)(x)(A)(2) and (3). The day the public is notified will not control the final receipt dates. When necessary to ensure the fair and orderly allocation of numbers subject to the numerical limitations in paragraphs (h)(6)(x)(A)(1), (2), and (3), USCIS may randomly select from among the petitions received on the final receipt dates the remaining number of petitions deemed necessary to generate the numerical limit of approvals. This random selection will be made via computer-generated selection. Petitions subject to a numerical limitation not randomly selected or that were received after the final receipt dates that may be applicable under paragraph (h)(6)(x)(A)(1), (2), or (3) will be rejected. If the final receipt date is any of the first 5 business days on which petitions subject to the applicable numerical limits described in paragraph

(h)(6)(x)(A)(1), (2), or (3) may be received (in other words, if any of the numerical limits described in paragraph (h)(6)(x)(A)(1), (2), or (3) is reached on any one of the first 5 business days that filings can be made), USCIS will randomly apply all of the numbers among the petitions received on any of those 5 business days.

(E) *Sunset.* This paragraph (h)(6)(x) expires on October 1, 2021.

(F) *Non-severability.* The requirement to file an attestation under paragraph (h)(6)(x)(B)(2) of this section is intended to be non-severable from the remainder of this paragraph (h)(6)(x), including, but not limited to, the numerical allocation provisions at paragraphs (h)(6)(x)(A)(1), (2), and (3) of this section in their entirety. In the event that any part of this paragraph (h)(6)(x) is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this paragraph (h)(6)(x) is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this paragraph (h)(6)(x), as consistent with law.

\* \* \* \* \*

(26) *Change of employers and portability for H-2B workers.* (i) This paragraph (h)(26) relates to H-2B workers seeking to change employers during the time period specified in paragraph (h)(26)(iv) of this section. Notwithstanding paragraph (h)(2)(i)(D) of this section, an alien in valid H-2B nonimmigrant status:

(A) Whose new petitioner files a non-frivolous H-2B petition requesting an extension of the alien's stay on or after May 25, 2021, is authorized to begin employment with the new petitioner after the petition described in this paragraph (h)(26) is received by USCIS and before the new H-2B petition is approved, but no earlier than the start date indicated in the new H-2B petition; or

(B) Whose new petitioner filed a non-frivolous H-2B petition requesting an extension of the alien's stay before May 25, 2021 that remains pending on May 25, 2021, is authorized to begin employment with the new petitioner before the new H-2B petition is approved, but no earlier than the start date of employment indicated on the new H-2B petition.

(ii)(A) With respect to a new petition described in paragraph (h)(26)(i)(A) of this section, and subject to the requirements of 8 CFR 274a.12(b)(30), the new period of employment described in paragraph (h)(26)(i) of this section may last for up to 60 days beginning on the Received Date on Form

I-797 (Notice of Action) or, if the start date of employment occurs after the I-797 Received Date, for a period of up to 60 days beginning on the start date of employment indicated in the H-2B petition.

(B) With respect to a new petition described in paragraph (h)(26)(i)(B) of this section, the new period of employment described in paragraph (h)(26)(i) of this section may last for up to 60 days beginning on the later of either May 25, 2021 or the start date of employment indicated in the H-2B petition.

(C) With respect to either type of new petition, if USCIS adjudicates the new petition before the expiration of this 60-day period and denies the petition, or if the new petition is withdrawn by the petitioner before the expiration of the 60-day period, the employment authorization associated with the filing of that petition under 8 CFR 274a.12(b)(30) will automatically terminate 15 days after the date of the denial decision or 15 days after the date on which the new petition is withdrawn. Nothing in this paragraph (h)(26) is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (h)(6)(vii) of this section and 8 CFR 274a.12(b)(9).

(iii) In addition to meeting all other requirements in paragraph (h)(6) of this section for the H-2B classification, to commence employment and be approved under this paragraph (h)(26):

(A) The alien must have been in valid H-2B nonimmigrant status on or after May 25, 2021;

(B) The new H-2B petition must have been—

(1) Pending as of May 25, 2021; or

(2) Received on or after May 25, 2021, but no later than November 22, 2021;

(C) The petitioner must comply with all Federal, State, and local employment-related laws and regulations, including health and safety laws, laws related to COVID-19 worker protections, and any right to time off or paid time off for COVID-19 vaccination; and

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

(iv) Authorization to initiate employment changes pursuant to this paragraph (h)(26) begins at 12 a.m. on

May 25, 2021, and ends at the end of November 22, 2021.

\* \* \* \* \*

#### **PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

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

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

■ 4. Effective May 25, 2021 through May 28, 2024, amend § 274a.12 by adding paragraph (b)(30) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(30)(i) Pursuant to 8 CFR 214.2(h)(26) and notwithstanding 8 CFR 214.2(h)(2)(i)(D), an alien is authorized to be employed no earlier than the start date of employment indicated in the H-2B petition and no earlier than May 25, 2021, by a new employer that has filed an H-2B petition naming the alien as a beneficiary and requesting an extension of stay for the alien, for a period not to exceed 60 days beginning on:

(A) The later of the "Received Date" on Form I-797 (Notice of Action) acknowledging receipt of the petition, or the start date of employment indicated on the new H-2B petition, for petitions filed on or after May 25, 2021; or

(B) The later of May 25, 2021 or the start date of employment indicated on the new H-2B petition, for petitions that are pending as of May 25, 2021.

(ii) If USCIS adjudicates the new petition prior to the expiration of the 60-day period in paragraph (b)(30)(i) of this section and denies the new petition for extension of stay, or if the petitioner withdraws the new petition before the expiration of the 60-day period, the employment authorization under this paragraph (b)(30) will automatically terminate upon 15 days after the date of the denial decision or the date on which the new petition is withdrawn. Nothing in this section is intended to alter the availability of employment authorization related to professional H-2B athletes who are traded between organizations pursuant to paragraph (b)(9) of this section and 8 CFR 214.2(h)(6)(vii).

(iii) Authorization to initiate employment changes pursuant to 8 CFR 214.2(h)(26) and paragraph (b)(30)(i) of this section begins at 12 a.m. on May 25, 2021, and ends at the end of November 22, 2021.

\* \* \* \* \*

#### **Department of Labor**

#### **Employment and Training Administration**

#### **20 CFR Chapter V**

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

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

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

**Authority:** Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), (p), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103-206, 107 Stat. 2428; sec. 412(e), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106-95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107-296, 116 Stat. 2135, as amended; Pub. L. 109-423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115-218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C.

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

Subpart E issued under 48 U.S.C. 1806.

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

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

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

■ 6. Effective May 25, 2021 through September 30, 2021, add § 655.64 to read as follows:

#### **§ 655.64 Special application filing and eligibility provisions for Fiscal Year 2021 under the Consolidated Appropriations Act, 2021.**

(a) An employer filing a petition with USCIS under 8 CFR 214.2(h)(6)(x) to request H-2B workers who will begin employment on or after May 25, 2021, through September 30, 2021, must meet the following requirements:

(1) The employer must attest on Form ETA-9142-B-CAA-4 that without the ability to employ all of the H-2B

workers requested on the petition filed pursuant to 8 CFR 214.2(h)(6)(x), its business is likely to suffer irreparable harm (that is, permanent and severe financial loss), and that the employer will provide documentary evidence of this fact to DHS or DOL upon request.

(2) The employer must attest on Form ETA-9142-B-CAA-4 that each of the workers requested and/or instructed to apply for a visa, whether named or unnamed, on a petition filed pursuant to 8 CFR 214.2(h)(6)(x), have been issued an H-2B visa or otherwise granted H-2B status during one of the last three (3) fiscal years (fiscal year 2018, 2019, or 2020), unless the H-2B worker is a national of Guatemala, El Salvador, or Honduras and is counted towards the 6,000 cap described in 8 CFR 214.2(h)(6)(x)(A)(2).

(3) The employer must attest on Form ETA-9142-B-CAA-4 that the employer will comply with all the assurances, obligations, and conditions of employment set forth on its approved *Application for Temporary Employment Certification*.

(4) The employer must attest on Form ETA-9142-B-CAA-4 that it will comply with all Federal, State, and local employment-related laws and regulations, including health and safety laws and laws related to COVID-19 worker protections, any right to time off or paid time off for COVID-19 vaccination, and that the employer will notify any H-2B workers approved under the supplemental cap in 8 CFR 214.2(h)(6)(x)(A)(1) and (2), in a language understood by the worker, as necessary or reasonable, that all persons in the United States, including nonimmigrants, have equal access to COVID-19 vaccines and vaccine distribution sites.

(5) An employer that submits Form ETA-9142B-CAA-4 and the I-129 petition 45 or more days after the certified start date of work, as shown on its approved *Application for Temporary Employment*, must conduct additional recruitment of U.S. workers as follows:

(i) Not later than the next business day after submitting the I-129 petition for H-2B worker(s), the employer must place a new job order for the job opportunity with the State Workforce Agency (SWA), serving the area of intended employment. The employer must follow all applicable SWA instructions for posting job orders and receive applications in all forms allowed by the SWA, including online applications (sometimes known as “self-referrals”). The job order must contain the job assurances and contents set forth in § 655.18 for recruitment of U.S. workers at the place of employment,

and remain posted for at least 15 calendar days;

(ii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact, by email or other available electronic means, the nearest comprehensive American Job Center offering business services and serving the area of intended employment where work will commence, request staff assistance advertising and recruiting qualified U.S. workers for the job opportunity, and provide the unique identification number associated with the job order placed with the SWA or, if unavailable, a copy of the job order;

(iii) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must contact (by mail or other effective means) its former U.S. workers, including those who have been furloughed or laid off, during the period beginning January 1, 2019, until the date the I-129 petition required under 8 CFR 214.2(h)(6)(x) is submitted, who were employed by the employer in the occupation at the place of employment (except those who were dismissed for cause or who abandoned the worksite), disclose the terms of the job order, and solicit their return to the job. The contact and disclosures required by this paragraph (a)(5)(iii) must be provided in a language understood by the worker, as necessary or reasonable;

(iv) During the period of time the SWA is actively circulating the job order described in paragraph (a)(5)(i) of this section for intrastate clearance, the employer must engage in the recruitment of U.S. workers as provided in § 655.45(a) and (b). The contact and disclosures required by this paragraph (a)(5)(iv) must be provided in a language understood by the worker, as necessary or reasonable; and

(v) The employer must hire any qualified U.S. worker who applies or is referred for the job opportunity until the date on which the last H-2B worker departs for the place of employment, or 30 days after the last date on which the SWA job order is posted, whichever is later. Consistent with § 655.40(a), applicants can be rejected only for lawful job-related reasons.

(6) The employer must attest on Form ETA-9142-B-CAA-4 that it will fully cooperate with any audit, investigation, compliance review, evaluation, verification, or inspection conducted by DOL, including an on-site inspection of the employer's facilities, interview of the employer's employees and any other

individuals possessing pertinent information, and review of the employer's records related to the compliance with applicable laws and regulations, including but not limited to evidence pertaining to or supporting the eligibility criteria for the FY 2021 supplemental allocations outlined in this paragraph (a) and § 655.68(a), as a condition for the approval of the H-2B petition. Pursuant to this subpart and 29 CFR 503.25, the employer will not impede, interfere, or refuse to cooperate with an employee of the Secretary who is exercising or attempting to exercise DOL's audit or investigative authority.

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

(c) The requirements under paragraph (a) of this section are intended to be non-severable from the remainder of this section; in the event that paragraph (a)(1), (2), (3), (4), or (5) of this section is enjoined or held to be invalid by any court of competent jurisdiction, the remainder of this section is also intended to be enjoined or held to be invalid in such jurisdiction, without prejudice to workers already present in the United States under this part, as consistent with law.

■ 7. Effective May 25, 2021 through September 30, 2024, add § 655.68 to read as follows:

**§ 655.68 Special document retention provisions for Fiscal Years 2021 through 2024 under the Consolidated Appropriations Act, 2021.**

(a) An employer who files a petition with USCIS to employ H-2B workers in fiscal year 2021 under authority of the temporary increase in the numerical limitation under section 105 of Division O, Public Law 116-260 must maintain for a period of three (3) years from the date of certification, consistent with 20 CFR 655.56 and 29 CFR 503.17, the following:

(1) A copy of the attestation filed pursuant to the regulations in 8 CFR 214.2 governing that temporary increase;

(2) Evidence establishing, at the time of filing the I-129 petition, that employer's business is likely to suffer irreparable harm (that is, permanent and severe financial loss), if it cannot employ H-2B nonimmigrant workers in fiscal year 2021;

(3) Documentary evidence establishing that each of the workers the employer requested and/or instructed to apply for a visa, whether named or unnamed on a petition filed pursuant to 8 CFR 214.2(h)(6)(x), have been issued an H-2B visa or otherwise granted H-2B status during one of the last three (3) fiscal years (fiscal year 2018, 2019,

or 2020), unless the H-2B worker(s) is a national of El Salvador, Guatemala, or Honduras and is counted towards the 6,000 cap described in 8 CFR 214.2(h)(6)(x)(A)(2). Alternatively, if applicable, employers must maintain documentary evidence that the workers the employer requested and/or instructed to apply for visas are eligible nationals of El Salvador, Guatemala, or

Honduras, as defined in 8 CFR 214.2(h)(6)(x)(A)(2); and

(4) If applicable, proof of recruitment efforts set forth in § 655.64(a)(5)(i) through (iv) and a recruitment report that meets the requirements set forth in § 655.48(a)(1) through (4) and (7), and maintained throughout the recruitment period set forth in § 655.64(a)(5)(v).

(b) DOL or DHS may inspect the documents in paragraphs (a)(1) through (4) of this section upon request.

(c) This section expires on October 1, 2024.

**Alejandro N. Mayorkas,**  
*Secretary, U.S. Department of Homeland Security.*

**Martin J. Walsh,**  
*Secretary, U.S. Department of Labor.*

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